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CITY OF SAN LEANDRO v. RAILROAD COMMISSION, and four other cases. (S. F. 9306–9309, 9314.)

(Supreme Court of California. June 22, 1920. Rehearing Denied July 22, 1920.)

1. Waters and water courses ⊂=203(6)—Commission can fix charges of water company on municipalities, if property devoted to public.

The jurisdiction of the Railroad Commission to impose charges on municipalities for the service of a water company is dependent on whether, as regards the services for which the charges are sought to be imposed, the company has actually devoted its property to a public use.

2. Waters and water courses ⊂=203(6)—Water service furnished municipalities a public use.

Water service dedicated by water company impartially to all municipalities requiring such service *held* a public use, so that the Railroad Commission had jurisdiction to fix charges on such municipalities.

3. Waters and water courses ⊂=203(1)—Water company must be compensated by cities for cost of operation and maintenance.

A water company, supplying municipalities, must be compensated for the cost of operating and maintaining the portions of its system devoted to their requirements; the services in return for which charges are imposed being those involved in supplying water and maintaining the system.

4. Waters and water courses ⊂=203(6)—Fixing of water company's charges to cities within power of Railroad Commission; "interference with municipal affair."

Fixing of charges for service on municipalities in favor of water company *held* within rate-fixing power of the Railroad Commission, and not an interference with municipal money or property by the imposition of a tax, in violation of Const. art. 11, § 13; fixing of rates for service not being interference with municipal affair, within sections 6, 8.

5. Waters and water courses ⊂=203(12) — Failure to object in applications for rehearing by commission precludes review.

Under Public Utilities Act, § 66, municipalities which, in their applications to the Railroad Commission for rehearing of the matter of fixing rates to be charged them by a water company for its service, fail specifically to set forth the alleged failure of the commission to fix a rate base for its award, cannot urge the objection to the award in the Supreme Court on certiorari.

6. Waters and water courses ⊂=203(6)—Requiring cities to pay for water service not in excess of jurisdiction of Railroad Commission or confiscatory.

Requirement of Railroad Commission that certain municipalities pay a water company for its service of fire protection, etc., a sum amounting to less than 10 per cent. of the total revenue allowed the water company, *held* not to have exceeded the jurisdiction of the commission, or to have amounted to confiscation of the property of the cities.

7. Waters and water courses ⊂=203(12)—Supreme Court will not disturb discretionary findings of commission.

The Supreme Court will not disturb the discretionary finding of the Railroad Commission on the question whether a water storage project would be available to meet the needs of water consumers during the year for which rates to be allowed a water company were imposed on municipalities.

8. Waters and water courses ⊂=203(12)—Inability of cities to meet charges in favor of water company cannot be considered by Supreme Court.

The inability of municipalities to meet certain rates for water service imposed on them in favor of the water company by the Railroad Commission, though a matter of expediency to be weighed by the commission, cannot be considered by the Supreme Court in a proceeding attacking the legality of the charges or rates.

In Bank.

Certiorari by the City of San Leandro, by the City of Richmond, by the City of Oakland, by the City of Berkeley, and by the city of Alameda, respectively, to review an order of the Railroad Commission of the state of California fixing rates. Decision of the commission affirmed.

H. L. Hagan, City Atty., and Leon E. Gray, Deputy City Atty., both of Oakland, Frank V. Cornish, City Atty., of San Francisco, Wm. J.

Locke, City Atty., of Alameda, D. J. Hall, City Atty., of Richmond, and Harris P. Jones, City Atty., of San Leandro (G. Clark, of San Francisco, of counsel), for petitioners.

Hugh Gordon, of Los Angeles (Douglas Brookman, of San Francisco, of counsel), for respondent Railroad Commission.

Creed, Jones & Dall, of San Francisco, and Fitzgerald, Abbott & Beardsley, of Oakland, for East Bay Water Co.

LENNON, J. Certiorari upon the petition of each of the above-named petitioners, seeking a review by this court of an order of the Railroad Commission of the state of California which fixed the rates to be charged by the East Bay Water Company for water supplied. In the order directing the issuance of a writ of review, the above-entitled proceedings were consolidated. The petition in each one of the separate proceedings attacks the same portion of the decision of the commission upon practically the same grounds. The rates fixed in said decision make no distinction between the residents of each community, and, while it is true that the basic charge allocated to each community varies, the underlying principle is the same in all cases. Therefore it is obvious that, if any one of the cities prevails, there must be a readjustment of the rates as to all the communities, or, in other words, an entire new allocation of rates.

On July 1, 1918, the Railroad Commission, by decision No. 5534, fixed the total revenues to which the water company was entitled at $2,000,000. In allocating or apportioning this total sum among the various classes of consumers, the commission determined that approximately $192,000 should be charged against the East Bay cities. Portions of this $192,000 charge were imposed upon the respective petitioners as follows:

Oakland	$105,500.00
Berkeley	43,000.00
Alameda	22,000.00
Richmond	11,000.00
San Leandro	2,500.00

The cities were, in addition, required to pay rates upon all pipe lines and hydrants installed subsequent to January 1, 1917, and a surcharge of 10 per cent. on the above amounts. Upon the cities making a showing to the commission that their tax budgets had already been made up, and that it would be impossible to provide money to meet this new charge, the commission, by a supplemental order on August 13, 1918, temporarily suspended the above rates as to the municipalities. On August 8, 1919, the East Bay Water Company filed an application, alleging the necessity of increased revenue and requesting the reimposition of the rates upon the municipalities. After a hearing, the commission by its decision No. 6755, determined that the water company was entitled to a gross income of $2,350,000, approved rates which it was estimated would yield that income, and reimposed upon the East Bay cities the charges fixed in its prior decision. Applications of the petitioners for a rehearing were denied by the commission in November, 1919.

[1] Petitioners urge the objection, in various forms, that the commission is without jurisdiction to impose these charges, for the reason, it is claimed, that as to the services in return for which the charges are imposed the water company is not a public utility. The jurisdiction of the commission to fix the charges is, of course, dependent upon whether, as regards the services for which the charges are sought to be imposed, the company has actually devoted its property to a public use. Allen v. Railroad Commission, 179 Cal. 68, 89, 175 Pac. 466. Upon this phase of the case, the decision of the commission declares that the basic charges in controversy are imposed upon the several municipalities mentioned—

"for water used by them for fire fighting, street sprinkling, and other purposes. * * * Admittedly it is difficult to equitably distribute the expense of maintaining and operating a system such as this among the various consumers in proportion to the benefits derived by each. An exact allocation of the cost to the company of rendering a service such as is rendered to the cities is impossible. The amount of water used is not a proper measure, because the demand for fire purposes is wholly unexpected, and the company must stand ready to deliver a large quantity of water within a short period at any point where the fire may occur. This has been designated a 'readiness to serve' or 'stand-by' service. The utility is rendering a valuable service to the municipality and its taxpayers, which requires an investment and operating expense largely in excess of what would be required, if domestic and industrial consumers only were served."

It has been decided in this state that the law does not impose any duty upon a water company, as a public utility, to furnish a municipality, or its inhabitants, with water for a particular purpose. Ukiah v. Ukiah Water & Improvement Co., 142 Cal. 173, 75 Pac. 773, 64 L. R. A. 231, 100 Am. St. Rep. 107; Niehaus Bros. Co. v. Contra Costa, etc., Co., 159 Cal. 305, 113 Pac. 375, 36 L. R. A. (N. S.) 1045. The cases cited further hold that liability for loss resulting from fire is not an incident of the ordinary relation of water distributor and consumer, but such liability on the part of a water company can only be created by an express private contract whereby the water company agrees to furnish water as a protection against fire. Accordingly, throughout the hearing in the case now before the court, the water company steadfastly denied that it had assumed, or could as a public utility be compelled to

assume, any liability to furnish water to the municipalities or their inhabitants for the particular purpose of fire protection, claiming that it is a public utility to the extent, and only to the extent, that it furnishes water as a commodity, and irrespective of the purpose for which the water is used by the consumer. It is upon this stand taken by the water company that petitioners rest their argument that the commission is attempting to impose upon them charges for a service which they are not receiving, and which rests upon private contract, and cannot be regulated as a public utility service.

[2] The argument in this behalf, however, fails to distinguish between the furnishing of water for a particular purpose, such as for fire protection, and supplying it as a commodity merely, in the quantity and manner desired, but without reference or regard to the use to which it is put by the consumer. While the company is not furnishing water to the municipalities for any particular purpose, and is not liable for fire protection, it is furnishing water as a commodity, which is ready for use and may be received and used by the municipalities for certain purposes, the most important of which is that of fire protection. That the water company is thus rendering a material municipal service, and that such service cannot be dispensed with by the cities at present, is beyond question. It is equally indisputable that this service has been dedicated impartially to all consumers within the class that requires such services. Having been devoted to all municipalities within the field of the company's operations, and the use being one of importance to the public generally, the dedication is of such a character that every member of the class has a legal right to the use, and it falls, therefore, within the accepted definition of a public use. Allen v. Railroad Commission, supra.

The cases of Lewis v. People's Water Co., 3 Cal. Railroad Com. Rep. 416, and City of Alameda v. People's Water Co., P. U. R. 1916D, 865, hold that, in the absence of a public duty to furnish fire protection, a water company cannot be compelled to extend its mains solely for the purpose of rendering such protection adequate. Petitioners rely upon these cases as establishing the principle that the commission is without jurisdiction to control the services for which it has imposed the charges. It will be noted that these cases do not go to the extent of holding that the company cannot be compelled to extend its service, so as to furnish the municipalities with water in an adequate manner, provided that the municipalities compensate the company for such extension and that the water is supplied as a commodity and without liability for loss by fire in case it is used by the municipalities for fire protection. Section 549 of the Civil Code provides:

"All corporations formed to supply water to cities or towns must furnish pure fresh water to the inhabitants thereof, for family uses, so long as the supply permits, at reasonable rates and without distinction of persons, upon proper demand therefor; and must furnish water to the extent of their means, in case of fire or other great necessity, free of charge."

Aside from the fact that water need no longer be furnished "free of charge," this section remains in force. The phrase "to the extent of their means," as used in that section, may signify merely that the company is not an insurer as regards fire protection, or that the furnishing of water to municipalities is a function secondary in importance, and one which must not be permitted to interfere with the primary function of furnishing water to private individuals. On the other hand, it may mean that water companies cannot be compelled to increase their means in order to supply water to municipalities. That point has never been passed upon by the Railroad Commission, nor by this court, and seems not likely to arise in so far as petitioners are concerned, for the reason that the company has stipulated to such an extension and asserts its refusal in the past to have been due solely to the failure of petitioners to provide for compensation to the company for the additional expenditure. Moreover, it is unnecessary, for the purposes of this decision, to pass upon the question as to whether or not such extension of service can be compelled. While the power to compel an extension of plant is an ordinary element of the right to regulate a public utility, the mere fact that the Legislature deemed it expedient to dispense with this power does not take away the public utility character of the service nor prevent regulation of the service "within the present means."

[3] The fact that the commission stated that the charges are imposed for "services" is not, as is contended by petitioners, inconsistent with the principle that the company is furnishing water to the cities as a commodity, and not as a fire protection service. Admittedly the amount of water furnished the municipalities is not a fair standard of valuation. The water company must be compensated for the cost of operating and maintaining the portions of its system devoted to the requirements of the municipalities, and the "services" in return for which the charges are imposed are those involved in supplying the water and maintaining the system.

[4] The fixing of the charges is within the rate-fixing power of the commission, and is not an interference with municipal money or property or the imposition of a tax in violation of section 13 of article 11 of the Constitution of this state. The services are rendered to the municipalities, and should be paid for by them, and not by the ordinary consumers. Merely because the money to

pay the charges will probably be raised by taxation is no argument for holding the charges themselves to be taxes, and, since the payment of the charges is dependent upon the continuing acceptance by the cities of the services in question, they are essentially rates and not taxes. Nor is the fixing of rates for the services to the cities an interference with a "municipal affair" within the control of the municipalities, within the meaning of sections 6 and 8 of article 11 of the state Constitution. Furthermore, even if it were, the provisions of section 23 of article 12 of the Constitution, and of the Public Utilities Act (Laws Ex. Sess. 1911, p. 18), give the Railroad Commission power to regulate public utility services rendered to municipalities as well as those to individuals.

Section 23 of article 12 of the Constitution of this state, in vesting the commission with jurisdiction in the matter of the regulation of public utilities, saves to the cities the power to make local regulations governing public utilities, "other than the fixing of rates." Therefore, by virtue of this provision, a vote of the respective petitioners is unnecessary to confer upon the commission jurisdiction to regulate the rates in question.

The contention is made that, even if the service is a public utility service, subject to regulation by the commission, the commission did not regularly pursue its authority in fixing the amount of the charges. The method pursued was as follows: There were submitted, on behalf of the company and also on behalf of the cities, various rate bases which purported to comprise the value of the property upon which the company was entitled to a reasonable return. The smallest rate base was submitted by a representative of one of the petitioners, the city of Berkeley. At the same time the company submitted a statement of its financial needs. The commission expressly refrained from passing upon the value of the company's property or a proper interest return; it computed the revenue to which the company would be entitled, if allowed interest at 8 per cent. on the rate bases submitted, and found that, allowing interest at this per cent. the smallest rate base submitted, if corrected by the addition of certain items erroneously omitted, would yield a return at least equal to the amount claimed as necessary to meet the financial needs of the company. Accordingly a sum equal to the amount of the financial needs of the company, plus operating expenses, was fixed by the commission as the amount of revenue to be allowed the company. The commission then estimated from the evidence before it the proportion of this revenue to be borne by the cities. It is now claimed that the commission arbitrarily allowed a return based upon the financial needs of the company, whereas the amount to which the utility is entitled is a fair return on a reasonable rate base. In its decision of October 11, 1919, the commission states:

"It is very important to provide a sufficient revenue to put the company's credit upon a sound basis so that it may obtain money at reasonable rates, thus preventing a heavier burden being placed upon the consumers. The production of this revenue, however, to care for the financial needs of this company, should not place an unreasonable burden upon its consumers *nor should it be in excess of a reasonable return upon the value of the utility's property.*" (Italics are ours.)

[5] The commission then proceeded to compare the amount of the financial needs with an 8 per cent. return on the lowest rate base submitted, and found it did not exceed that return. Therefore, even though no rate base nor rate of interest was expressly found and adopted by the commission, nevertheless it follows, as a necessary implication from all that was said and done by the commission, that it found that this particular rate of interest and rate based represented at least a reasonable rate of return on the fair value of the company's property, in the sense that neither were, as against the consumer, excessive. Since the amount allowed the company was first compared with this return to ascertain that it did not exceed such return, the allowance was, in effect, nothing more than an allowance of a return on the investments of the company. In view of the fact that it is not claimed that the revenue allowed exceeds a reasonable return on a reasonable rate base, petitioners' objection to the method of procedure is purely academic. But, however that may be, petitioners failed to specifically set forth the alleged failure to fix a rate base in their applications to the commission for a rehearing, and are therefore precluded by the terms of section 66 of the Public Utilities Act from urging the objection in this court.

It is further contended that the commission was without jurisdiction to impose the charges upon the cities, unless it first ascertained the value of the portion of the system of the water company devoted to service to the cities, and also the cost of operating this portion of the system. As previously indicated herein, the commission states:

"Admittedly it is difficult to equitably distribute the expense of maintaining and operating a system such as this among the various consumers in proportion to the benefits derived by each. An exact allocation of the cost to the company of rendering a service such as is rendered to the cities is impossible."

[6] There is no rule which requires the commission to allocate charges for public service among the different classes of consumers by an exact mathematical calculation. In the vast majority of cases this is impossible, for there is no segregation of

plant. If the mere fact that a segregation of plant or cost of operation is impossible rendered invalid the charges here sought to be imposed, for like reason the commission would be without jurisdiction to fix the rates for water supplied to private individuals. Of course, an allocation based upon estimate presents the possibility of an abuse of the rate-fixing power. For that reason the court will closely scrutinize rates so fixed, lest the exercise of the rate-fixing power merge into a system of confiscation. We take into consideration the facts that the cities are receiving substantially all of their water fire protection from the East Bay Water Company, with the possible exception of San Leandro; that, in conjunction with the domestic and industrial consumers, they are using the entire water supply, pumps, reservoirs, transmission lines, all the mains of 4 inches in diameter, and all the larger mains, aggregating approximately 440 miles in length, and are having the use of special service and higher pressure in the case of sudden demands caused by large fires. Having this in view, it cannot be said that a requirement that these cities pay a sum amounting to less than 10 per cent. of the total revenue allowed exceeds the jurisdiction of the commission or amounts to confiscation.

[7] Certain property of the East Bay Water Company, known as the San Pablo project, is now under construction. There was testimony at the hearing that this lake contained at the time of the hearing about 2,000,000,000 gallons, or 8 months' water storage; that this could be connected with the water company's mains supplying water to East Bay consumers within 30 days in case of an emergency; that the company was at the time drawing from San Leandro Lake 2,000,000 gallons a day in excess of the safe yielding capacity of that lake, and was able to do so because of the San Pablo storage available in case of an emergency. The value of the San Pablo project was excluded from the rate bases with which the statement of financial needs was compared.

It is contended by petitioners, however, that because certain expense items, including taxes and interest on bonds, connected with the San Pablo project, were included in the statement of financial needs approved by the commission, the San Pablo project was treated as property used and useful, upon which the company was allowed a return. Even assuming this view to be tenable, it was within the jurisdiction of the commission, in the exercise of its discretionary powers, to determine from the facts before it whether or not the San Pablo project would be available to the needs of the consumers during the year for which the rates were imposed. This court will not disturb the finding of the commission upon that question. Union Hollywood Water Co. v. Los Angeles, 178 Cal. 206, 172 Pac. 983.

[8] Petitioners urge their inability to meet this additional financial obligation as an objection to the imposition of the charges. This was a matter of expediency to be weighed by the commission, but, of course, cannot be considered by this court in a proceeding attacking the legality of the charges.

The decision is affirmed.

We concur: OLNEY, J.; SHAW, J.; WILBUR, J.; LAWLOR, J.

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BOEHM et al. v. SPRECKELS. (S. F. 7692.)

(Supreme Court of California. June 22, 1920. Rehearing Denied July 22, 1920.)

1. Pleading ⊜8(3) — Allegation that newspaper route was property right held allegation of opinion.

An allegation that it was the custom and usage of newspapers in a certain city to treat and deal with routes and the business connected therewith as property was but an allegation of an opinion.

2. Sales ⊜7—Agreement transferring route to newspaper carrier not sale of property.

An agreement whereby a newspaper transferred and delivered a newspaper route for a consideration *held* to create an agency and not to declare a sale of property.

3. Principal and agent ⊜27—Agent can convey only opportunity to vendee to offer himself as substitute.

In a qualified sense an agent of an agency terminable at will may sell or transfer his right to the agency, but he cannot transfer to the purchaser anything more than the opportunity to offer himself to the principal as a substitute.

4. Principal and agent ⊜34—Interest in money collected not "interest in subject of agency."

The interest which an agent authorized to collect a debt may have in the money collected, a part of which he is to take as compensation for his services, is an interest in that which is to be produced by the exercise of his power, and not an interest in "the subject of the agency," within the meaning of Civ. Code, § 2356, as to agency coupled with an interest.

5. Principal and agent ⊜36—Sale of subject of agency terminates agency.

The sale of the subject of an agency terminable at will made in good faith by the principal operates as a termination of the agency and is equivalent to a revocation thereof.

6. Evidence ⊜65—Every one presumed to know law.

Every one is presumed to know the law.

⊜For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

7. Principal and agent ⟹41—No damages for termination of indefinite agency.

An agent cannot recover damages from the principal on account of the termination of an agency for an indefinite period for causes mentioned in Civ. Code, § 2355, except where the agency was procured for a valuable consideration passing from the agent to the principal and the revocation is prior to the expiration of a reasonable time after its creation.

8. Principal and agent ⟹33—Principal may revoke unless agent's power is coupled with interest.

Except where an agent's power is coupled with an interest, the power to revoke always exists under Civ. Code, § 2355, but the right to revoke without liability for damages depends upon circumstances.

9. Principal and agent ⟹41 — Revocation of agency for consideration after 10 years not unreasonable as matter of law.

In an action by a newspaper carrier who paid $3,250 for the right to deliver papers in a certain district for an indefinite period, it cannot be said that 10 years was not a reasonable time for the continuance of the agency and that revocation at the end of that period would give the carrier the right to recover the original sum paid for the agency, in the absence of a showing of special hardship or of facts indicating that a longer period was contemplated or expected.

10. Principal and agent ⟹41 — Benefits to business arising from performance by agent inure to principal.

The benefits to the business of the principal arising from the performance by the agent of his duties under the contract of agency inure entirely to the principal, and the agent is entitled to nothing except the agreed compensation, unless the contract of agency expressly provides for something more.

Angellotti, C. J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by M. Boehm and others against John D. Spreckels. Judgment for defendant, and plaintiffs appeal. Affirmed.

Wm. M. Abbott, Wm. M. Cannon, Fabius T. Finch, Paul F. Fratessa, and Geo. B. Keane, all of San Francisco, for appellants.

Samuel M. Shortridge, of San Francisco, for respondent.

SHAW, J. In the court below a demurrer to the complaint was sustained, and judgment was thereupon given for the defendant. The plaintiffs appeal.

The plaintiffs are the assignees of all the rights of one James Shepherd to recover damages under a contract made between Shepherd and Spreckels on September 1, 1903. Spreckels was at that time the owner of the San Francisco Call, a morning newspaper of general circulation in San Francisco, which had been published and circulated therein for more than 40 years prior to said date. For the more convenient transaction of the business the city of San Francisco had been divided into districts, in each of which the newspapers taken by patrons thereof were delivered to such patrons by carriers who received the papers from the publisher and delivered the same to such patrons. These districts were commonly known as "newspaper routes." The contract between Spreckels and Shepherd related to one of these routes. Spreckels was the party of the first part and Shepherd the party of the second part therein. Substituting their names for these phrases, the material parts of the agreement are as follows:

"That for and in consideration of the sum of $3,250.00 gold coin of the United States in hand paid to said Spreckels, the receipt whereof is hereby acknowledged, and of the further conditions and covenants named in this agreement, said Spreckels has transferred and delivered and by these presents does transfer and deliver to said Shepherd, that certain route for the delivery of said newspaper the San Francisco Call lying and being in said city, county and state aforesaid, and more particularly described as follows, to wit:

"Route number 4 of the San Francisco Call, embracing the following territory: Commencing at the southeasterly corner of Sixteenth and Howard streets, thence southerly along the easterly line of Howard street to the corner of Twenty-Fourth street, thence easterly along the northerly line of Twenty-Fourth street to Potrero avenue, thence northerly along the westerly line of Potrero avenue to Channel street, thence westerly along the southerly line of Channel street to Harrison street, thence southerly along the easterly line of Harrison street to Sixteenth street, thence westerly along the southerly line of Sixteenth street to point of commencement.

"Spreckels agrees to deliver to Shepherd daily, a sufficient number of issues of said newspaper to supply said newspaper route, and said Shepherd agrees to receive the same and to pay said Spreckels therefor at the rate of $10^{11}/_{13}$ cents per paper per week, said payments to be made weekly and upon Saturday of each and every week during the existence of this agreement.

"It is expressly understood and agreed that said Shepherd shall manage, conduct and control said newspaper route above described in such manner and with such efficiency as shall be for the best interests of said the San Francisco Call newspaper, and shall maintain and preserve the extent and value of said newspaper route to the satisfaction of said Spreckels, and said Spreckels hereby reserves the right to make such changes in the rate to be paid for the newspapers delivered Shepherd under this contract, as changed conditions in said route and the service thereof or in the cost of production of said newspaper shall render rea-

sonable and just, and further reserves the right to give his written consent before any legal transfer of this contract shall be made.

"It is distinctly understood and made a part of this agreement that this bill of sale shall not be hypothecated or loans negotiated thereon where loans may be raised on said route without the full knowledge and sanction of said San Francisco Call, John D. Spreckels, proprietor."

Attached thereto as a part thereof was the following:

"It is hereby agreed and understood by and between Spreckels, proprietor, and James Shepherd, owner and holder of that certain newspaper route on the San Francisco Call known as route number 4, as described in the attached bill of sale, of which this agreement is made a part;

"That whereas the subscription price of said newspaper has been increased from 65 cents to 75 cents per month from and after July 1st, 1903.

"Now, therefore, in consideration of the premises, and of said increase of 10 cents per month in said subscription price, it is understood and agreed that of said increase of 10 cents per month in the subscription price said James Shepherd shall receive 2 cents per calendar month and the Call shall receive 8 cents per calendar month, in addition to the amount received by each of them respectively previous to said increase. That the said San Francisco Call may at any time increase its subscription price, or reduce the same back to 65 cents per month, to suit existing conditions as the judgment of said newspaper management shall deem reasonable, and said rate to James Shepherd will be increased or decreased in proportion to the increase indicated herein."

The complaint further alleges that at the time the contract was made, and ever since, it was, and has been, a custom and usage of publishers of newspapers in San Francisco, including the defendant, to treat and deal with newspaper routes, the lists of subscribers thereon, and the exclusive right to sell and deliver newspapers and procure new subscribers upon said routes and the good will of the business thus carried on over such routes, as property, and to make sales and transfers thereof accordingly; that the defendant, during all the period of his ownership of said newspaper, had known and acted upon said custom and usage, and that he and Shepherd executed the aforesaid contract with knowledge of said custom and in pursuance thereof; that Shepherd continued to perform his part of said contract, until September 1, 1913, and by his efforts had secured large numbers of new subscribers to the paper whereby the value of the business was materially increased and at that time was of the value of $4,000; that it had returned to him a net annual profit of $227.50, and he would have continued to have received that profit for the period of at least 14 years succeeding said date if the defendant had continued to perform his part of the said agreement; that on August 15, 1913, defendant, intending to take said newspaper route from said Shepherd and deprive him of the same and all benefits and advantages of the business conducted by him under said agreement and to transfer and sell said newspaper route with the business aforesaid to other parties, gave notice to each of the subscribers of said paper upon said route that they would be served with the San Francisco Chronicle instead of the Call until September 1, 1913, and that thereafter the San Francisco Chronicle would be delivered to them daily instead of the San Francisco Call; that on September 1, 1913, defendant refused, and ever since has refused, to deliver to Shepherd any copies of said San Francisco Call, although delivery thereof was demanded of defendant by said plaintiff, and defendant has repudiated said agreement; and that by reason thereof the business of the defendant in selling and distributing said newspaper upon said route has been destroyed, to the damage of the plaintiff in the sum of $7,185. In said item of damages is contained the sum of $3,185, alleged to be the value of the profits which the plaintiff would have received after September 1, 1913, if the defendant had continued to deliver the said newspapers as provided in the contract.

[1] The allegation that it was the custom and usage of the publishers in San Francisco to treat and deal with such routes and the business connected therewith as property adds nothing to the case of the plaintiff. It amounts to nothing more than a statement that it was the opinion of such publishers that rights concerning said newspaper routes constituted property. The question whether the rights relating thereto constitute property which is a subject of sale is a question of law that is to be determined by the principles of law and not by the opinions or customs of persons who deal with such matters.

The plaintiffs contend that the agreement aforesaid operated as a grant to Shepherd of that portion of the business of Spreckels which was transacted within the territory included in said route, consisting of the delivery of the paper to the subscribers along said route and making sales of the paper to others within the territory; that this grant included the good will of the business; and that it gave Shepherd the absolute right to continue the business and compel Spreckels to perform his part thereof during the life of Spreckels. They also contend that, if the agreement created an agency authorizing Shepherd to sell and deliver papers for Spreckels, it was an agency coupled with an interest in the subject-matter thereof and was therefore irrevocable by Spreckels except for cause. Also that, even if the agency was not coupled with an interest, it was created for a valuable consideration and therefore

was irrevocable at the will of Spreckels, and that inasmuch as it did not specify the time for its continuance it could not be revoked for a reasonable time, which reasonable time is a period equal to the life of the newspaper, or the life of Spreckels.

[2] The facts stated in the complaint must be considered in construing the contract. At and before the time it was made, Spreckels was the publisher and proprietor of the newspaper. It circulated generally throughout the city, and there were subscribers thereto and patrons thereof living or doing business along said route, to whom it was then being delivered. The contract shows that the subscription price was 75 cents per month and that Spreckels had the right to raise or lower this price at will and could also make reasonable changes in the rate to be paid by Shepherd. The contract is not entirely complete on the subject, but it is reasonably clear from its contents in connection with the facts alleged that, subject to this power to change the price, Shepherd was to pay to Spreckels for each paper received, the sum of $10^{11}/_{13}$ cents per week, plus 8 cents per month, and that he was to collect from the subscribers 75 cents per month and keep the difference for his own compensation. Spreckels does not agree to sell the papers to Shepherd. The fact would appear to be that the papers were sold by Spreckels to the subscribers. That was the condition when the contract was made, and there is nothing in the contract to indicate that it was to effect a change in the relations between the publisher and the subscribers. The agreement of Spreckels is that he will "deliver" to Shepherd "a sufficient number of issues of said newspaper to supply said route." In view of the fact that Spreckels had already agreed to sell and deliver the papers to the subscribers, this language cannot reasonably be construed to import a sale of the same copies to Shepherd.

If Spreckels had sold an interest in his business as publisher of the newspaper, the two would have become partners. If a separable part of that business, assuming that a separation was possible, had been sold, they would have been partners in the ownership of that part. In either case the ownership of the respective interests would have continued after a dissolution of the partnership, each would have been entitled to his share of the profits, and would be liable to the other for a share of losses, and would be liable for the debts of the joint enterprise. The contract manifestly had no such effect. The statement that Spreckels does "transfer and deliver" to Shepherd "that certain route for the delivery of said newspaper" therein described cannot reasonably be understood to be a transfer to Shepherd of any interest in the business of publishing the newspaper. The more reasonable conclusion, in view of all the facts, is that it is only a rather awkward expression of the idea that Shepherd was to have the right and duty, as agent of Spreckels, of delivering the papers, soliciting and taking new subscriptions thereto, and conducting the business incidental thereto within the territory described, including the collection of the price of the subscriptions owing to Spreckels. The statements that Shepherd was to receive the papers, distribute them within the territory, and "manage, conduct and control said newspaper route in such manner and with such efficiency as shall be for the best interests" of said newspaper, "and as shall maintain and preserve the extent and value of said newspaper route to the satisfaction of" Spreckels, are apt expressions to describe the duties and powers of an agent. They strongly imply that an agency only was contemplated. They are meaningless as applied to a sale of the business, or a part thereof, to the carrier. For these reasons we conclude that the contract created an agency and did not declare a sale of property. This is the effect of the decisions of other courts upon similar contracts. Harlow v. Oregonian Pub. Co., 45 Or. 525, 78 Pac. 737; Harlow v. Oregonian Pub. Co., 53 Or. 272, 100 Pac. 7; Staroske v. Pulitzer Pub. Co., 235 Mo. 67, 138 S. W. 36; Wilcox & Gibbs Co. v. Ewing, 141 U. S. 636, 12 Sup. Ct. 94, 35 L. Ed. 882. So far as the opinion of the District Court of Appeal in Otten v. Spreckels, 24 Cal. App. 262, 141 Pac. 224, contains anything inconsistent with this conclusion, that case is disapproved.

[3] Appellants refer to cases which say that an agent may sell or transfer his right to the agency even where it is terminable at will. In a qualified sense he may do so, but he cannot transfer to the purchaser anything more than the opportunity to offer himself to the principal as a substitute for the transferror. He buys a mere chance that the principal may accept him in place of the other. No interest in the agency, or in the business which the former agent was authorized to transact for the principal, can be thus sold or transferred. These cases are not authority for the proposition that such an agent has a property interest in the business which he carries on and which is the subject of his agency. Expressions may be found in such decisions indicating that the agent may sell his agency, but they cannot be considered as declaring that he has any interest in the business which may be the subject thereof.

[4] Shepherd had an interest in collecting the subscription price, for upon that his compensation as agent was dependent. But the interest which an agent authorized to collect a debt may have in the money collected, a part of which he is to take as compensation for his services, is an interest in that which is to be produced by the exercise

of his power, and not an interest in "the subject of the agency," within the meaning of section 2356. Hunt v. Rousmanier, 21 U. S. 204, 5 L. Ed. 589; Meyer v. Pulitzer Pub. Co., 156 Mo. App. 176, 136 S. W. 5; Flanagan v. Brown, 70 Cal. 260, 11 Pac. 706; Hartley and Miner's Appeal, 53 Pa. 212, 91 Am. Dec. 207. We therefore conclude that the action cannot be maintained on the theory that Shepherd had an interest in the subject of the agency and that, as the first count of the complaint is founded on this theory, it does not state a cause of action.

The second count of the complaint is founded upon the theory that the payment of a valuable consideration by Shepherd implies an agreement that the agency should continue for a reasonable time, and that the revocation by Spreckels occurred before such reasonable time had expired. This count prays only for the recovery of the $3,250 paid for the route by Shepherd to Spreckels, with interest thereon from the time of revocation. It alleges that 7 per cent. upon said sum was received by Shepherd annually during the 10-year period; that it was only a reasonable return thereon; and that he had never received or had returned to him any part of the principal. It also repeats the other facts hereinbefore stated.

[5, 6] It is contended that the implied agreement for a reasonable time means that the agency should continue for a period which would "enable the carrier to get back his invested capital, together with a fair profit on his investment." The Civil Code provides that an agency is terminated by:

"(1) The expiration of its term; (2) the extinction of its subject; (3) the death of the agent; (4) his renunciation of the agency; or (5) the incapacity of the agent to act as such." Section 2355.

Also, that when not coupled with an interest in the subject of the agency it is terminated by:

"(1) Its revocation by the principal; (2) his death; or (3) his incapacity to contract."

It is also an established rule that a sale of the subject of the agency made in good faith by the principal operates as a termination of the agency and is equivalent to a revocation thereof. 1 Mechem on Agency, § 698. Every one is presumed to know the law, and it must therefore be presumed that the parties to the agreement contracted with knowledge of the possibility of a termination of the agency by either of the causes above specified.

[7-9] We know of no rule of law which allows the agent to recover damages from the principal on account of a termination of an agency for an indefinite period for any of the causes above mentioned, except where the agency was procured for a valuable consideration passing from the agent to the principal and the revocation is prior to the expiration of a reasonable time after its creation. In Frink v. Roe, 70 Cal. 309, 11 Pac. 820, it is said that an agency created for a valuable consideration is irrevocable, but as this is directly contrary to the Civil Code, and as the expression was clearly obiter, the case cannot be considered as authority. There is a distinction between the "power" to revoke and the "right" to revoke an agency. Except where the agent's power is coupled with an interest, the power to revoke always exists, but the right to revoke without liability for damages depends upon circumstances. 1 Mechem on Agency, vol. 1 (2d Ed.) § 568. If the right does not exist, the principal will be liable for damages upon a revocation. In Brown v. National Electric Co. Works, 168 Cal. 337, 143 Pac. 606, the defendant, for a valuable consideration agreed to employ the plaintiff at a monthly salary for an indefinite time. The plaintiff was discharged without cause after three months' service. It was held that there was an implied contract arising from the valuable consideration, to continue the employment for a reasonable time, that the discharge in three months was a breach of the implied contract, and that by reason thereof the plaintiff was entitled to rescind the contract and recover what he had paid thereon. In the present case the paper had been published for more than 40 years before the contract was made in 1903. The payment of $3,250 for an agency for an indefinite period raises the inference that both parties considered the privilege valuable and that both assumed that it would be continued for a considerable period of time. The plaintiff contends that under such circumstances the implied agreement is that the agency shall continue until the agent has received, as compensation, a sum sufficient to repay the consideration paid by him to the principal, together with a fair profit thereon during the necessary period, in addition to a reasonable compensation for his own time and labor in performing his duties. We cannot agree to this proposition. It would add to the agreement something not contained therein, and instead of being an agency for an indefinite time, terminable at will, it would become an agency, indefinite, it is true, but one which must necessarily continue for a long time after its creation, the length of the period depending upon the capacity and diligence of the agent and on many other future conditions which might arise affecting his success or failure, none of which could be foreseen. No subsequent condition which affected the ability of the plaintiff to recoup his outlay is alleged. The contention is that the obligation to allow him time to recoup arises solely from the payment of a consideration for the agency. The complaint does not disclose the amount which Shepherd received

and applied as compensation for his own time and labor. It must be presumed that the opportunity of obtaining such employment and compensation was one of the main inducements which caused him to enter into the arrangement. No standard can be fixed for the determination of the question what is a reasonable time. Under all the circumstances of the case, and in the absence of any showing of special hardship or of further facts indicating that a longer period was contemplated or expected, we think it cannot be said that 10 years was not a reasonable time for its continuance, and that the revocation at the end of that period would not give a right to Shepherd to recover the original sum paid for the agency.

[10] In support of the proposition that the agency was terminated before a reasonable time had expired, the plaintiff cites the Brown Case above mentioned and also Pierce v. Tenn., etc., Co., 173 U. S. 1, 19 Sup. Ct. 335, 43 L. Ed. 591, Davidson v. Laughlin, 138 Cal. 320, 71 Pac. 345, 5 L. R. A. (N. S.) 579, Brown v. Crown, etc., Co., 150 Cal. 385, 89 Pac. 86, Harlow v. Oregonian Pub. Co., 53 Or. 272, 100 Pac. 7, and Meyer v. Pulitzer Pub. Co., 156 Mo. App. 177, 136 S. W. 5. We have already stated the effect of Brown v. Natl. Elec. Co. Works, supra. In Pierce v. Tenn., etc., Company the decision was put upon the ground that the contract was that the employment was to continue as long as the employé was able to do the kind of work specified. It has no bearing upon the question of a reasonable time. Neither Davidson v. Laughlin nor Brown v. Crown, etc., Co., touch upon the question. In Meyer v. Pulitzer Pub. Co. the carrier had paid $45.46 for his agency and had enjoyed it for more than 11 years. The court said that if it appeared that the agent, induced by his appointment, had in good faith incurred expense, devoted time, and bestowed labor in the matter of the agency without having had a sufficient opportunity to recoup the same from the agency, the principal would be required to compensate him to that extent, but that the law required no more than that—

"In every instance the agent shall be afforded a reasonable opportunity to avail himself of the preliminary expenditure and efforts put forth to the end of executing the authority conferred."

The conclusion was that the plaintiff in that case had had ample time for that purpose and he was denied a recovery. The main reliance of the plaintiff is upon the case of Harlow v. Oregonian Pub. Co. This case is somewhat remarkable, both in its facts and in the law declared thereon. The agency in that case was created in the year 1864 for the delivery of the Daily Oregonian in a certain part of the city of Portland. The consideration paid by the agent was $350. It continued for 48 years and was then terminated by a revocation. In the meantime the population of the city had greatly increased and the value of the privilege was declared to have increased to more than $5,000. The decision did not go upon the theory that the valuable consideration implied an agreement that the agency should continue for a reasonable time, but upon the meaning of the contract creating the agency. The court construed it to provide that, no matter how long the agency might continue, a just and equitable allowance was to be made to the agent for the value of the privilege at the time of its revocation. A jury had allowed him $5,000 for his loss caused by the revocation of the agency, and this allowance was upheld, although the contract was construed to create a mere agency not coupled with any interest in the subject thereof. In other words, the decision, aside from what we deem a strained construction of the contract itself, appears to go upon the idea that, where an agent is employed to assist in the business of the principal and receives from time to time the compensation agreed upon between them, he nevertheless becomes entitled to the value which his efforts add to the business of his principal, in case the agency is terminated by the principal without the fault of the agent. It appears to us that the correct rule is that the benefits to the business of the principal, arising from the performance by the agent of his duties under the contract of agency, inure entirely to the principal and that the agent is entitled to nothing except the agreed compensation, unless the contract expressly provides for something more. The contract there involved contained no such covenant, and we think none could be implied from its terms. Neither this nor any of the other cases cited sustain the contention of the plaintiff. The demurrer to the complaint was properly sustained.

The judgment is affirmed.

We concur: OLNEY, J.; WILBUR, J.; LAWLOR, J.

ANGELLOTTI, C. J. (dissenting). In all respects except one I concur in the opinion. It is conceded that because of the payment of a valuable consideration there was an implied agreement that the agency should be allowed to continue for what under all the circumstances would be a "reasonable time," and with this view I am in accord. I have no doubt that, if the agency here was allowed to continue through the life of the newspaper, it should be held that it had been allowed to continue for such time as was contemplated, with the result that no recovery could be had by plaintiff. But the complaint does not show that such was the fact, and we are here dealing only with the question of the sufficiency of the complaint. Assuming that

the publication of the newspaper continued, it seems to me that the complaint sufficiently alleges matters showing that the agency was terminated prior to the expiration of the "reasonable time" for which it was given. I dissent from the judgment solely for this reason.

183 Cal. 252

OTTEN v. SPRECKELS. (S. F. 8203.)

(Supreme Court of California. June 22, 1920. Rehearing Denied July 22, 1920.)

1. Appeal and error ⊂=1097(6)—Decision of Court of Appeals law of case on subsequent appeal to Supreme Court.

A decision of the District Court of Appeals was the law of the case on a subsequent appeal to the Supreme Court.

2. Appeal and error ⊂=1097(6)—Record on former appeal may be examined under doctrine of law of case.

Where an appeal was had to the District Court of Appeals and a hearing was denied in the Supreme Court, on a subsequent appeal to the Supreme Court, the record used on the former appeal could be examined in order to determine whether the evidence on the former trial was substantially the same as on the second trial, to determine whether the doctrine of the law of the case applied.

3. Appeal and error ⊂=1097(3)—Doctrine of law of case inapplicable where facts are different.

Where the facts on a second appeal are substantially different from those on a former appeal, the doctrine of the law of the case does not apply.

4. Principal and agent ⊂=33—Mutual stipulations not consideration preventing termination by principal.

Stipulations of one transferred a route by a newspaper to faithfully perform the duties required of him by his contract was not such a valuable consideration as would take the contract out of the rule of Civ. Code, § 2356, that an agency may be terminated by the principal, or to bring it within the rule that, if an agency is given for a valuable consideration, the principal will be liable in damages if he revokes it before the agent has had a reasonable time to enjoy his agency so as to some extent to reimburse himself, since the law would make him subject to such obligation without any stipulation, under section 2228.

5. Principal and agent ⊂=41 — Benefits of agent's services go to principal and give agent no interest in business.

The benefits of an agent's services go to the principal and not to the agent, and while a contract of agency which gives the agent a profitable employment is valuable to him, and if he is allowed by his principal to perform his agency in his stead, his agency may have a commercial value, and as between the agent and a substitute it may have all the attributes of property, such agent has no interest or right which he can assert against his principal as a basis for damages for revocation, where the agency is revocable at will.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by C. H. Otten against John D. Spreckels. Judgment for plaintiff, and defendant appeals. Reversed.

Samuel M. Shortridge, of San Francisco, for appellant.

Mastick & Partridge, of San Francisco, for respondent.

SHAW, J. The defendant appeals from a judgment in favor of the plaintiff.

[1] The cause has been tried twice. Upon the first trial a verdict was returned for the plaintiff and a new trial was thereupon ordered. From this order the plaintiff appealed. The appeal came before the District Court of the Third District for decision and the order was affirmed. 24 Cal. App. 251, 141 Pac. 224. The plaintiff applied to the Supreme Court for a rehearing and it was denied. The respondent contends that the decision of the District Court upon the appeal from the order granting a new trial constitutes the law of the case, binding upon the lower court and upon this court upon the question of the legal effect of the contract set forth in the complaint upon which the judgment is based. The denial of a rehearing by this court is of no significance as an approval of the law stated in the opinion of the District Court of Appeal, for the plaintiff in his petition did not complain of the points there decided in his favor. The plaintiff now invokes, as the law of the case, certain parts of the opinion which are favorable to him and which this court has had no occasion to consider. The decision, nevertheless, constitutes the law of the case to the same extent as if it had been made by this court. It is necessary, therefore, to determine whether or not, upon the second trial, the facts were the same as those upon which the conclusions of the district court as to the law were predicated, since otherwise the doctrine of the law of the case does not apply.

[2] The complaint alleges a contract in writing, which it sets out in full. It then alleges facts which it is claimed constituted a breach thereof and states the amount of the resulting damages. On the first trial this writing was not admitted in evidence. Evidence of oral negotiations leading up to the execution of the writing was given and the trial court treated this as evidence of an oral contract. The complaint was not amended, but the cause was submitted to the jury on the theory that proof of an oral con-

tract was admissible, with the result already stated. The District Court held that the writing was improperly excluded by the court below. Upon the second trial the writing set forth in the complaint was admitted in evidence, and it formed the basis of the verdict and judgment. It is necessary therefore to inquire whether or not the evidence of the oral negotiations upon which the district court based its conclusion as to the effect of the contract was substantially the same as the written contract upon which the present judgment was based. The record used on the former appeal may be examined by us on this appeal in order to determine this question. McKinlay v. Tuttle, 42 Cal. 576.

The contract alleged was executed on September 30, 1903, between "The San Francisco Call, and John D. Spreckels, the parties of the first part, and C. H. Otten, the party of the second part." It may be inferred from its language that the San Francisco Call was a newspaper which was then being printed somewhere and circulated in Berkeley, and that Spreckels was either the owner, or was in control, of the business of publishing and circulating it; but these facts are not alleged in the complaint. In describing the contract we use the name "Spreckels" to designate the party of the first part. Its material provisions are as follows:

"In consideration of $3,000.00 paid to Spreckels by Otten," Spreckels sold, transferred, and delivered to Otten "the agency of and for the San Francisco Call, and of and for that certain newspaper route" of said paper in Berkeley, particularly described.

Spreckels also agreed to deliver to Otten, daily, enough copies of the paper to supply said route. Otten was to pay therefor one cent per copy and 8 cents per month in addition. The subscription price of the paper was 75 cents per month, subject to increase or reduction at the will of Spreckels. It provided that Otten "shall manage, control and conduct the said newspaper route above described in such a manner, and with such efficiency, as shall be for the best interests of the said San Francisco Call newspaper, and shall maintain and preserve the extent and value of said newspaper route to the satisfaction of said Spreckels, and in all respects keep and perform all of his obligations unto the said Spreckels, arising out of the possession and management of said newspaper route during such time as the said Otten shall be in possession thereof." It further provided that Spreckels reserved the right to give his "written consent before any legal transfer of this contract shall be made." This is the contract the effect of which the court is now required to consider and to compare with the oral contract proven in the case and construed by the District Court of Appeal as above stated. It is to be observed, however, that the recitation in the instrument that the $3,000 was paid by Otten to Spreckels for its execution was not true. It was admitted upon the last trial that no consideration for the contract passed between the parties, other than their respective stipulations therein.

The record on the first appeal shows that, on the first trial, evidence was given regarding the oral negotiations. The District Court considered this as evidence of the contract between the parties. This evidence was in effect that Otten had been engaged in distributing the San Francisco Call in Berkeley ever since the year 1896, in connection with one Cordes; that on or about September 30, 1903, he made an arrangement with the agents of Spreckels to continue the delivery of the papers in the territory in Berkeley embraced in the territory described in the contract aforesaid and to pay Spreckels one cent the copy for the papers so distributed; that Spreckels was to deliver to him at Oakland the number of papers required to supply the subscribers in the Berkeley territory, and that Otten had them distributed to subscribers within the territory by certain persons whom he employed for that purpose; that he made out the bills to the subscribers and collected them monthly as they became due, deducting his own charges as arranged and returned the balance to Mr. Spreckels. It was further shown that Otten was to be allowed to sell the territory at any time he had a party who would buy it, who would be agreeable to Spreckels; that, if Spreckels was not satisfied with Otten's services, Otten was to be notified and then have an opportunity to sell out the territory to some other person; that Otten paid between $8,000 and $9,000 for the route; and that when the agency was terminated on January 1, 1909, the defendant had procured one McCoy to buy out Otten and pay him $5,000 and offered the opportunity to Otten to sell out his rights or route at that price, which offer Otten refused.

Concerning the rights of Otten under this oral contract the District Court on the former appeal, in discussing the question of the sufficiency of evidence to sustain the verdict for the amount of damages allowed, said (24 Cal. App. 262, 141 Pac. 228):

"Unquestionably, he acquired, by virtue of the agreement, a right of property in said territory—the exclusive right to distribute and deliver the Call therein—of which he cannot be divested without just compensation. * * * The right remained absolute only so long as the plaintiff rendered efficient service."

This declaration, it is now claimed, establishes the law of the case.

The oral contract, according to the testimony above related, was given for a valuable consideration, amounting to at least $8,000, and it included an agreement by Spreckels

that Otten should have the right at any time to transfer the agency to some other person acceptable to Spreckels, and that even if Spreckels was not satisfied with Otten's manner of performing the service, Otten was to have notice thereof and an opportunity to transfer the agency to some person satisfactory to Spreckels and to obtain for himself whatever sum of money such person would pay for the privilege of becoming such agent.

[3] No such provisions are contained in the written contract, and at the last trial it was admitted that Otten did not pay Spreckels any money for its execution. The facts are therefore substantially different, and the doctrine of the law of the case does not apply. Allen v. Bryant, 155 Cal. 259, 100 Pac. 704; McLeran v. Benton, 73 Cal. 337, 14 Pac. 879, 2 Am. St. Rep. 814; Mitchell v. Davis, 23 Cal. 383; Smith v. Goethe, 159 Cal. 631, 115 Pac. 223, Ann. Cas. 1912C, 1205, 4 Cor. Jur. 1095, footnote 78.

We may therefore consider the effect of the contract pleaded free from any embarrassment arising from the law laid down in the former decision.

In the case entitled Boehm v. Spreckels (S. F. No. 7692, 191 Pac. 5), submitted simultaneously with the present case, we considered the question of the legal effect of a contract relating to a "newspaper route" which is similar to the contract with the plaintiff, Otten, set forth in the complaint, and certainly more favorable to the theory that it vests a property right in the carrier of the papers. We have there held that such a contract creates an agency only; that it does not vest in the agent any interest in the subject of the agency; that the agency is not coupled with an interest; that it is for an indefinite period, and hence that it is revocable by the principal at any time.

We further held that, unless such agency was given for a valuable consideration, it could be revoked by the principal without liability to the agent for any loss or damage to him that might be caused by loss of the compensation provided for him by the contract of agency. The agency in the present case was not given for a valuable consideration.

[4] It cannot seriously be contended that the effect of the stipulations of the respective parties, as being a consideration sufficient to support it as a contract, is sufficient to take it out of the rule of section 2356 of the Civil Code that an agency may be terminated by the principal, or to bring it within the rule that if an agency is given for a valuable consideration the principal will be liable in damages if he revokes it before the agent has had a reasonable time to enjoy his agency so as to some extent to reimburse himself for his outlays in getting it or in preparing to perform the duties imposed on him thereby. All of the cases on that subject involve the payment of some money by the agent to secure the agency, or the incurring of preliminary expenses by him in preparing to execute the powers given him. No reason can be given for the proposition that his agreement to faithfully perform the duties required of him by his contract of employment will, as a valuable consideration, make this rule applicable. The law would make him subject to that obligation without any stipulation. 2 Cor. Jur. p. 692; Civ. Code, § 2228; Calmon v. Sarraille, 142 Cal. 641, 76 Pac. 486.

[5] Throughout the trial the counsel for the plaintiff apparently assumed that in an agency of this character the efforts of the agent to increase his compensation by increasing the number of subscribers to the defendant's newspaper within the described territory operated to give him an interest in the principal's business, an interest distinct and separate from that of the principal and of which the principal could not deprive him without his consent, or without adequate compensation in damages equal to the value of that interest. This is a manifest mistake in every case in which the contract of agency does not so provide. The contract in this case required that Otten should control and conduct the route for the best interests of Spreckels and maintain and preserve its extent and value to the satisfaction of Spreckels. His commissions were allowed for the purpose of paying him for this service. If he was required by the contract to endeavor to increase the number of subscribers within the territory he served, the commissions paid for that endeavor also, and his compensation would be automatically increased proportionally thereby. In contemplation of law, in this and all similar cases, the benefits of the agent's services go to the principal and not to himself, and the agent has no interest therein. A contract of agency which gives the agent a profitable employment by reason of the large compensation allowed him is, of course, valuable to him, and if he is allowed by his principal to procure another to perform the service in his stead, his agency may have a commercial value, similar in many respects to a right of property. As between him and the substitute with whom he agrees to abdicate, it may indeed have all the attributes of property and the transfer may command a high price. But where the agency is revocable at will, as in this case, he has no interest or right which he can assert against his principal who revokes it, as the basis of damages for such revocation.

These principles are decisive of the case. The only breach of contract alleged was the revocation of the agency by Spreckels on January 1, 1909. The only damage alleged or proven was that Otten thereby was de-

prived of the agency. The agency being terminable at will by the principal and being for an indefinite term and without a valuable consideration, its revocation was not a breach of the contract. The plaintiff has no cause of action and the judgment should have been for the defendant. This renders it unnecessary to consider other questions presented.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; LAWLOR, J.

183 Cal. 259

SMITH et al. v. BACH et al. (L. A. 5121.)

(Supreme Court of California. June 24, 1920.)

1. Statutes ⟸205—Entire statute to be considered.

For the purpose of ascertaining the legislative intent, courts should consider the entire statute.

2. Contracts ⟸105 — Ipso facto void when made as prohibited by statute.

A statute prohibiting the making of contracts, except in a certain manner, ipso facto makes them void if made in any other way, notwithstanding that the statute does not expressly pronounce it void, and it is immaterial whether the thing forbidden is malum in se or merely malum prohibitum.

3. Vendor and purchaser ⟸39—Contract of sale by reference to unrecorded map void.

A contract of sale of land made in violation of Act March 15, 1907 (St. 1907, p. 290), making it unlawful to sell or offer for sale land with reference to an unrecorded map, is void.

4. Contracts ⟸139 — Vendee may recover money paid under unlawful contract of sale.

Where a contract of sale of land is made in violation of Act March 15, 1907 (St. 1907, p. 290), making it unlawful to sell or offer for sale land by reference to an unrecorded map, the vendee may rescind and recover money paid; the prohibition in the statute being for the vendee's benefit, and he therefore not being in pari delicto.

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Clara L. Smith and others against George J. Bach and another. Judgment for defendants, and plaintiffs appeal. Reversed.

F. G. Blood and Crouch & Chambers, all of San Diego, for appellants.

Sweet, Stearns & Forward and C. C. Pease, all of San Diego, for respondents.

The following opinion was prepared by Mr. Justice KERRIGAN of the District Court of Appeal for the First Appellate District, while acting as justice pro tempore in this court in place of Mr. Justice MELVIN. It is adopted as the opinion of this court.

This action is one in assumpsit for money had and received. The case grows out of a contract relating to the sale of certain tracts of land in a subdivision situated in San Diego county. Plaintiffs paid defendant a part of the purchase price under the terms of the contract of sale, and they seek by this action to recover the same upon the ground that the contract relating to the sale is void. The claimed invalidity is based upon the admitted fact that the sales were made in violation of the act of March 15, 1907 (Stats. 1907, p. 290), making it unlawful to sell or offer for sale land by reference to an unrecorded map. At the conclusion of plaintiff's case the trial court granted a nonsuit, and from the judgment and the order denying a new trial plaintiffs appeal. The main question here presented is whether or not such a contract is void, so as to prevent any right of action being based thereon.

By the terms of the statute in question not only is the selling or offering for sale of lots of land by reference to an unrecorded map or plat expressly prohibited, but the act makes it a misdemeanor so to do, the penalty for which is fixed at both a fine and imprisonment. This precise question has been presented to the appellate courts of this state in three different cases, in none of which, however, have the rights of a vendee thereunder been passed upon. See Bentley v. Hurlburt, 153 Cal. 796, 96 Pac. 890; Baines v. Shank, 12 Cal. App. 391, 107 Pac. 631; King v. Johnson, 30 Cal. App. 63, 157 Pac. 531; Shultz v. Redondo Imp. Co., 156 Cal. 439, 440, 105 Pac. 118. In the Bentley Case this court found it unnecessary to pass upon the validity of the contract, for the reason that the evidence showed that the statute had been substantially complied with. In Baines v. Shank, supra, the District Court of Appeal also found it unnecessary to consider the question; the case being disposed of upon a different point. The only case, therefore, where the question has received consideration in this state, is King v. Johnson, supra, which is hereinafter referred to.

Many of our sister states have adopted laws of a similar character. These statutes differ in terms; some containing no express prohibitory words, but recognizing that the act may be done subject to a fine for its disregard, while others, analogous to our own, contain an express prohibition and a penalty for violation. The decisions of the courts of these various jurisdictions, construing these statutes to determine the legislative intent, are not harmonious. See 39 Cyc. 1215;

13 Corpus Juris, p. 410 et seq. An extensive review of these numerous cases would answer no useful purpose. Frequently, as here, a statute imposes a penalty on the doing of an act without expressly declaring such act illegal and void.

Applying the doctrine, "Expressio unius est exclusio alterius," some of the courts have held that, the Legislature having fixed the penalty for the execution of the contract, courts cannot impose another, invalidating the agreement. See 39 Cyc. 1215. In cases announcing this doctrine a distinction is usually made between acts malum in se, which are generally regarded as void, and those which are mala prohibitum. On the authority of these cases, respondent in effect contends, in support of the judgment, that the statute imposing specific penalties for its violation, and the act condemned not being malum in se, the purpose of the act can be accomplished without declaring contracts made in violation thereof illegal, and that the inference is that it was not the intention of the Legislature to render them illegal, or it would have so declared in unequivocal terms.

The decisions supporting the doctrine invoked are in the main based upon revenue statutes, which simply impose a fine or penalty, the amount of which is definitely fixed, as distinguished from those, as here, which prohibit and declare the violation of the act a misdemeanor punishable by fine and imprisonment.

[1-3] For the purpose of ascertaining the legislative intent courts should consider the entire statute, and if from such consideration it is manifest that the Legislature had no intention of declaring a contract void, they should be sustained and enforced; otherwise, they should be adjudged void. Dunlop v. Mercer, 156 Fed. 548, 86 C. C. A. 435. Here it is manifest from a reading of the entire act that the statute in question was passed for the protection of the public, and not as a revenue measure. King v. Johnson, 30 Cal. App. 63, 157 Pac. 531. In such a case a contract made in violation of its terms should be held to be void. Levinson v. Boas, 150 Cal. 193, 88 Pac. 825, 12 L. R. A. (N. S.) 575, 11 Ann. Cas. 661; Pangborn v. Westlake, 36 Iowa, 548. The general rule controlling in cases of this character is that, where a statute prohibits or attaches a penalty to the doing of an act, the act is void, and this, notwithstanding that the statute does not expressly pronounce it so, and it is immaterial whether the thing forbidden is malum in se, or merely malum prohibitum. A statute of this character, prohibiting the making of contracts except in a certain manner, ipso facto makes them void if made in any other way. 13 Cyc. 351; 13 Corpus Juris, p. 410. The imposition by statute of a penalty implies a prohibition of the act to which the penalty is attached, and a contract founded upon such act is void. This general rule finds support in the decisions of this state. Berka v. Woodward, 125 Cal. 127, 57 Pac. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31, and cases cited; Bentley v. Hurlburt, supra.

It is true, as stated by Mr. Justice Sloss in Bentley v. Hurlburt, that cases may be found holding a contrary doctrine; but an examination of those cases will, as hereinbefore stated, show that the statutes upon which they are based generally do not prohibit, but merely impose a fine as an exclusive punishment. This identical statute was construed in King v. Johnson, supra, where the general rule above stated was applied. It is there said that—

> "Cases * * * from other jurisdictions are based upon statutes which the court, for different reasons, construed as not prohibiting the sale, while the statute under consideration, in express terms, prohibits the doing of the act."

Concluding, as we do, that the contract in question is void, it only remains to determine the rights of plaintiffs to recover in this action.

[4] There are authorities which, while not denying the general rule that an illegal contract cannot be enforced, whether malum in se or malum prohibitum, hold that all the consequences which attend a contract contrary to public morals do not attend one which is purely malum prohibitum, and that in the latter case courts will take notice of the circumstances, and will give relief, if justice and equity require a restoration of money received by either party thereunder. 13 Corpus Juris, p. 411, § 341. In such a case the complaining party is protected, the prohibition being for his benefit, and, not being in pari delicto, he is entitled to relief. Id., p. 501, § 443. By the weight of authority, where money has been paid in consideration of an executory contract which is illegal, the party who has paid it may repudiate the agreement at any time before it is executed and reclaim the money. In such a case it is the duty of the court in furtherance of justice to aid one not in pari delicto, though to some extent involved in the illegality, but who, as here, is comparatively the more innocent, and to permit him to recover back money paid on a contract as the circumstances of the case may require. Pomeroy, Eq. Jur. (3d Ed.) § 942; Gray v. Roberts, 2 A. K. Marsh. (Ky.) 208, 12 Am. Dec. 385; Wassermann v. Sloss, 117 Cal. 431, 49 Pac. 566, 38 L. R. A. 176, 59 Am. St. Rep. 209; City of Los Angeles v. City Bank, 100 Cal. 18, 34 Pac. 510; Savings Bank v. Burns, 104 Cal. 480, 38 Pac. 102; Manchester R. R. v. Concord R. R., 66 N. H. 100, 20 Atl. 383, 9 L. R. A. 689, 49 Am. St. Rep. 589; 13 Corpus Juris, p. 501, § 444.

For the reasons given, the judgment is reversed.

ANGELLOTTI, C. J., and SHAW, WILBUR, OLNEY, LAWLOR, and LENNON, JJ., concur.

(183 Cal. 284)

In re STREETON'S ESTATE.

SHOULTS v. WILLIAMS.

(L. A. 6329.)

(Supreme Court of California. July 1, 1920.)

1. Wills ⇐111(2) — Test for determining whether signature not at end of will intended as token of execution.

The test whether a will has been signed by the testator is, under Civ. Code, § 1277, that, if placed at the end of document, and nothing to the contrary appears, he intended to so sign, but, if placed elsewhere, it is for the court to say, from an inspection of the whole will as to language and form and the relative position of its parts, whether there is positive and satisfactory inference that the signature was so placed as a token of execution.

2. Wills ⇐133 — Signature at top of will where no other space left held intended to authenticate will.

Where no space was left at the bottom of an olographic will, and testator's name was signed in the only blank space which had been left, which was in the upper left-hand corner, *held*, that the document showed testator's intention to thus authenticate the instrument.

3. Wills ⇐386—Finding as to execution not overthrown unless without evidentiary support.

The due execution of a will is a question of fact and its determination by the trial court will not be overthrown unless without support in the evidence.

4. Wills ⇐289—Face of document held to show testator's intention to sign at top to authenticate instrument.

The trial court's finding that testator signed his name at the top of the will with the intention of authenticating the instrument *held* sustained by positive and satisfactory inference arising from the face of the document.

5. Wills ⇐278—Allegation that instrument is not deceased's will insufficient as plea of revocation.

An allegation "that said written instrument is not the last will and testament of said S., deceased," is a mere conclusion of law, and is insufficient to plead a revocation.

6. Wills ⇐306—Evidence held insufficient to show revocation.

Evidence *held* insufficient to show that an olographic will admitted to probate had been revoked.

7. Wills ⇐290—Crumpling of instrument insufficient to support presumption of revocation.

While the crumpling of a will might be a sufficient act of destruction if accompanied by clear evidence of other circumstances showing an intent to revoke, yet such act of itself is insufficient to support a presumption of intention to revoke, particularly where it is not shown that the will had been continually under testator's control until his death.

8. Wills ⇐290—Tearing of part of instrument held not to revoke part remaining.

The tearing of a portion of a will as originally drafted from the remaining text raises no presumption of intention to revoke the whole instrument, particularly where so torn as to leave the portion found intact and complete, the torn edge being practically horizontal except the lower left-hand corner where such line is departed from to preserve two syllables of a word divided at the end of the preceding line, so that the mutilation affected only the part destroyed.

9. Wills ⇐290—Presumption of intent to revoke by destruction of signature overcome by restoration.

Although the destruction of a signature of a will may be sufficient to support a presumption of intention to revoke the whole, yet, if the signature destroyed has been later restored or rewritten, courts in general will admit the will to probate; for it then affirmatively appears there was no intention to revoke.

10. Wills ⇐290—Replacing of testator's signature in different place after destruction repels presumption of revocation.

Assuming that a testator tore his signature from the will together with a part thereof, any presumption therefrom of an intent to revoke is repelled by the fact that his signature was again appended to and appeared at the top of his will for the obvious purpose of authentication and execution.

Department 2.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

In the matter of the estate of Harry Streeton, deceased. Petition by Emma Louisa Shoults against Nellie Williams, administratrix. Fron an order denying petition to revoke the probate of an olographic will, the petitioner appeals. Affirmed.

Robert M. Clarke and Henry L. Knoop, both of Los Angeles, for appellant.

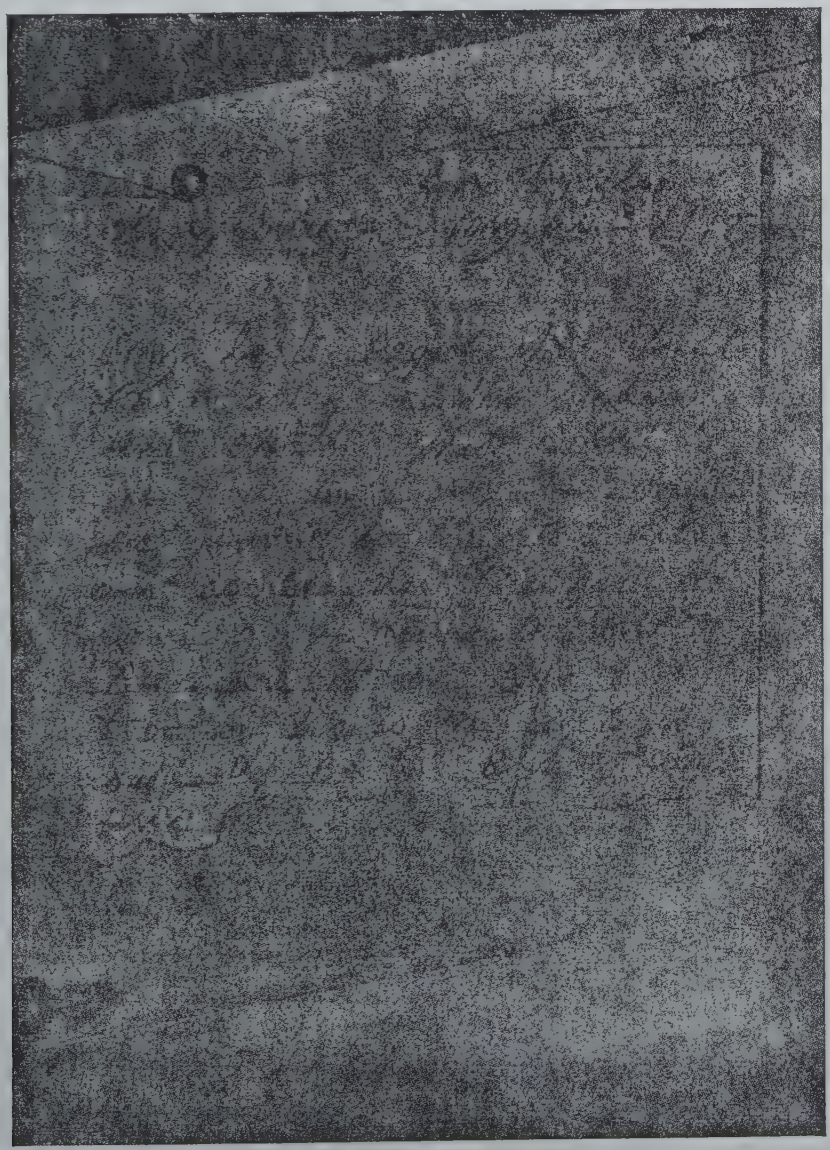
I. R. Rubin, of Los Angeles, and M. G. C. Harris, for respondent.

LENNON, J. The superior court of Los Angeles county denied a petition for the revocation of an order which admitted to probate a certain written instrument, olographic in form, as the last will and testament of Harry Streeton, deceased. Petitioner appeals. The respondent herein is the adminis-

tratrix with the will annexed. The petitioner, an heir at law of said decedent, sought to have the probate of the will revoked, apparently upon three grounds: (1) That the instrument was not executed as required by law; (2) that the will had been revoked; (3) that the decedent was not of sound mind at the time the instrument was executed. In view of substantial conflict in the evidence, the sufficiency of the evidence to support the findings of the trial court upon the question of mental competence is not challenged, and petitioner, upon this appeal, relies entirely upon the first two grounds.

After the death of Harry Streeton the instrument in question, which consists of a single sheet of paper, was found in an envelope. At the time it was found, the lower portion of the page had been torn off in such a way as to disclose, by "pencil marks and dots" appearing along the torn edge of the paper, that there were written words on the part torn off. There were creases in the paper indicating that it had been crumpled. The document is entirely in the handwriting of decedent. The date is written in the upper right-hand corner of the page, and in the upper left-hand corner, on a line with the date and above all the other writing, appears the name of decedent.

The condition of the will is best portrayed by a photographic reproduction thereof, which appears in the record, and is therefore reproduced in this opinion as follows:



[1] The alleged defect in the execution of the will is the claimed insufficiency of the signature as a token of authenticity. The test to be applied in determining whether a will has been "signed by the hand of the testator himself," as required by section 1277 of the Civil Code, was stated in Estate of Manchester, 174 Cal. 417, 163 Pac. 358, L. R. A. 1917D, 629, Ann. Cas. 1918B, 227, as follows:

"The true rule, as we conceive it to be, is that, wherever placed, the fact that it was intended as an executing signature must satisfactorily appear on the face of the document itself. If it is at the end of the document, the universal custom of mankind forces the conclusion that it was appended as an execution, if nothing to the contrary appears. If placed elsewhere, it is for the court to say, from an inspection of the whole document, its language as well as its form, and the relative position of its parts, whether or not there is a positive and satisfactory inference from the document itself that the signature was so placed with the intent that it should there serve as a token of execution. If such inference thus appears, the execution may be considered as proven by such signature."

[2] Applying this test in the present case, we find no language in the document which adopts the name as a signature for the purpose of execution. Reference to the name as a signature is not essential, however, if the form of the document is such that the relative position of its parts alone gives rise to a positive inference that the name was affixed for the purpose of execution. In the document now under consideration, there is no space at the end of the writing in which a signature could have been placed. The name of the testator appears in a blank space, disconnected from the rest of the written matter both as to location and meaning. Had the name appeared in the exordium, the logical inference from the context would probably have been that it was intended merely to identify the person making the will, and additional facts might have been necessary to raise the inference that it was also intended as a signature in execution of the will. Estate of Hurley, 178 Cal. 713, 174 Pac. 669; Estate of McMahon, 174 Cal. 423, 163 Pac. 669, L. R. A. 1917D, 778. But, as above stated, the name of decedent appears entirely separate from the rest of the writing and by itself. It must be assumed that it was placed on the document for some purpose, and the only apparent and reasonable purpose under the circumstances would seem to be the signing of the instrument with the intention of authenticating the same. This conclusion becomes the more compelling when we consider that the name is written in a blank space at the beginning of the instrument; for such a space is the most natural one in which to place a signature when the usual place at the end of the document is unavailable. The fact that the end of the page was torn off, whatever its importance in a determination of the question of revocation, if of any weight in a consideration of the sufficiency of the signature, tends to support, rather than defeat, the inference that the name was written at the top of the page with the intention of authenicating the instrument.

[3, 4] The due execution of a will is a question of fact, and its determination by the trial court is not to be overthrown unless that determination is without support in the evidence. Estate of Cullberg, 169 Cal. 365, 370, 146 Pac. 888. We are satisfied that the finding of the trial court to the effect that the testator signed his name at the top of the will with the intention of authenticating the instrument was sustained by a "positive and satisfactory inference" arising from the face of the document itself.

[5] The petition to revoke the probate of the will contains no direct allegation of the revocation of the will by the testator. The allegation "that said written instrument is not the last will and testament of said Harry Streeton, deceased" was evidently intended as an allegation of revocation. Such an allegation is a mere conclusion of law, and therefore insufficient.

"In stating the grounds of contest, if unsoundness of mind is relied on, it is sufficient to state that the deceased, at the time of the alleged execution of the proposed paper, was not of sound and disposing mind. And the same is true as to undue execution. But when the grounds of contest embrace fraud, duress, or undue influence, a subsequent will, revocation, or the like, such matters, not being ultimate facts, but conclusions of law to be drawn from facts, must be pleaded, not in the language of the statute, but the facts relied on must be stated." 40 Cyc. 1269; Estate of Gharky, 57 Cal. 274, 279; Estate of Harris, 3 Cof. Prob. 1; Barksdale v. Davis, 114 Ala. 623, 22 South. 17.

However that may be, no demurrer was interposed, and, inasmuch as the question of revocation was apparently a contested issue in the court below, we shall consider the point upon its merits.

[6, 7] With reference to the question of revocation there was the following testimony of respondent concerning the condition in which the will was found:

"Q. It appears from the pencil marks and dots along the tear that there was other writing upon this paper. Can you give us any light on that, or do you know anything about it? A. I don't know anything about it. I got it after he died. I opened the envelope, and that was the condition of the will.

"Q. With reference to the crumpled condition, is that the condition that it was? A. That is the condition; I suppose laying around. I have no other reason; I don't know why."

No other evidence was adduced. Petitioner, however, claims to have thereby borne the burden of proving a revocation. In this be-

half petitioner relies upon the statement in Estate of Olmsted, 122 Cal. 224, 230, 54 Pac. 745, to the effect that, where it appeared that an instrument during the lifetime of the maker had been in his secure possession, and, when discovered by the two parties in interest, bore marks of cancellation, "from these circumstances alone arise the presumptions: (1) That the cancellations were the act of the testator; and (2) that they were performed with the intent and purpose of revoking the instrument." The facts of that case are, however, distinguishable from the facts now presented. In the case at bar there was, apparently, no proof that the will had been continually under the control of the testator until the time of his death; moreover, the acts from which it is claimed the intent to revoke is presumed are of a different character from the acts proved in the Estate of Olmsted. In that case it was also said:

"What act of destruction will supply the requirement of the statute is a question much discussed. It is apparent that the destruction may be total or partial. The will, for example, may be wholly burned or totally obliterated, or it may be but partially destroyed, and still legible. Generally, it may be said that, *if the intent to revoke clearly appears, a slight act within the statute will be deemed sufficient.*" (Italics are ours.)

In other words, there must be an act coupled with an intent. If the act is a slight one, the evidence of intent must be clear; if, on the other hand, the act is sufficiently definite in character, the intent may be presumed from the very nature of the act and the surrounding circumstances. While the crumpling of the instrument in the instant case might be a sufficient act of destruction if it were accompanied by clear evidence of other circumstances showing, or tending to show, an intent to revoke, the mere act of crumpling in and of itself is insufficient to support a presumption of an intention to revoke.

[8-10] Nor does the fact that a portion of the will as originally drafted was torn from the remaining text raise any presumption of an intention to revoke the whole instrument.

"The slightest act of tearing with intent to revoke the whole will is sufficient for the purpose. But the whole will is not necessarily revoked by the destruction of a part. It is the animus which must govern the extent and measure of operation to be attributed to the act, and determine whether the act shall effect the revocation of the whole instrument, or only of some, and what portion thereof. It is obvious that the mutilation may be of such a part as to afford evidence that the deceased did not intend the document any longer to operate as his will. On the other hand, in the absence of evidence aliunde an intent to revoke the whole will cannot be inferred from a partial mutilation which does not affect the instrument as an entirety, or destroy that part which gives effect to the whole." 40 Cyc. 1191.

The fact that a will is found with the signature destroyed may be sufficient to support a presumption of an intention to revoke the whole will. King v. Ponton, 82 Cal. 420, 22 Pac. 1087. While this act imports prima facie an intent to revoke, it is nevertheless a presumption which may be repelled by accompanying circumstances. Therefore, if a signature has been destroyed, but later restored or rewritten, the courts in general admit the will to probate; for it then appears affirmatively that there was no intent to revoke. Re Wood (Sur.) 11 N. Y. Supp. 157; Sellards v. Kirby, 82 Kan. 291, 108 Pac. 73, 28 L. R. A. (N. S.) 270, 136 Am. St. Rep. 110, 20 Ann. Cas. 214; Re Brock, 247 Pa. 365, 93 Atl. 487, L. R. A. 1915D, p. 1140. Even assuming, then, in the present case, that the testator tore his signature from the will, any presumption therefrom of an intent to revoke is repelled by the fact that his signature was again appended to and appeared on the will when it was found after his death, obviously placed there for the purpose of authentication and execution.

The document was carefully torn so as to leave the portion found in the envelope intact and complete in itself. The torn edge is practically horizontal, with the exception of the lower left-hand corner, where the horizontal line is departed from so as to preserve two syllables of a word divided at the end of the preceding line. The mutilation is a partial one "which does not affect the instrument as an entirety, or destroy that part which gives effect to the whole."

After a careful examination of the photographic copy of the document, we are convinced that the marks of crumpling and tearing which it bears are, in the absence of additional evidence, insufficient to support a presumption of an intention on the part of the testator to revoke the whole will.

The order is affirmed.

We concur: WILBUR, J.; SLOANE, J.

183 Cal. 191

McCOY v. ZAHN CORPORATION.
(L. A. 6366.)

(Supreme Court of California. June 17, 1920. Rehearing Denied July 15, 1920.)

1. Brokers ⟸51—Must place client in touch with customer or procure contract.

An agent to procure a loan must have placed his client in touch with one ready, willing, and able to make the loan, or must have secured from a prospective lender an unqualified agreement to make the loan on the terms proposed to be entitled to commission, it not being sufficient that he first interested the lender in the proposed loan and told the borrower who the lender was.

2. Brokers ⟸51—Merely mentioning name of lender who subsequently made the loan through another is insufficient.

The fact that the broker, who knew that others were seeking to procure the same loan under an agreement that the first agent to bring in the money should receive the commission, told the owner that he was dealing with the one who subsequently made the loan, is insufficient to entitle him to a commission, where he did not introduce the lender to the borrower nor secure an agreement from the former.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Lon S. McCoy against the Zahn Corporation. Judgment for plaintiff, and defendant appeals. Reversed.

J. Wiseman Macdonald, of Los Angeles, for appellant.

Paul H. McPherrin, of Los Angeles, for respondent.

SLOANE, J. This action was brought to recover $800 as commissions for services of plaintiff rendered pursuant to employment in assisting the defendant to procure a loan secured by mortgage on real property. The trial court found that the plaintiff had been employed to procure for the defendant a loan of $40,000 to be secured by mortgage on real property in the city of Los Angeles owned by the defendant corporation and known as the Gordon Apartments, defendant agreeing to pay the plaintiff for his services in "so securing such customer ready and willing to make said loan the sum of 2 per cent. on the amount of said loan, or the sum of eight hundred ($800) dollars." It was further found by the court.

That "plaintiff in this action fully rendered and performed all the services for which he was employed and procured a customer ready, able, and willing to make the loan of $40,000 desired by the defendant corporation on the same terms specified in his employment and on the security offered by defendant, viz. a first mortgage on the Gordon Apartments, and that said plaintiff was the means of bringing the said E. W. Hadley, the customer so secured by him, and the defendant corporation together in pursuance of his employment, according to the terms thereof, and that his efforts in so bringing the said Hadley and defendant corporation together were the proximate and procuring cause resulting in the making of the loan of the said Hadley to defendant corporation."

The judgment was for plaintiff in the amount demanded, and it is from this judgment that the appeal is taken. The grounds stated on the appeal are: First, the insufficiency of the evidence to establish the employment; and, second, the insufficiency of the evidence to support the finding that the plaintiff was the efficient agent in bringing the lender and borrower together, or in procuring the loan. The finding as to the employment is not very seriously controverted, and is one clearly justified by the evidence and it may be dismissed from further consideration.

The finding that the plaintiff brought the parties together and secured the proffer of the loan is the real issue in controversy. The doubt on this point does not arise upon a conflict in the evidence, but from a challenge of the legal conclusions drawn by the court from the uncontroverted facts. One significant fact is that several agents were engaged in trying to place this loan for defendants, and plaintiff was informed during the negotiations that other agents than himself were employed, and that the commission would go to the agent who first brought in the money. The plaintiff himself testified:

"Hector N. Zahn told me at that time there were other agents working on the loan, and the first one who came in with the money would get the commission."

The agents concerned in these negotiations other than the plaintiff, McCoy, and one Allen, who was associated with him, were F. A. Pattee, A. W. Ross, and the firm of Rowan & Co. These agents actually closed the deal by obtaining the lender's final ratification of the loan and by securing an escrow deposit of the money or check for the amount of the loan. It was in response to a notice from some of these parties, and not the plaintiff, that the defendants met Mr. Hadley and made the loan and thus finally closed the deal.

While these facts are not disputed, it is contended in behalf of plaintiff that it was he who first brought this application for a loan to the attention of Hadley, and that prior to any negotiations between Hadley and the other agents Hadley had expressed himself favorably toward this loan, and had, in effect, agreed to take it if on personal inspection he was satisfied with the security.

It appears without dispute that Hadley, who lived in San Francisco, communicated about May 6, 1915, with several real estate firms in Los Angeles, including the various agents mentioned in this deal, by a circular letter in which he inquired about the demand for loans and stated that he was in the market to place a considerable amount of money on Los Angeles property. On May 10th plaintiff wrote to Hadley offering to aid him in placing loans. On September 29th Hadley wrote to plaintiff asking to be advised as to applications for loans that he might have to submit. On October 7th plaintiff for the first time mentioned the Gordon Apartments' application for $40,000. He had not then any agency from the defendants to act in the matter, but had learned of their desire to secure a loan from his associate, Allen. It is not necessary to follow the details of the negotiations. Plaintiff went to considerable pains to present the Gordon Apartments' loan in a favorable light. On October 14th Hadley sent a letter and telegram informing plaintiff that he thought he could take care of the $40,000 loan and he would soon be in Los Angeles to investigate. It was after this, on the 20th of October, that the plaintiff first met representatives of the defendant corporation and procured authority to act for them in obtaining the loan. He informed them that he had a prospective customer, but did not then mention the name. On the following day he claims to have read to them a telegram and letter from Hadley, including the signatures, and to have given them other information as to his negotiations, but did not give them the documents to read. It was on this occasion that he was informed that there were other agents working on the loan, and that the first to come in with the money would get the commission. Learning from a son of Hadley that the latter would be in Los Angeles on the 27th of October, plaintiff communicated with defendants, told them his client had not yet shown up, and requested them to wait until he had heard from him and asked if everything was O. K. He was answered in the affirmative, and was told that they were anxious to get the money. On October 29th Hadley called upon the plaintiff at his office and refused the latter's offer to show him the Gordon Apartments property. Hadley further said that he had already been to the Gordon Apartments and had investigated them, but had a little more investigating to do, and that he would let the plaintiff know about it in the afternoon or soon after. It developed later that Hadley had already inspected the property with Pattee, one of the other agents. Plaintiff testified that on the evening of October 29th he telephoned defendants that his client had been at the office that morning, that he had said he had a little more investigating to do, and that after he completed it he would make up his mind in a few minutes and let him know soon thereafter. Plaintiff further informed them that he would try to get an answer from his client the next day and not later than Monday, the 1st of November. He claims they told him they would let the matter rest in that way. Testimony was given by defendants, which was undisputed, that plaintiff stated in his telephone conversation that his man was in the office that morning and promised to come again in the afternoon, but had not come. This was the last communication that plaintiff had with either Hadley or the defendants until after the deal was closed through other agents on Monday, the 1st of November, about 4:30 p. m. Up to this time the defendants had not met Hadley. If they knew his name, there is no evidence that they knew where to find him, and he had not agreed with plaintiff to make the loan.

In the meantime the undisputed evidence shows that Pattee had learned about the same time plaintiff did of Hadley's desire to place loans in Los Angeles. He later learned of the Gordon Apartments' application through his associate, Ross, who had been authorized by defendants to find them the money. On the 14th of October Hadley telephoned Pattee that he expected to be in Los Angeles very soon. On October 21st Pattee reported to Hadley a number of applications for loans, including the Gordon Apartments' property. On October 27th Pattee and Hadley inspected this property together and saw each other nearly every day thereafter. On November 1st the loan was agreed to and the money placed in escrow. It was Ross, Pattee's associate, who notified the defendants that the money was in escrow and to go down at once and close the deal. The escrow included this loan on the Gordon Apartments and another loan to defendants upon other property. The commissions were divided between Pattee, Ross, and Rowan upon representations made to the defendants by Hadley that Pattee did the work and brought the parties together on the Gordon Apartments' loan.

[1] The law applicable to this sort of agency is well settled. It is clear that the agent, in order to recover a commission, must have placed his client in touch with a customer ready, able, and willing to make the loan, or must have carried on negotiations to such a point as to secure from the prospective lender an unqualified agreement to make the loan upon the terms proposed. Such is practically the rule as quoted in appellant's brief from the authorities cited. In Cone v. Keil, 18 Cal. App. 675, 124 Pac. 548, the court said:

"Merely putting a prospective purchaser on the track of property which is on the market will not suffice to entitle the broker to the commission contracted for, and, even though a broker opens negotiations for the sale of prop-

erty, he will not be entitled to a commission if he finally fails in his efforts, without fault or interference of the owner, to induce a prospective purchaser to buy, or make an offer to buy, notwithstanding that the owner may subsequently, either personally or through the instrumentality of other brokers, sell the same property to the same individual at the price and upon the terms for which the property was originally offered for sale."

In the case of Massie v. Chatom, 163 Cal. 772, 127 Pac. 56, this language was quoted with approval:

"The contract of the broker is to negotiate a sale; that is, to procure a valid contract, to purchase, which can be enforced by the vendor if his title is perfect; or if he does not procure such contract to bring the vendor and the proposed purchaser together, that the vendor may secure such a contract, unless he is willing to trust to an oral agreement.' * * *

" 'The readiness and willingness of a person to purchase the property can be shown only by an offer on his part to purchase; and unless he has actually entered into a contract binding him to purchase, or has offered to the vendor, and not merely to the broker, to enter into such contract, he cannot be considered a purchaser.' "

We do not find that the authorities quoted by respondent distinguish the application of this rule. The opinion in Justy v. Erro, 16 Cal. App. 519, 117 Pac. 575, quoting from Mechem on Agency, that it is not necessary that the broker should personally have conducted the negotiations between his principal and the purchaser leading to the sale, nor that he should have been present when the bargain was completed, "or even that the principal should, at the time, have known that the purchaser was one found by the broker," refers to a condition where the broker has brought the vendor and vendee together and then they contract for themselves. The rule as quoted from Ruling Case Law (4 R. C. L. "Brokers," §§ 46, 57, 58) holds that, where the services of the broker, as well as those of another agent, have contributed generally to the successful termination of the negotiations in question, "if the success of the transaction is directly attributable to the broker originally employed, his right to his commissions cannot be defeated by the mere fact that the negotiations were conducted, or the transaction finally consummated, through the medium of another broker." In this action the very controversy is as to whose agency actually brought about a meeting of the minds upon the proposed loan, and the contention here is that it does not appear that the final decision of the lender to accept the loan was affected through the influence or agency of the plaintiff. However nearly he may have brought him to a favorable decision, if the negotiations were broken off before a decision was reached and a final decision is brought about by another agent, the latter will be entitled to the commission. It may also be conceded as a correct statement of the law that, "if the broker is to merely find or procure a purchaser, it is not necessary that he should be present at the time the negotiations are entered into with the purchaser, or be an active participater in the consummation of the contract, provided he can show that the same was effected through his agency, and that the parties were brought together and the deal resulted from his acts as its procuring cause." But how can it be said in this case that the lender and borrower were brought together by the previous negotiations through the plaintiff when he failed to bring the parties together or in any way to introduce them to each other, and it is shown that this office was performed by other agents who had been employed under a contract and were negotiating with the same party?

[2] We do not see how, under the evidence here, it can be held that plaintiff met either of the requirements of his employment. It is certain that he at no time obtained an agreement from Hadley to make this loan. On the occasion of his last communication with the defendants, and after he had interviewed Hadley for the last time, Hadley had told him that he wanted to make further investigation, that he would make up his mind and let him know later, and plaintiff telephoned defendants that his customer had not shown up as agreed and asked them to wait on him until Monday. This was on Friday, the 29th of October. They did wait until Monday, as the deal through the other agents was not closed until 4:30 p. m. on Monday, November 1st, and no further word had been received by them from the plaintiff up to that time. Clearly the plaintiff, through his negotiations with Hadley, had not brought him to the "sticking point" of obtaining any final promise or agreement from him. Neither could he be said to have brought the parties together. Conceding that he had disclosed Hadley's name to the defendants as the party with whom he was negotiating, which is denied by defendants' witnesses, it does not appear that he had more than casually mentioned the name in the reading of a telegram and in a conversation relating to the loan, and he had at no time given Hadley's Los Angeles address or told defendants where they could find him or attempted in any way to bring the parties into personal contact. On the contrary, a fair inference from his conduct was that he was intending to carry negotiations through by himself to an acceptance of the loan. There is no justification for reaching a conclusion that the defendants would have met Hadley had they not been brought together by the other agents or that Hadley would have made the loan without their agency in the matter. It was

understood that the agent who first produced the money would receive the commission. It seems to us that this was a controlling feature of the case. The defendants were anxious for the money. They had been in the market for this loan a number of months; they had to meet an outstanding mortgage on their property in the very near future; they had placed the procuring of the loan with various agents; and it was understood with plaintiff that the first agent who came with the money would receive the commission. These other agents produced the customer and the money. We do not think, under the circumstances, that it was incumbent upon defendants to trace back the negotiations of the different agents to ascertain who saw the customer first. The controlling fact was who saw him last and brought him to a favorable decision. Whatever may be said of the conduct of the lender in leading the plaintiff to believe that if he made the loan he would close it through plaintiff, no bad faith is attributable to defendants, and they are not responsible for any bad faith on the part of the customer. They unite in denying that they even knew Hadley was plaintiff's customer; but, accepting plaintiff's contention and the court's finding that the latter had disclosed Hadley's name, the last word they had received from plaintiff three days previous to the closing of the deal was that his customer had not then made up his mind, but had promised to let him know soon, and had not appeared, and up to the time that Pattee and Ross notified them they had the money in escrow no further word was had from plaintiff.

Under this condition of the law and the facts it becomes immaterial that the plaintiff may have notified defendants that he claimed the commission before the money had actually been paid out to the other agents. The decision of the case rests upon the conclusion that the evidence does not show that the plaintiff was the efficient agent in procuring the loan.

Judgment is reversed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LENNON, J.; SHAW, J.; LAWLOR, J.; OLNEY, J.

183 Cal. 264

McPHEE v. LAVIN. (L. A. 5167.)

(Supreme Court of California. June 25, 1920.)

1. Negligence ⊂=72—One confronted by emergency not held to strict accountability.

One suddenly confronted with an unexpected danger may use such means for avoiding the danger as would appeal to a person of ordinary prudence in a like situation, without being held to strict accountability as to whether the course chosen is the most judicious or not.

2. Municipal corporations ⊂=705(10)—Plaintiff automobilist not contributorily negligent in swerving to wrong side of street to avoid collision.

Where defendant automobilist unlawfully cut a corner at a street intersection and bore down on plaintiff automobilist from the wrong side of the street, plaintiff was not contributorily negligent in turning his machine to the left in an effort to avoid the threatened collision, in view of the sudden emergency.

3. Municipal corporations ⊂=706(7) — Driver of automobile held not guilty of contributory negligence as matter of law under crossing speed regulation.

Motor Vehicle Act, § 22, prohibiting greater speed than 10 miles an hour at street intersections where the view is obstructed, is complied with if speed is so reduced in the territory common to both streets at or within the lines of intersection, and one driving 15 miles an hour at a point 25 or 30 feet from the intersection could not be held guilty as a matter of law of contributory negligence therefor, especially where at 15 miles an hour he could stop completely within 15 to 30 feet.

4. Evidence ⊂=222(2)—Defendant's declaration that he carried accident insurance admissible as admission.

In automobile collision case, it was proper to admit in evidence, as part of a conversation had with defendant, defendant's declaration to plaintiff, immediately after the collision, that he carried accident insurance that would provide for plaintiff if he suffered injury; this tending to show an acknowledgment of responsibility by defendant for the accident.

5. Appeal and error ⊂=1060(1)—Trial ⊂=127—Eliciting that defendant carried accident insurance held error, but not prejudicial.

In automobile collision case, where upon questioning on behalf of defendant of a physician who had examined plaintiff, plaintiff's counsel asked if he made the examination at the instance of the Fidelity & Casualty Company, such line of examination was improper; but, the trial being before the court without a jury, and the witness' affirmative reply being afterwards stricken out, it could be treated as error without prejudice.

6. Damages ⊂=130(3)—$1,000 for bruises and shock from automobile accident not excessive.

Where plaintiff was pinned beneath an overturned automobile and subjected to severe nervous shock and numerous bruises, $1,000 for his injuries *held* not excessive.

In Bank.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by George McPhee against J. D. Lavin. From a judgment for plaintiff, defendant appeals. Affirmed.

R. P. Jennings, of Los Angeles (Frank B. Belcher, of Los Angeles, of counsel), for appellant.

R. Y. Williams, A. W. Rutan, and Williams & Rutan, all of Santa Ana, for respondent.

SLOANE, J. This appeal is from a judgment for plaintiff for injuries caused by an automobile collision. The principal point presented is on the contention of appellant that the record discloses contributory negligence on the part of plaintiff.

The parties, each driving an automobile, were approaching the crossing of intersecting streets in the city of Anaheim; the plaintiff going west on the north side of Center street and the defendant going south on the west side of Claudina street. The main facts in the case, as found by the trial court and supported by the undisputed weight of the evidence, show that the defendant, upon reaching the vicinity of the street intersection, instead of keeping to the right until he had passed the center of the intersection, as required by section 20 of the state Motor Vehicle Act, cut across the corner of the intersection to the east of the center of the street; that the plaintiff, who was approaching the intersection from the east, saw defendant's machine coming toward him on the wrong side of the street, and in an attempt to avoid a collision turned to the left and increased his speed. The defendant also, seeing the imminence of a collision, turned his car to the right, and the machines came together near the southern line of the intersection, with resultant injuries to the plaintiff. Under this state of facts thus found there can be no question but that the defendant, by reason of his negligent and unlawful crossing on the wrong side of the street, was responsible for the accident, unless the contention of contributory negligence on the part of plaintiff can be maintained.

Section 22 of the Motor Vehicle Act, then in force, already referred to, prohibits the driving of a motor or other vehicle on a public highway—

"At a greater rate of speed than ten miles an hour where the operator's or chauffeur's view of the road traffic is obstructed either upon approaching an intersecting way, or in traversing a crossing or intersection of ways or in approaching or traversing a bridge, * * * causeway or viaduct, or in going around corners or a curve in a street or highway." Stats. 1915, p. 409.

Contributory negligence was pleaded by an allegation of the answer averring that the plaintiff was driving at an excessive rate of speed in violation of the statute and that contributory negligence is imputed as a matter of law. On the issue thus raised the trial court found as follows:

"The court finds: That the defendant negligently, recklessly, carelessly, and unlawfully caused his said automobile to be driven and propelled, so that the same was unlawfully driven to the east side of the intersection of the prolongation of Claudina street in and upon said Center street, in the city of Anaheim. That by the action of said defendant a collision was imminent between the automobiles of plaintiff and defendant. That plaintiff saw that a collision was imminent between the said automobiles, and on account of the same caused his said automobile to veer in a southwesterly direction towards the left-hand side of Center street. That if defendant had kept upon the proper side of the street there would have been no accident. That the proximate cause of said accident was the failure of defendant to follow the law in keeping on the right-hand side of the street, and by his unlawfully driving his automobile to the east side of the intersection of the prolongation of Claudina street in and upon said Center street, and by causing his said automobile to be driven upon the northeastern portion of said intersection when he was going in a southeasterly direction. That the defendant did, when a collision was imminent, attempt to turn his automobile towards the right for the purpose of avoiding a collision with the plaintiff's automobile, but that plaintiff's automobile was not then and there being driven at a high or dangerous or unlawful rate of speed. That the plaintiff turned his automobile to the left without slackening the speed thereof, and that up to the time of so turning to the left plaintiff was at all times proceeding at a speed of 15 miles per hour, and that upon so turning to the left he increased the speed of his automobile for the purpose of avoiding a collision." "That the rate of speed that plaintiff was driving his automobile prior to and at the time of the accident did not contribute to or cause the said collision and accident, and that plaintiff was not guilty of contributory negligence in the speed, way, or manner in which he was driving his said automobile."

[1, 2] It is appellant's contention that the specific finding of fact that at all the times mentioned the plaintiff was driving at a speed of 15 miles an hour negatives and supersedes the conclusion of the court that plaintiff was not driving at a dangerous or excessive rate of speed and that the rate at which he was driving did not contribute to the accident. If we may go behind the findings of the facts in this matter, it appears from the evidence that the plaintiff's view around the corner in the direction from which the other vehicle was coming was obstructed by buildings; that the plaintiff was driving in the direction of this intersection at a rate of 14 or 15 miles an hour, and was at a point 25 or 30 feet from the intersection when the defendant came into his line of vision, crossing directly toward him on the wrong side of the street. The plaintiff in an effort to avoid the threatened collision speeded up his machine and turned at an angle to the left. That he cannot be held as a matter of law guilty of negligence in doing this is clear from the well-established rule than one suddenly confronted with an un-

expected danger may use such means for avoiding the danger as would appeal to a person of ordinary prudence in a like situation without being held to strict accountability as to whether the course chosen is the most judicious or not. Schneider v. Market St. Ry., 134 Cal. 482, 490, 66 Pac. 734. The defendant, by unlawfully cutting the corner and approaching the plaintiff from the wrong side of the street, is not in a position to complain of the plaintiff's deviation from the rule of the road in an attempt to avoid a collision. If the plaintiff was guilty of negligence at all, it was by virtue of the fact that he was driving at the rate of 15 miles an hour at a point within 25 or 30 feet of an intersection where the view of the intersecting street was obstructed. This situation involves the construction of the law in question as to the precise point on approaching such an intersection at which the driver must have reduced his rate of speed to 10 miles an hour.

[3] The purpose of this limitation of speed at intersections is obviously to avoid danger from the traffic crossing on the transverse street. Under the rules regulating such traffic, no danger arises until the passing vehicles reach the territory common to both streets at or within the lines of intersection. If then the speed has been reduced to 10 miles an hour at the point of intersection, the purpose of the limitation has been met. This is so held in Blackburn v. Marple, 184 Pac. 873, and we are in accord with the decision on that point. In this case the plaintiff was driving at the rate of 15 miles an hour as he came toward this intersection, and was within the speed limit prescribed by law on that part of the street. He was still from 25 to 30 feet from the intersection when driven by the emergency that confronted him to change his course and accelerate his speed. Testimony was given in the case that his brakes were in good order and that he could, while moving at 15 miles an hour, bring his car to a complete stop within 15 or 30 feet. Under these conditions he could without difficulty, had he been permitted to pursue a straight and uninterrupted course, have slowed down to 10 miles an hour before reaching the intersection. It cannot then be held as a matter of law that he was guilty of negligence because of driving at the rate of 15 miles an hour at this point. If defendant had kept to the right side of the street until he had passed the center of the intersection, there is no reason to assume that the plaintiff would not have slowed down to the prescribed speed at the intersection and allowed defendant the right of way to cross ahead of him.

We find no evidence of the presentation of any claim by plaintiff for compensation under the Workmen's Compensation Act (St. 1917, p. 831), or any assignment or subrogation of right, to support appellant's contention that plaintiff could not maintain this action in his own name and right.

[4, 5] The errors of law assigned upon admission of testimony over defendant's objections and motions to strike, so far as in any way suggestive of prejudice, arise upon the admission in evidence, as part of a conversation had with defendant, of defendant's declaration to plaintiff, immediately after the collision that he carried accident insurance that would provide for plaintiff if he had suffered injury. As this was admitted as tending to show an acknowledgment of responsibility by defendant for the accident, we think it was proper evidence. Later in the trial, upon questioning on behalf of defendant of a physician who had made an examination of plaintiff to discover the extent of his injuries, plaintiff's counsel was permitted over defendant's objection to ask if he made the examination at the instance of the Fidelity & Casualty Company. This line of examination was objectionable and improper, but as the trial was before the court without a jury, and the affirmative answer of the witness was afterwards struck out by the court as incompetent, irrelevant, and immaterial, it may be treated as error without prejudice.

[6] Appellant complains of the judgment as excessive. It appears that $1,000 of the total amount of $1,241.50 included in the judgment was for personal injuries to the plaintiff. The evidence discloses that he was pinned beneath the overturned automobile, subjected to a severe nervous shock, and received numerous contusions and bruises, which, while they only confined him to his bed nine days, were still evidenced by swellings and soreness four months later. It also appeared that he was suffering from soreness of the kidneys, which the physician attributes to the accident, and expresses doubt as to whether or not it may be permanent. Under these conditions we are not prepared to say that the damages allowed are so great as to justify disturbing the findings and judgment of the court.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; OLNEY, J.; SHAW, J.; LAWLOR, J.; LENNON, J.

183 Cal. 273

CITY AND COUNTY OF SAN FRANCISCO v. INDUSTRIAL ACC. COMMISSION et al. (S. F. 9260.)

(Supreme Court of California. June 30, 1920. Rehearing Denied July 30, 1920.)

1. Constitutional law ⊜20—Choice of Legislature between two possible meanings controls.

Where a constitutional provision may well have either of two meanings, the action of the Legislature in adopting one of such meanings by statute is well-nigh, if not completely, controlling.

2. Constitutional law ⊜48—Court cannot invalidate statute except for plain conflict.

The Supreme Court cannot declare void a provision of a statute, except for a plain and unmistakable conflict between it and the Constitution.

3. Master and servant ⊜372—"Injury" in provision for workmen's compensation includes disease.

In view of the construction of the word "injury" in Workmen's Compensation Act, § 3, subd. 4, and section 6, Const. art. 20, § 21, providing the Legislature may create and impose liability on employers to compensate employés for any "injury" in the course of employment, irrespective of the fault of either party, permits an award of compensation for death of a city's hospital employé, caused by influenza contracted in the course of employment, and not by any bodily injury through violence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Injury.]

4. Master and servant ⊜405(4) — Evidence held to sustain conclusion influenza contracted in employment.

In a widow's proceeding under the Workmen's Compensation Act for death of a city's hospital employé from influenza, evidence *held* sufficient to sustain the conclusion of the Industrial Commission that the employé contracted influenza in the course of his employment.

In Bank.

Proceedings for compensation for death of her husband under the Workmen's Compensation Act, by Geraldine Slattery, opposed by the City and County of San Francisco, a municipal corporation, the employer. To review an order of the Industrial Accident Commission awarding compensation, the employer applies for certiorari. Affirmed.

George Lull, City Atty., Maurice T. Dooling, Jr., and Hugh L. Smith, all of San Francisco (Redman & Alexander, of San Francisco, of counsel), for petitioner.

A. E. Graupner and A. A. Tiscornia, both of San Francisco (W. H. Pillsbury, of San Francisco, of counsel), for respondents.

OLNEY, J. This is an application for a writ of certiorari annulling an award of the Industrial Accident Commission. The applicant is a municipal corporation, and had in its employ as a hospital steward in one of its hospitals a man named Ernest F. Slattery. While so employed, Slattery was taken with influenza on October 15, 1918, and died of that disease eight days later. His widow presented to the commission a claim for compensation for his death, and the commission made an award in her favor. The present application is to annul this award.

Two grounds are urged why the award is invalid. The first, and more important, is that the awarding of compensation for death by disease, the origin of which was not a bodily injury suffered through violence, is beyond the powers of the commission. The second is that there is no evidence to support the finding of the commission that the disease of which Slattery died was contracted in the course of his employment, and arose out of it.

The decision on the first question presented turns on the meaning to be given to the word "injury" as used in article 20, § 21, of our Constitution. The section has been amended since Slattery's death, but at that time it read:

"The Legislature may by appropriate legislation create and enforce a liability on the part of all employers to compensate their employés for any injury incurred by the said employés in the course of their employment, irrespective of the fault of either party."

The word "injury" as so used means, of course, only bodily injury, and the position of the city is that it means only bodily injury suffered by or resulting from violence, while the position of the commission is that it covers any harmful effect upon the body, whether by violence or by disease. The word is frequently used in both the broader and the more limited sense. In common usage, it has the more general meaning. Thus, Webster defines "injury" as: (1) "Any wrong, damage, or mischief done or suffered"; as (2) "a source of harm"; or as (3) "a wrong or damage done to another." On the other hand, when personal injuries are spoken of, there are apt to be meant only bodily injuries suffered through violence in some form or to some extent, traumatic injuries. The exact meaning of the word "injury" as used in Workmen's Compensation Acts, or in a similar connection, has come before the courts for consideration on numerous occasions, and their rulings are by no means harmonious. On the one hand, there are a number of cases holding that the word has the more limited meaning. An example of this is Linnane v. Ætna Brewing Co., 91 Conn. 158, 99 Atl. 507, L. R. A. 1917D, 77, where it was held that the phrase "personal injury" did not include injury or harm suffered by disease, and that compensation was

not allowable for the death of an employé by pneumonia contracted as the result of unusual exposure and exhaustion in the course of his employment. Other examples along the same line are Industrial Accident Comm., etc., v. Brown, 92 Ohio, 309, 110 N. E. 744, L. R. A. 1916B, 1277; Adams v. Acme, etc., Co., 182 Mich. 157, 148 N. W. 485, L. R. A. 1916A, 283, Ann. Cas. 1916D, 689; Richardson v. Greenburg, 188 App. Div. 248, 176 N. Y. Supp. 651; Liondale, etc., Works v. Riker, 85 N. J. Law, 426, 89 Atl. 929.

On the other hand, there are a large number of decisions which adopt the broader meaning, and hold that compensation is allowable for the injury or harm done by disease, although the disease is not contracted as the result of any violence whatever in the ordinary sense of that word.

Under the English Workmen's Compensation Act, compensation is, or was, allowable only for "personal injury by accident," a much more limited expression than that found in our constitutional provision, and one in which it might well be thought there was some implication of an injury by violent external means. Nevertheless, the House of Lords held in Brinton's v. Turvey, L. R. Ap. Cases (1905) 230, that compensation was allowable for the injury sustained by a workman from anthrax contracted by him in the handling of infected wool; there being no violence other than that bacteria from the wool found their way into his system.

Similarly, it was held in Scott v. Pearson, L. R. 2 K. B. Div. (1916) 61, that compensation was allowable for cattle ringworm contracted by an employé by coming in contact, not violent, with infected calves.

Along the same line, the House of Lords held in Glasgow Coal Co. v. Welsh, L. R. 2 Ap. Cases (1916) 1, that a miner was entitled to compensation for rheumatism contracted by him as a result of his being required to stand for a number of hours in cold water to bale out the mine pit.

The Indiana Workmen's Compensation Act, like the English Act, allows compensation for "personal injury or death by accident." But in United Paperboard Co. v. Lewis (Ind. App.) 117 N. E. 276, compensation was allowed to a workman for acute nephritis contracted by him through his being required to work for several hours in heated paper pulp. The following portion of the opinion is pertinent here, the italics being ours:

"The courts have also differed as to whether a disease following an employment, should be considered an injury by accident within the meaning of such acts. In the various decisions on this subject it is generally recognized that diseases are of two classes: First, the so-called industrial or occupational diseases, which are the natural and reasonably to be expected results of a workman following a certain occupation for a considerable period of time; second, diseases which are the result of some unusual condition of the employment. The first class is illustrated by lead poisoning and the second by pneumonia following an enforced exposure. As a rule such industrial or occupational diseases are not considered as injuries by accident and in the absence of special statutory provision compensation is not allowed therefor. On the other hand, it is generally accepted that a *disease*, which is not the ordinary result of an employé's work, reasonably to be anticipated as a result of pursuing the same, but contracted as a direct result of unusual circumstances connected therewith, *is to be considered an injury* by accident, and comes within the provisions of acts providing for compensation for personal injury so caused [citing a long list of authorities]."

In Hurle's Case, 217 Mass. 223, 104 N. E. 336, L.R. A. 1916A, 279, Ann. Cas. 1915C, 919, a workman employed to tend furnaces for making gas claimed compensation for the loss of his sight due to an acute attack of optic neuritis induced by poisonous gases from the furnaces to which his work constantly exposed him. The Massachusetts act allowed compensation for "personal injury" without requiring that it be by accident, and the question discussed by the court was as to whether the case was one of a "personal injury." The discussion concludes thus:

"The learned counsel for the insurer in his brief has made an exhaustive and ingenious analysis of the entire act touching the words 'injury' or 'injuries,' and has sought to demonstrate that it cannot apply to an injury such as that sustained in the case at bar. But the argument is not convincing. It might be decisive if 'accident' had been the statutory word. It is true that in interpreting a statute words should be construed in their ordinary sense. Injury, however, is usually employed as an inclusive word. The fact remains that the word 'injury,' and not 'accident,' was employed by the Legislature throughout this act. It would not be accurate, but lax, to treat the act as if it referred merely to accidents."

In State v. Trustees, 138 Wis. 133, 119 N. W. 806, 20 L. R. A. (N. S.) 1175, the widow and children of a policeman dying from pneumonia contracted by exposure in the course of his duty made application for a pension under a statute which provided for a pension to the dependents of a policeman "injured" in the performance of his duty. It was contended that by injury was not meant disease merely, and upon this point the court said (138 Wis. 135, 119 N. W. 807, 20 L. R. A. [N. S.] 1175):

"The word 'injury,' in ordinary modern usage, is one of very broad designation. In the strict sense of the law, especially the common law, its meaning corresponded with its etymology. It meant a wrongful invasion of legal rights, and was not concerned with the hurt or damage resulting from such invasion. It is thus used in the familiar law phrase damnum absque injuria. In common parlance, however, it is used broadly enough to cover both the damnum and the in-

juria of the common law, and indeed is more commonly used to express the idea belonging to the former word, namely, the effect on the recipient in the way of hurt or damage, and we cannot doubt that at this day its common and approved usage extends to and includes any hurtful or damaging effect which may be suffered by any one. Hence, unless some reason to the contrary is presented, it should be so understood in these statutes. Subdivision 1, § 4971, Stats. (1898). The respondent contends that, nevertheless, the word should be limited to the results of external violence. By itself the word 'injury' or 'injure' has no more application to the result of violence than to the result of any other injurious influence. A disease resulting from negligence of a physician in failing to give treatment is just as much an injury in common phrase as if it resulted from affirmative maltreatment or external violence."

The following cases, in none of which was the element of violence present, are along the same line: Alloa Coal Co. v. Drylie, 6 B. W. C. C. 398 (death by pneumonia); Hood v. Maryland, etc., Co., 206 Mass. 223, 92 N. E. 329, 30 L. R. A. (N. S.) 1192, 138 Am. St. Rep. 379 (contracting of glanders); Dove v. Alpena, etc., Co., 198 Mich. 132, 164 N. W. 253 (death by anthrax); Vennen v. New Dells Lumber Co., 161 Wis. 370, 154 N. W. 640, L. R. A. 1916A, 273, Ann. Cas. 1918B, 293 (death by typhoid fever).

Finally there is the decision in this state in Hartford, etc., Co. v. Industrial Accident Commission, 32 Cal. App. 481, 163 Pac. 225, where an employé engaged in handling pulverized grain, and who contracted an affection of the nose and throat from the grain, was allowed compensation. The sole point discussed in the opinion, to be sure, is as to whether the disease was caused by the man's employment, but nevertheless it is a decision that cannot be justified unless the word "injury" is broad enough to include the harm done by disease.

[1] As between these two conflicting lines of decision it is not necessary to determine where the weight of authority lies, or which cases are the better reasoned. If those which give the broader meaning to the word "injury" do not lay down the better rule, they at least establish this, that it cannot be said that the broader meaning is an impossible or unreasonable one. The situation then, as it presents itself in connection with our constitutional provision, is at least that both by general usage and by the decisions of the courts the word "injury" may have either of two meanings, and that either is reasonable and possible. In such a situation, where a constitutional provision may well have either of two meanings, it is a fundamental rule of constitutional construction that, if the Legislature has by statute adopted one, its action in this respect is well-nigh, if not completely, controlling. When the Legislature has once construed the Constitution, for the courts then to place a different construction upon it means that they must declare void the action of the Legislature. It is no small matter for one branch of the government to annul the formal exercise by another and co-ordinate branch of power committed to the latter, and the courts should not and must not annul, as contrary to the Constitution, a statute passed by the Legislature, unless it can be said of the statute that it positively and certainly is opposed to the Constitution. This is elementary. But plainly this cannot be said of a statute which merely adopts one of two reasonable and possible constructions of the Constitution. In Fargo v. Powers (D. C.) 220 Fed. 697, 709, it is said:

"If the constitutional provisions in question are susceptible of two constructions—one being that contended for by complainants, the other that taken by the Legislature—the action of the Legislature in adopting one of those constructions and enacting a statute carrying it into effect, as thus construed, must be deemed conclusive. That rule is: 'That the acts of a state Legislature are to be presumed constitutional until the contrary is shown; and it is only when they manifestly infringe some provision of the Constitution that they can be declared void for that reason. In case of doubt, every presumption, not clearly inconsistent with the language or subject-matter, is to be made in favor of the constitutionality of the act. The power of declaring laws unconstitutional should be exercised with extreme caution, and never where serious doubt exists as to the conflict.'

"Where a statute has been adopted in carrying into effect a constitutional provision, the constitutional provision and statute must both be so construed as to permit the act to stand. This question was passed on in People v. Blodgett, 13 Mich. 151, 161, 162, where Judge Christiancy says: 'But it has been strenuously insisted here that these principles can only properly apply when the doubt exists as to the construction of the act, and not where it arises upon the meaning of a constitutional provision; that it is, in all cases the duty of the court first to fix and settle the meaning, definitely, of the Constitution, whatever may be their doubts upon it, and then to examine the act and apply it to the Constitution. Now, it strikes me, as a self-evident proposition, that the question whether a legislative act conflicts with the Constitution must, of necessity, equally involve the examination of both, and that, while it can make but little practical difference which is first examined and construed, the more logical order, when it is claimed that an act is unconstitutional, would be first to determine what the act is. Nor can I perceive any good ground for holding that the doubt which is to restrain us from pronouncing the act unconstitutional must be confined to the meaning of the act; nor why courts can be bound to settle, fix, and declare the meaning of the one, in spite of their doubts, more than of the other. The doubt which is to save the act is the doubt of the conflict; and this may arise alike from the construction of the one or the other, or both. In fact, it will be found that, in much the greater number of cases, where the rules above cited have been laid down, the doubts arise upon the

construction of the Constitution, and not upon that of the act which was claimed to conflict with it.'

"In Board of Education v. State Board of Assessors, 133 Mich. 120, 94 N. W. 669, the question of the construction of this constitutional provision was before the court, which gave effect to the legislative construction, saying: 'But it is urged in behalf of the power exercised by the board in this case that, if the act is subject to this construction, it is in conflict with the constitutional amendment itself. In determining this question, under well-settled rules, we are not to ignore the contemporaneous construction placed upon the amendment by the Legislature itself.' Kennedy v. Gies, 25 Mich. 92; Pfeiffer v. Board of Education, 118 Mich. 564, 77 N. W. 250, 42 L. R. A. 536."

See, also, County of Tulare v. County of Kings, 117 Cal. 195, 49 Pac. 8; Railroad Commissioners v. Market Street Ry. Co., 132 Cal. 677, 64 Pac. 1065.

In the present case, the Legislature has construed the Constitution, and has placed upon the word "injury" the broader meaning possible to it. Section 6 of the Workmen's Compensation Act (St. 1917, p. 831) provides that compensation shall be given by an employer "for any injury sustained by his employés arising out of and in the course of the employment and for the death of any such employé if the injury shall proximately cause death." Subdivision 4 of section 3 of the act defines injury as follows:

"4. The term 'injury,' as used in this act, shall include any injury or disease arising out of the employment. In case of aggravation of any disease existing prior to such injury, compensation shall be allowed only for such proportion of the disability due to the aggravation of such prior disease as may reasonably be attributed to the injury."

[2, 3] The Constitution cannot be given the more limited meaning contended for by the city without declaring this provision in the statute void. This we cannot do, unless there is a plain and unmistakable conflict between the statute and the Constitution. But there is no such plain and unmistakable conflict, since the statute does no more than adopt what is at least a possible and not unreasonable construction of the Constitution. This being the case, it must be held that the provision of the Compensation Act, whereby a disease arising out of employment is declared to be an injury for which compensation shall be paid, is not unconstitutional, but is operative and controlling.

As to the second contention of the city, that Slattery did not contract the influenza from which he died because of his employment, the facts relied upon in its support are that an epidemic of the disease was raging in the city at the time, that the disease is highly infectious, and was so general that one out of every ten in the city contracted it, and that every member of the community was exposed to it to a more or less extent. The existence of these facts cannot be doubted, and from them it is argued that it cannot be said with any reasonable certainty that Slattery contracted the disease because of his employment as hospital steward, even though he was handling influenza cases. It is also contended, and truly, that compensation is not due merely for injury by disease contracted by an employé, while employed. The injury must be one arising out of the employment, and where the injury is by disease there must exist the relation of cause and effect between the employment and the disease. It is also true that to justify an award there must be an affirmative showing of a case within the statute or, concretely, it must affirmatively appear here that Slattery contracted the disease from which he died because of his employment.

On the other hand, the evidence showed that the incubation period of the disease is from one to four days, that Slattery in the course of his duties during the five days preceding his being taken ill had had to handle and had been exposed to at least 12 developed cases of influenza, that so far as known he was not exposed to any cases except in the course of his employment, that he lived only half a block from the hospital where he was employed, and during the two weeks preceding his illness had been working very hard, and had gone directly from his home to his work and from his work to his home, and had not been out, that his exposure because of his work was far greater than that of the average person, and that among the nurses in the hospitals of the city, a class exposed in much the same degree as Slattery, the proportion who contracted the disease ran from 50 to 85 per cent. as against 10 per cent. for the community in general. The preponderance of the medical testimony also was to the effect that Slattery contracted the disease as a result of his peculiar exposure to it incidental to his employment.

[4] It, of course, cannot be said that from these facts it is certain that Slattery contracted his sickness because of his employment. But certainty is not required. It is not even required that the award be, in our judgment in accord with the preponderance of the evidence, in order that we be not at liberty to annul it. We cannot disturb the award unless we can say that a reasonable man could not reach the conclusion which the commission did. This we cannot say in the present case.

If there had been no epidemic in San Francisco at the time, and it appeared that Slattery as hospital steward had been exposed directly to a considerable number of influenza patients, and was not known to have been exposed otherwise, and had come down with the disease within the period

of incubation after his exposure, the conclusion that the disease was due to his exposure in the course of his work could hardly be questioned. But these are the actual facts, with the single exception that an epidemic was raging. To the extent of the severity of this epidemic the strength of the conclusion is weakened. It may well be that if the epidemic were so severe that the proportion of the general public who were attacked was anything like as great as the proportion of those exposed as was Slattery, the question of whether he was attacked because of the exposure incident to his employment or because of the exposure general to the public would be so much a matter of conjecture and speculation as not to warrant a definite conclusion as the basis of an award. But the actual fact is that of persons exposed as was Slattery the proportion of those attacked was from five to eight times as great as the proportion of those not so exposed. This ratio is so great that it cannot be said that the commission was not justified in concluding from it, in connection with the other facts, that Slattery's illness was due to the peculiar exposure of his employment. Its conclusion is the more justified by the fact that it coincides with the conclusions of most of the physicians who testified. Their opinions upon a point of this character are entitled to consideration, since it is a part of their vocation to observe diseases and how they spread, and to draw conclusions from their observations.

Award affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LAWLOR, J.; LENNON, J.; WILBUR, J.; SLOANE, J.

47 Cal. App. 694

PETERSON v. RASMUSSEN et al.
(Civ. 2147.)

(District Court of Appeal, Third District, California. May 22, 1920. Rehearing Denied June 27, 1920. Hearing Denied by Supreme Court July 19, 1920.)

1. Libel and slander ⟹112(1)—Finding that writing imputed want of chastity held warranted.

Findings that a letter written by one of the defendants imputed want of chastity, etc., to plaintiff *held* warranted.

2. Libel and slander ⟹21 — Party need not be named if otherwise identified.

To constitute libel a party need not be named in the writing if pointed to by description or circumstance tending to identify him.

3. Libel and slander ⟹7(16)—Imputation of unchastity actionable per se.

Words imputing to a woman want of chastity are actionable per se.

4. Libel and slander ⟹33—Damages to reputation presumed to result from libel per se.

Damages to a person's reputation are presumed to result from a libel per se; so, where a letter was libelous per se because imputing want of chastity to plaintiff, who was sufficiently identified, there is a sufficient presumption of damage.

5. Libel and slander ⟹44(2) — Libelous letter not "privileged communication."

Under Civ. Code, § 47, subd. 3, a "privileged communication" is one made without malice to a person interested by one who is also interested or by one who stands in such a relation to a person interested as to afford a reasonable ground for supposing the motive for the communication innocent, etc.; hence a letter to plaintiff's friends written by defendant, the mother of one who was then engaged to marry plaintiff, imputing to her a want of chastity, etc., was not privileged, where it was not in response to any question by plaintiff's friends, who had introduced her to defendants' son.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Privileged Communication.]

6. Libel and slander ⟹101(4) — Burden of proving privilege on defendant.

Defendant has the burden of proving privilege set up in the answer.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Helga Peterson against Christ Rasmussen and Mrs. C. (Boline) Rasmussen. From a judgment for plaintiff, the last-named defendant appeals. Affirmed.

P. H. Johnson and Irving D. Gibson, both of Sacramento, for appellant.

Martin I. Welsh, of Sacramento, for respondent.

NICOL, Presiding Judge pro tem. This is an action for damages for an alleged libel on plaintiff, committed by means of a letter written by appellant Mrs. C. (Boline) Rasmussen in the Danish language. It is not disputed that the said appellant wrote the letter, and that it was delivered to and read by the addressees, a certain Mr. and Mrs. Simonsen, in Sacramento.

Briefly the complaint alleges that plaintiff is an unmarried woman of 24 years of age; that the defendants are husband and wife, residing together as such near Loomis in Placer county; that on the 7th day of March, 1917, the plaintiff and defendants knew each other personally, and on said day, and for a long time prior thereto, the plaintiff and Mr. and Mrs. Simonsen (the addressees of the letter) were close friends; that at all times prior to the publication of the defamatory statements contained in the letter hereinafter set forth plaintiff had always maintained a good

name and reputation among her neighbors, acquaintances, and friends for virtue, politeness, moral worth and integrity, and had never been suspected of being unchaste and without virtue; that on the 7th day of March, 1917, the defendant Mrs. C. Rasmussen wrote of and concerning plaintiff a letter in the Danish language to Mr. and Mrs. Simonsen in Sacramento; that by said letter the said defendant published of and concerning plaintiff a false, unprivileged, and malicious writing which, translated from the Danish into the English language, is as follows:

"Loomis, March 7, 1917.

"Mr and Mrs. Simonsen: Inclosed you will find receipt for $50.00, there is $15.00 due yet. We have heard you are selling milk for $14.00 per month, so we see she is paying for herself, which we are very glad to hear, but there is one thing we are not satisfied with, and that is, you put that old thing on Andrew, why she looks old enough to be his grand mother, with her glasses on and false teeth, no, just leave other peoples children alone, you may have trouble enough before you have your own boys brought up and send out into this world, so you shall not do ill to others, it may fall back on yourself some day, and what is that kind of talk he is telling about her operation? is that why she had to wear a maternity dress, when she comes up to visit us, was she afraid we should see her shape and then she comes up here before I even had a chance to invite her, no, that is the most shameful I have seen, and I am absolutely ashamed that she is Danish, we have never in our lives seen such an impudent woman before in this country next time she comes up here I will lock the door, as we do not like to be insulted in our own house. Thanks for the money but let Andrew alone he has plenty of time he can get plenty of sickness, he don't need to marry it.

"[Signed] Mrs. C. Rasmussen

"Box 105. Loomis, Cal."

It was alleged that by the language used in this letter the said defendant intended to charge, and to be understood as charging, that plaintiff was pregnant, and was wearing a maternity dress to hide and conceal her shape, in order that her pregnant condition might not be disclosed, and that she was to have an unlawful operation performed to relieve her of the child, and further that the letter was so understood by the readers thereof. It was further alleged that the charges so made in said letter were and are in every particular false, untrue, defamatory, libelous, and unprivileged, and that they did expose plaintiff to hatred, contempt, ridicule, and obloquy, and that by reason thereof she was injured in her reputation and good name, and has also caused her grievous mental suffering and humiliation.

The Simonsens, to whom this letter was addressed, were intimate friends of the plaintiff and had introduced appellant's son Andrew to plaintiff. The plaintiff and Andrew thereafter were engaged to be married, but the engagement was broken when plaintiff learned of the letter above set forth. At the time of the trial Andrew was in the United States forces in France.

An answer was filed denying the material allegations of the complaint, and by way of defense sets up that the communication was privileged. The case came on for trial before the court without a jury, and the court filed its findings of fact and conclusions of law sustaining the material allegations of the complaint and gave judgment in favor of plaintiff and against the defendant Mrs. C. Rasmussen, from which judgment said defendant has appealed.

Appellant argues that the judgment should be reversed for the following reasons: (1) That the allegations of the complaint that the letter was written "of and concerning plaintiff" is not sustained by the evidence; (2) that the plaintiff was not entitled to damages, as there is no presumption of general damages, since the words in the letter are not libelous per se; that they do not on their face apply to plaintiff and are not libelous of themselves; and (3) that the letter was a privileged communication.

[1] 1. The court found that by the use of the words and language contained in said letter "the said defendant Mrs. C. Rasmussen intended to charge and assert and to be understood as charging and asserting, and was by the readers of the said letter, and those to whom the contents thereof were disclosed, in fact understood as charging and asserting and it did charge and assert therein, among other things, that the plaintiff was pregnant and with child and was wearing a maternity dress to hide and conceal her shape in order that her pregnant condition might not be disclosed, and that the said plaintiff was to have an unlawful abortion performed to relieve her of the child."

And the court further found that the said charges "were in every particular false, untrue, defamatory, libelous, and unprivileged. * * *"

These findings are fully sustained by the evidence. That the said defendant referred to the plaintiff in this letter appears from her own testimony given at the trial:

"Mr. Welsh: Q. Who were you referring to, Mrs. Rasmussen? A. I was referring to that girl. Q. Miss Peterson here? A. Yes; I did. Q. That is the one you referred to? A. Yes."

It is also plain from the record that Mr. and Mrs. Simonsen (the addressees of the letter) understood the letter as referring to the plaintiff. S. Simonsen testified:

"I have known Helga Peterson since she came to this country. She came to our house quite often. Miss Peterson and my wife are very close friends. * * * I have no feeling against the Rasmussens. I don't like that let-

ter they sent her very much. I have a feeling against them at the present time on account of the letter. * * * I did not make any effort to have Andrew Rasmussen become engaged to Miss Peterson, nor did my wife, that I know of. It is not true that my wife invited her there when she came there in the first place. My wife invited her to come to my place in North Sacramento. Andrew Rasmussen was there at the time. He came first."

The plaintiff testified that when Mrs. Simonsen showed her the letter the first time "she said some mother-in-law I had to write a letter like that." This evidence of the plaintiff was received without objection. The testimony in the case shows that the Simonsens understood the letter to refer to the plaintiff and plaintiff's engagement to Andrew Rasmussen, the son of defendants.

[2] To constitute libel a party need not be named in the writing if pointed to by description or circumstance tending to identify him. Burkhart v. North American Co., 214 Pa. 39, 63 Atl. 410; Clark v. North American Co., 203 Pa. 346, 53 Atl. 237; Bohan v. Record Publishing Co., 1 Cal. App. 429, 82 Pac. 634.

[3, 4] 2. The appellant takes the position that, since plaintiff's name is not mentioned in the letter, there is no libel per se, and therefore no presumption of general damages. Her position in this regard is untenable. The letter, we think, is on its face libelous; and it is alleged and proven that the said letter referred to the plaintiff. Words imputing to a woman a want of chastity are actionable per se. Preston v. Frey, 91 Cal. 107, 27 Pac. 533; Hitchcock v. Caruthers, 82 Cal. 523, 23 Pac. 48; Kedrolivansky v. Niebaum, 70 Cal. 216, 11 Pac. 641; McKinney v. Roberts, 68 Cal. 192, 8 Pac. 857. Damages to a person's reputation are presumed to result from the publication of a libel per se. Bohan v. Record Publishing Co., 1 Cal. App. 429, 82 Pac. 634.

[5] 3. There is nothing in the record showing, or tending to show, that the letter was a privileged communication. The letter was not in response to any inquiry made by the Simonsens. A privileged communication is one made "without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information." Section 47, subd. 3, Civ. Code.

[6] The burden of proving the privilege as set up in the answer was upon the defendant. Schomberg v. Walker, 132 Cal. 224, 64 Pac. 290; Adams v. Cameron, 27 Cal. App. 625, 150 Pac. 1005, 151 Pac. 286. The testimony shows an absence of privilege and the said letter and charges were by the trial court found to be false, malicious, and unprivileged.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

47 Cal. App. 555

BOWDEN v. HERBERGER et ux.

(Civ. 2684.)

(District Court of Appeal, Second District, Division 2, California. May 19, 1920.)

1. Appeal and error ⇐100(1)—Verdict not disturbed where sustained by evidence.

Where there is sufficient evidence to warrant the jury on finding as it did on a question of fact, the appellate court will not disturb the verdict.

2. Animals ⇐70—Knowledge of viciousness essential to liability for injury.

The owner of an animal not naturally vicious is liable for injuries done by it if in fact vicious and he had knowledge.

3. Animals ⇐74(7)—Instruction on dog's propensity termed "mischievous," held not erroneous.

In an action for injuries to a boy when bitten by defendant's bulldog, use of word "mischievous" in addition to "vicious," in an instruction on the dog's propensity and defendant's knowledge thereof, *held* not erroneous as importing misconception into the instruction.

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by Edward Frank Bowden, a minor, by K. K. Keith, his guardian ad litem, against L. J. Herberger and wife. From judgment for plaintiff, defendants appeal. Affirmed.

Griffith Jones, Warren L. Williams and Leland S. Bower, all of Los Angeles, for appellants.

Riddle & Cheroske, of Los Angeles, for respondent.

WELLER, J. This is an action to recover for injuries to plaintiff, caused by the attack of a dog belonging to the defendants. A jury fixed the damages at $1,000, and from the judgment entered on the verdict defendants appeal.

Defendants were the owners of two bulldogs, and kept them in defendants' back yard, which was inclosed with a high-board fence, and from which a gate opened into the alley in the rear of the premises. Plaintiff, a minor six years of age, lived with his mother in the same block, and was accustomed to play in the alley. On the occasion of the injury, he was in the alley spinning a top. One of the dogs had escaped from defendants' premises into the alley, and Mrs. Herberger stood at the open gate calling him.

From this point confusion reigned. No witness gives a clear statement of what occurred. Mrs. Herberger testified that as the dog approached her the boy threw the top at him, provoking the assault. Plaintiff denied being the aggressor, and stated that he struck the dog with the top after the animal bit him. But the result was that the dog attacked the boy, and inflicted the injuries upon which this action is based.

[1] Appellants challenge the sufficiency of the evidence to sustain the verdict claiming a lack of proof that the dog was vicious, and that the defendants were aware of its viciousness. Witnesses testified to previous attacks by the dogs on other persons, and that knowledge thereof had been communicated to defendants. While there is a conflict in the testimony on this point, there is sufficient evidence to warrant the jury in finding as it did; and, under the well-established rule, this court will not disturb the verdict.

The second point urged by appellants is that the court erred in instructing the jury. Defendants requested the following instruction:

"You are further instructed that the plaintiff's evidence must be sufficient to sustain the allegations of the complaint as to the vicious character of the dog and the defendants' knowledge thereof, and the plaintiff's ignorance thereof."

The court modified the instruction by striking out the words "and the plaintiff's ignorance thereof." Counsel cites the case of Haneman v. Western Meat Co., 8 Cal. App. 698, 97 Pac. 695, as authority for his assignment of such action by the court as error. The court in that case did hold that the plaintiff was required to prove the allegations of his complaint that the horse was vicious, that the defendant knew of that fact, and that plaintiff was ignorant thereof. But that was an action by a servant against his master; and, as stated in the opinion, the employé assumes the risks that are ordinarily incident to the business in which he is employed.

[2] The general rule is that the owner of an animal, not naturally vicious, is liable for injury done by the animal if it was in fact vicious, and the owner had knowledge of that fact. Finney v. Curtis, 78 Cal. 498, 21 Pac. 120. The instruction as given was in accord with that rule, and the court properly applied it.

The jury was fully instructed on the question of contributory negligence, and it was not limited in its scope to a child of tender years; so that the defendants had the advantage of the instruction as though plaintiff had been an adult and in full possession of his faculties.

At the request of plaintiff the court gave the following instruction:

"Before the plaintiff can recover you must find from the evidence: First, that the dogs before the biting, or alleged biting, of the plaintiff complained of, were of a vicious, mischievous propensity, and accustomed to biting mankind. Second, that the defendants had knowledge or notice of these characteristics."

[3] Appellants assert that the use of the word "mischievous" imports a wholly erroneous conception into the instruction. In support of their criticism counsel cite Fries v. American Lead Pencil Co., 141 Cal. 610, 75 Pac. 164. We cannot find therein any analogy to the facts in the instant case. The word did not add to or detract from the efficacy of the instruction.

No other points are discussed by appellants, and we find no error in the record.

Judgment affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

47 Cal. App. 673

COMMERCIAL ACETYLENE SUPPLY CO. v. FOX. (Civ. 3221.)

(District Court of Appeal, First District, Division 2, California. May 22, 1920.)

1. Bailment ⟸11—Contract enlarging bailee's liability must be clear.

A contract, enlarging a bailee's liability to that of an insurer, must be specific and in clear and unambiguous language, when, though it will not be extended beyond its terms, it must be given effect as showing the intention of the parties.

2. Bailment ⟸14(1)—Bailee of gas cylinders liable as insurer.

Contract covering bailment of gas cylinders sent defendant by plaintiff as containers of gas sold, and providing that defendant was responsible for any damage to the cylinders while in his possession or control, *held* to render defendant liable for damage not caused by his negligence; provision defendant should trace and make claim against railroad company for lost cylinders being insufficient to nullify effect of agreement to be responsible.

3. Bailment ⟸14(1)—Bailment consideration for bailee's obligation as insurer.

The bailment of gas cylinders as containers of gas sold was sufficient consideration for the bailee buyer's obligation to make good all damage to the cylinders while in his possession, whether or not due to his negligence.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by the Commercial Acetylene Supply Company against E. Fox, doing business under the firm name and style of Markovits & Fox. From judgment for plaintiff, defendant appeals. Affirmed.

E. M. Rosenthal, of San Jose, for appellant.

Adams & Adams, of San Francisco, for respondent.

NOURSE, J. Judgment in the sum of $400 was rendered in favor of plaintiff and against defendant in this action, from which the latter appeals.

The action (which was tried on an agreed statement of facts) was for damage to four gas cylinders, of the value of $440, owned by plaintiff, and which were almost totally destroyed by fire while in the possession of defendant, without negligence on his part. Their value, when subsequently returned to the plaintiff, was but $40. The cylinders contained acetylene gas sold by plaintiff to defendant upon a contract in the form of a letter addressed by plaintiff to defendant and accepted by the latter. It provided as follows:

"We acknowledge, with thanks, your order for one tank of acetylene, which we are shipping to-day via Southern Pacific freight. This cylinder is the property of this company and valued at $110. It is merely loaned you while you are using the gas contained therein. Refilling of same, except by us, or the reloaning of any cylinder without our written consent, is prohibited. When empty they are to be returned to us at West Berkeley, via Southern Pacific freight, charges prepaid. You are also responsible for any damages to any of our cylinders while they are in your possession or care, and we hold you responsible for same until they are received back at our plant. Any cylinders lost in transit to us are to be traced by you until located and if this cannot be done, you are to enter claim with railroad or express company for the value of the cylinders. We require this as our gas is sold f. o. b. West Berkeley, Cal. We reserve the right to charge rental on cylinders retained by you in excess of thirty days. The above is equally applicable to future orders for acetylene except that should you at any time receive different size cylinders the value of same will vary accordingly. Kindly sign and return duplicate of this agreement, sent you herewith. Yours very truly, Commercial Acetylene Welding Co. [Signed] A. R. Chandler. Accepted. [Signed] Markovits & Fox. E. Fox. [Customer.]"

The determination of this action resolves itself into a proper interpretation of the foregoing agreement. It is conceded that a bailee may by a special contract assume the liability of an insurer. The question here is whether this agreement met the requirements necessary for such a contract so as to make the bailee liable for damages occurring without his negligence.

Appellant argues that it enlarged his liability only in that it increased the degree of care to be exercised by him; that otherwise it merely expressed what the law would have implied in the absence of an agreement, and that, therefore, with the exception mentioned, his liability was the same; that is, the damage having occurred without negligence on his part, he was not liable.

[1, 2] A contract enlarging a bailee's liability must be specific and in clear and unambiguous language; and, while it will not be extended beyond the obvious scope of its terms, it must be given effect as showing the intention of the parties. The provision, "You are responsible for any damages to any of our cylinders while they are in your possession or care," determines the nature of the contract and fixes appellant's liability. As the obligation to be responsible for any damages is not one which the law would have implied—the law implying responsibility only for damage due to a bailee's negligence (Commercial Elec. Sup. Co. v. Missouri Com. Co., 166 Mo. App. 332, 148 S. W. 995, 997)—it must be presumed that the purpose of including this clause in the agreement was to protect respondent from loss occurring under just such circumstances. It does not appear that the provision for tracing and making claim against the railroad company for lost cylinders is, when taken in connection with the entire agreement, sufficient indication of a contrary intention to nullify the effect of the definite agreement to be responsible for any damages while in appellant's possession. This provision is easily distinguishable from the provision of the contract in Fairmont Coal Co. v. Jones & Adams Co., 134 Fed. 711, 67 C. C. A. 265, cited by appellant, holding that an agreement to be "responsible" for coal after delivery was not a contract of insurance.

[3] There is no merit in the point urged by appellant that there was no consideration to support this obligation. The bailment itself is a sufficient consideration for such an obligation. Commercial Elec. Sup. Co. v. Missouri Com. Co., supra. In addition to that, in this instance, the bailee was given the use of the cylinders for one month without rent.

For the foregoing reasons the judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

47 Cal. App. 617

BOYER v. CITY OF LONG BEACH.
(Civ. 3371.)

(District Court of Appeal, First District, Division 2, California. May 20, 1920.)

1. Appeal and error ⊂=134(2)—Order of dismissal an appealable "final judgment."

Order, dismissing an action under Code Civ. Proc. § 581a, in view of section 581, when entered upon the minutes of the court, is a "final judgment," from which an appeal may be taken.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

2. Appeal and error ⊂=927(2)—Proceedings on hearing of motion to dismiss action presumed to have been regular.

In the absence of a record of proceedings had on hearing of motion to dismiss action, the presumption is that they were regular.

3. Dismissal and nonsuit ⊂=81(5)—Motion to vacate order dismissing action held properly denied.

Where the trial court had jurisdiction of the subject-matter of the action, and notice of substitution of attorneys was not treated as an appearance by either party until long after dismissal of the action, the notice was not followed by demurrer or answer, no attempt was made to bring the cause to trial, no stipulations were made on behalf of defendant, and no concessions were given by plaintiff, plaintiff's motion to vacate order dismissing the action was properly denied.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Samuel C. Boyer against the City of Long Beach. From an order denying motion to vacate order dismissing the action, plaintiff appeals. Affirmed.

J. W. Falkner, of Los Angeles, for appellant.

James E. Kelby, G. Hoodenpyl, and Christain Hoeppner, all of Los Angeles, for respondent.

NOURSE, J. This is an appeal by plaintiff from an order denying his motion to vacate an order dismissing his action against defendant, made under section 581a, Code of Civil Procedure, on the ground that the summons in the action was not served on defendant within three years next after the commencement of the action, and that defendant had not appeared in said action. The complaint was filed on May 12, 1914. Summons was not served upon defendant at any time. On October 4, 1915, the mayor of the defendant city served on counsel for plaintiff a notice that certain attorneys had been substituted by defendant for other attorneys, and this notice was filed with the papers in the case. Nothing further was done until January 4, 1918, when the attorneys so substituted for the first time appeared in the action and moved a dismissal on the grounds above stated. This motion was granted on January 16, 1918, no opposition being made thereto on behalf of plaintiff. Thereafter, and on August 5, 1918, plaintiff filed a notice of motion to vacate the order of dismissal on the grounds that: (1) The motion was made by one who was not an attorney of record; (2) that the face of the record showed that a general appearance had been made by defendant; and (3) that the motion was not supported by affidavits or other evidence. This motion was denied by the trial court, and from that order the appeal is taken.

[1] An order dismissing an action under section 581a, Code of Civil Procedure, is, when entered upon the minutes of the court, a final judgment from which an appeal may be taken. It was so held in Marks v. Keenan, 140 Cal. 33, 73 Pac. 751, when the provisions of this section were contained in section 581. It is true the latter section also provided that the orders of dismissal should be entered in the minutes of the court and that when so entered they should be effective for all purposes. This language was not carried into section 581a when the change was made, but the record here discloses that the order was entered in the minutes of the court, and the effect of the entry can be none other than that specified in section 581. When a judgment or order is not void on its face because the subject-matter is without the jurisdiction of the court reviewing it, the law provides sufficient methods to reverse or correct it by appeal, by certiorari, by a suit in equity, and by motion under section 473, Code of Civil Procedure. The time within which relief may be sought by appeal or motion under section 473 is limited by statute, the time within which certiorari or a suit in equity may be instituted is determined by the equities of the case. There is no statutory authority for a motion to set aside a judgment after the period fixed by section 473 has expired, at least if such judgment is not void on its face because of want of jurisdiction of the subject-matter. It is not necessary to discuss the remedies for relief from the latter class of judgments, because this is not such a case.

[2] The motion to vacate the judgment was made more than six months after its entry. The first and third grounds urged in the motion cannot be considered because, in the absence of a record of the proceedings had on the hearing of the motion to dismiss, the presumption is that they were regular. The second ground urged—that the defendant had made a general appearance in the action within the three-year period—presented a mixed question of law and fact which the trial court was required to determine up-

on the hearing of the motion. If it correctly determined that no appearance had been made—failure of service of summons being admitted—then the order dismissing the action was proper. If the court was in error, plaintiff had a plain remedy by appeal.

[3] In any event, the trial court certainly had jurisdiction of the subject-matter, and the judgment is not void on its face for that reason. It is apparent that the notice of substitution of attorneys was not treated as an appearance by either party until long after the action had been dismissed. The notice was not followed by demurrer or answer, no attempt was made to bring the cause to trial, no stipulations were made on behalf of defendant, and no concessions were given by plaintiff. That the notice was not intended to be an appearance is clear.

The trial court properly denied the motion to vacate the judgment, and its order is therefore affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

47 Cal. App. 608

MOSLEY v. SEELY. (Civ. 3131.)

(District Court of Appeal, Second District, Division 1, California. May 20, 1920.)

1. Bills and notes ⟸211 — Indorsement by payees rendered note transferable by delivery.

A note payable to parties who indorsed it was like a note payable to bearer, subject to transfer by mere delivery with intent to pass title.

2. Patents ⟸215 — Evidence held to show plaintiff's agreement to repurchase invention for which note was given.

Evidence *held* sufficient to support finding that plaintiff suing on a note agreed to rebuy from defendant the interest in a camera improvement for which the note was given at a like price to that paid by him, and that subsequently defendant elected to sell back and did so sell.

3. Appeal and error ⟸1170(1)—Errors not resulting in miscarriage of justice not reversible.

Under Const. art. 6, § 4½, errors committed on trial but not resulting in a miscarriage of justice are not reversible.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by L. J. Mosley against Will H. Seely. From judgment for defendant, plaintiff appeals. Affirmed.

Allison & Dickson, of San Bernardino, for appellant.

Cecil H. Phillips, of San Bernardino, for respondent.

SHAW, J. Action to recover upon a promissory note for $500 made by defendant to plaintiff and one H. K. Fairall, in which, as alleged in the complaint, Fairall transferred his interest therein to plaintiff, who was the legal holder thereof, and all of which remains unpaid.

The answer not only raised issues as to the ownership of the note and nonpayment thereof, but alleged that the note was in part consideration for a transfer to him by plaintiff and Fairall of a one-third interest in an invention for the improvement of cameras, for which at the time he paid $500 in cash and gave the note in question; that thereafter by mutual consent he reconveyed the interest, whereupon the obligation was rescinded.

Further answering and as a counterclaim, he alleged that, at the time of the making of the note, plaintiff and Fairall gave him a written agreement that in case he should desire to sell the interest and improvement in cameras so transferred to him on September 8, 1914, which was the date of the note, they would repurchase the same on or about January 15, 1915, at the price so paid by him; that thereafter, to wit, on or about January 14, 1915, he elected to sell the same back to them and so notified Fairall and plaintiff, who repurchased his interest for the sum of $1,000, upon which they paid the sum of $250, leaving a balance due and unpaid of $750, all of which allegations plaintiff by answer denied.

[1, 2] Upon the issues so tendered, the court made findings adverse to plaintiff and gave judgment thereon in favor of defendant, from which plaintiff appeals, claiming the evidence is insufficient to support certain findings. These findings are, first, that plaintiff is not the legal holder and owner of the promissory note. As appears from the record, the note was made payable to H. K. Fairall and L. J. Mosley, by both of whom it was indorsed and, therefore, like a note payable to bearer, subject to transfer by mere delivery with intent to pass title thereto. Meyer v. Foster, 147 Cal. 166, 81 Pac. 402; Eames v. Crosier, 101 Cal. 260, 35 Pac. 873. Conceding, however, that this and the further finding that the payees of the note agreed that they would not transfer the same are without support of evidence, the error could not affect the judgment, since the note was not transferred, and, in our opinion, the evidence is sufficient to support the further finding, upon which the judgment rests, to the effect that plaintiff agreed to rebuy from defendant the interest in said camera improvement at a like price to that paid by him therefor, and "that on or about the 14th day of January, 1915, defendant elected to sell and on or about the 29th day of May, 1915, did sell his said one-third interest in said improvement in cameras, to

said plaintiff and said Fairall, in accordance with last-mentioned agreement, and on or about last-mentioned date said plaintiff and said Fairall bought the same back from defendant in accordance with said agreement," which sale so made by defendant to plaintiff and Fairall was by them accepted. And, in this connection, the court, upon sufficient evidence, further found that plaintiff and Fairall paid to him the sum of $250, which, together with the promissory note, amounted to $750, thus leaving a balance due him of $250, for which he was given judgment. The evidence in support of these findings is: First, a written agreement signed by Fairall and Mosley whereby they agreed to repurchase the improvement in cameras from defendant at the same price paid therefor by him; and, second, testimony of Fairall to the effect that, for himself and plaintiff and pursuant to the terms of said agreement, he purchased from defendant the interest by them sold to him in said camera invention, and paid thereon the sum of $250. This was on May 29, 1915, from which date, his testimony tends to prove, they did not regard defendant as having any interest in the invention and dealt with other parties as to the invention, assuming they owned the whole thereof. The alleged insufficiency of evidence to support these findings is based upon the sole claim that defendant did not execute a written assignment of transfer of his interest in said invention to plaintiff and Fairall; the argument being that, under section 4898 of the Revised Statutes of the United States, an interest in a patent cannot be assigned except by an instrument in writing, in support of which he also cites several authorities. Conceding this to be true, there is no evidence that the invention was patented or that it was even patentable, and, as said in Burr v. De La Vergne, 102 N. Y. 415, 7 N. E. 366, said section 4898 has reference solely to patents or an interest therein. It does not relate to an invention which has not been and may never be patented.

[3] The evidence clearly tends to prove that plaintiff and Fairall, his copartner, agreed in writing to repurchase the interest sold by them to defendant in case he desired to sell; that he did express his desire to resell, and thereupon Fairall, with the knowledge of plaintiff, paid him $250 towards the repurchase, and, according to his testimony and that of defendant, both regarded the interest as belonging to plaintiff and Fairall, and in subsequent transactions dealt with it as being their own. We perceive no merit in the errors pointed out by appellant. Plaintiff and Fairall owned the invention. They agreed, at his option, to buy back the interest therein sold to him, and, upon his exercising the option, paid him $250 on account of such resale, thus leaving a balance due him of $750, upon which the effect of the judgment is to credit them with the $500 note. Applying section 4½ of article 6 of the Constitution, we cannot escape the conviction that, whatever errors were committed in the trial, they did not result in a miscarriage of justice.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(47 Cal. App. 691)

LINELL v. GORDON. (Civ. 2339.)

(District Court of Appeal, Second District, Division 1, California. May 22, 1920.)

Account stated ⇐19(3)—Evidence held insufficient to support finding of no account stated.

Evidence *held* insufficient to support the court's finding that there was not an account stated and that the defendant had not agreed to pay balance shown thereby.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Action by N. L. Linell against J. A. Gordon. Judgment for defendant, and plaintiff appeals. Reversed.

Andrew Johnston, of Turlock, and Walter C. Davison, of Riverside, for appellant.

Thomas C. Yager, of Los Angeles, for respondent.

CONREY, P. J. Action to recover money due on an account stated. From the judgment entered in favor of the defendant the plaintiff appeals.

The only controversy which we shall find it necessary to determine arises upon appellant's contention that the evidence is insufficient to justify the finding of the court that there was not an account stated and that the defendant did not agree to pay the balance shown by the alleged statement of account. Under date May 5, 1914, the defendant sent to plaintiff by mail a statement of account showing the result of certain financial transactions in which the plaintiff and the defendant were jointly interested, which statement of account closed as follows: "May 5/14. By balance due L. Linell, $1,009.65." The statement was accompanied by a letter in which the defendant informed the plaintiff that defendant had traded 40 acres of land of the plaintiff, together with other land of the defendant, and had received a trust deed for $21,000 secured on an alfalfa ranch near Riverside; that plaintiff's land had been put in at $4,000 and defendant had paid a commission of 5 per cent. The letter closes as follows:

"The trust deed is drawing 7% interest and no taxes, and the first payment will be Dec. 1/14, when you will get your money and 7% interest on it. I am very sorry that I could not get cash for this, but this is the very best offer that I have had since I saw you, and I hope this will meet with your approval. I have some notes due in Aug., and if I get the money on them I will pay you off. There will be some more small charges for certificate of title and escrow charges."

Plaintiff replied to that letter under date July 12, 1914, wherein he acknowledged receipt of defendant's letter, and said:

"I am very glad that you succeeded in disposing of the land at Thermal Heights."

The defendant, in his answer, denied that he rendered to the plaintiff an account stated, and denied that by said account stated there was any amount found due to the plaintiff from the defendant. To the contrary, defendant alleged that on or about February 14, 1913, they entered into a contract in writing, set out as Exhibit A of the answer. This contract, over plaintiff's objection, was received in evidence. It shows that the defendant advanced a sum of money to secure the redemption of plaintiff's 40 acres of land, and the plaintiff conveyed the land to the defendant; that the defendant thereupon agreed "that when said property shall be sold, and that at the time of such sale and out of the proceeds of which second party shall receive" certain specified moneys advanced by him, "then the balance of the proceeds shall be divided equally between both parties hereto." The account rendered in May, 1914, represents the outcome of that transaction down to that date.

Respondent contends that the evidence shows, not an account stated, but only an agreement under which appellant was not to receive any moneys from the defendant, except out of the proceeds of the sale of the plaintiff's property. It should be conceded that if the property had been sold for money only, as contemplated by the agreement of February 14, 1913, the defendant would have been bound to pay to plaintiff only plaintiff's share of the net proceeds of such sale. It appears, however, that, acting upon his own responsibility, he disposed of plaintiff's land in connection with the trade which he made for the trust deed. His statement to the plaintiff, and the report which he made, that "I have some notes due in Aug., and if I get the money on them I will pay you off," are inconsistent with his present theory that, having traded for the trust deed, he was to pay the plaintiff only out of the cash proceeds of the sale of plaintiff's land. In making this statement, together with his statement of account showing "balance due" from himself to Linell on May 5, 1914, he offered a statement of account, which, when accepted by the plaintiff, as it unqualifiedly was accepted, constituted an account stated. The money was then due, but the defendant explained that he was not prepared to pay at that time.

Our conclusion that this was an account stated on which the specified amount then became due is confirmed by the subsequent conduct of the defendant. Under date of September 20, 1915, the defendant wrote to the plaintiff a further statement of the situation. Here he states for the first time that the land covered by the $21,000 trust deed was subject to a first mortgage of $15,000. He then states that the owner of the land failed to pay the interest on the first mortgage; that defendant had been required to pay the interest, together with taxes and other expenses on the land; that—

"I finally had to foreclose on the trust deed and that cost me $438, and now that I have a title to it I am trying to sell or trade it, but times are so hard that I have not much hopes of doing either. You can rest assured that as soon as I get any money out of the property that I will pay you with interest, but it is impossible for me to do anything now."

The promise to pay plaintiff "with interest" implies a debt due; for if defendant was to pay only out of cash proceeds of the sale of plaintiff's land, he would not be chargeable with interest until such cash proceeds had been received. Moreover, defendant's admission that he foreclosed on the trust deed and obtained title to the land secured thereby, places him in the same position as if, on foreclosure of such trust deed, the land had been purchased by some third person and the purchase price paid over to the defendant. From the foregoing summary of the evidence we conclude that the evidence is insufficient to support the court's finding that there was not an account stated and that the defendant had not agreed to pay the balance shown thereby.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

47 Cal. App. 563

PRATT v. PADGETT. (Civ. 2954.)

(District Court of Appeal, Second District, Division 1, California. May 19, 1920.)

Landlord and tenant ⊜29(3)—Landlord renting house for gambling cannot recover for injury to its reputation.

One renting a house, with the intention of both parties that it be used for gambling, could not claim damages because the reputation of the house was injured by such use; the contract having for its object the violation of law; but the tenant, on landlord's seizing apparatus in the house to reimburse himself for damage by reason of such loss of reputation, could recover the same.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by G. M. Pratt against J. M. Padgett. Judgment for plaintiff, and defendant appeals. Affirmed.

E. L. Johnson, of San Diego, for appellant.

H. V. Richardson, of San Diego, for respondent.

SHAW, J. From a judgment for $265 entered in favor of plaintiff, the defendant has appealed upon the judgment roll.

The findings, in so far as applicable to the cause of action upon which the judgment was rendered, are as follows: On February 28, 1918, plaintiff was the owner, entitled to and in possession of certain personal property consisting of tables, pictures, stools, cushions, water, and wine glasses, cuspidors, a quantity of assorted liquors, one ice box, 2,000 chips, and a faro card case and check rack, of the value of $265, all of which defendant on said date wrongfully and unlawfully took possession of and converted to his own use. That these findings fully support the judgment rendered is not open to the slightest question. It is true that, in response to the allegations of a cross-complaint filed by defendant, wherein he sought a judgment against plaintiff for damages due to the fact that plaintiff had conducted a gambling house in a residence leased to him by defendant, thereby injuring the reputation of the house, as to which the court found that such lease of said premises so made by defendant to plaintiff was with the intention of both parties that the same should be so used, and hence, as held by the court, defendant was estopped from claiming damages by reason of such use. In other words, as to defendant the court applied the well-recognized rule that no recovery can be had by either party to a contract having for its object the violation of law. As said in Dunn v. Stegemann, 10 Cal. App. 38, 101 Pac. 25: "Where it appears that a contract has for its object the violation of law, the court should sua sponte deny any relief to either party."

The lease of the house for an unlawful purpose, so far as shown by the findings, had no connection with defendant's act in wrongfully converting plaintiff's property to his own use, and which presumably he took to reimburse himself for the alleged damage sustained. For aught that appears to the contrary, the property converted might have been elsewhere than in the building let by defendant to plaintiff, and which was used for gambling purposes. However this may be, there is nothing in the findings which brings the unlawful act of defendant within the rule invoked by appellant.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

47 Cal. App. 611

HALL v. PUENTE OIL CO. et al. (Civ. 3063.)

(District Court of Appeal, Second District, Division 1, California. May 20, 1920.)

1. Master and servant ⊜330(3) — Evidence held insufficient to sustain findings salesman did not operate automobile on own business.

In an action against an oil company and its salesman, who used an automobile, for injuries to a pedestrian struck by the car, evidence *held* insufficient to sustain findings that the salesman was not operating the car on his own business, but within the scope of his employment by the oil company at the time.

2. Master and servant ⊜302(1)—Respondeat superior not invoked unless servant engaged in employment.

The doctrine of respondeat superior cannot be invoked unless at the time of the negligent act causing the injury the servant was engaged in performing a service for the master or incidental thereto.

3. Master and servant ⊜302(6)—Loan of car to salesman by company did not render it liable for injuries.

Where an oil company lent to its salesman for his own use an automobile which he used in the course of his employment, the consent of the company to such personal use did not render it liable for negligent injuries to a pedestrian.

4. Appeal and error ⊜1011(1)—Determination of trial court on conflicting evidence conclusive.

Where the evidence on the question of the contributory negligence of plaintiff injured by defendant's automobile presented a conflict, the determination of the trial court was conclusive.

5. Compromise and settlement ⟸23(3)—Evidence held insufficient to show settlement of claim for personal injuries.

In an action against an oil company and its salesman for injuries from the company's automobile driven by the salesman, evidence *held* insufficient to show the making of any agreement between plaintiff and the salesman whereby the latter agreed to pay plaintiff $15 a month for 100 months, which plaintiff agreed to accept in full settlement.

6. Frauds, statute of ⟸44(1)—Parol agreement to pay sum per month for 100 months not enforceable.

Agreement of defendant, who injured plaintiff with an automobile, to pay plaintiff $15 a month for 100 months, not being in writing, was not enforceable against defendant under Civ. Code, § 1624, the statute of frauds.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by John Hall against the Puente Oil Company and John J. Roberts. From judgment for plaintiff, defendants appeal. Reversed as to the corporate defendant; affirmed as to the individual defendant.

H. W. Kidd and Perry F. Backus, both of Los Angeles (A. J. Verheyen, of Hollywood, of counsel), for appellants.

Hugh E. Macbeth, of Los Angeles, for respondent.

SHAW, J. Defendants appeal from a judgment in favor of plaintiff, awarded as damages for personal injuries.

Roberts was employed by his codefendant, whose place of business was in Los Angeles, as a traveling salesman of oil, and, in the performance of his duty, which required him to travel in Los Angeles and adjoining counties, the oil company provided him with an automobile and at all times furnished the oil and gasoline necessary in the operation thereof. His daily duties covered the period from 8 o'clock a. m. to 5 o'clock p. m. With the consent of his employer, Roberts used a garage at his home in Alhambra, wherein the car was kept at night and when not in use. In addition to his use of the car in traveling back and forth from his residence to the oil company's place of business in Los Angeles, he had the privilege, when not on duty to his employer, of using it for pleasure rides and purposes of his own. On the day of the accident he returned from Orange county to the yard of the oil company at approximately 5 o'clock p. m.; whereupon, his day's work being at an end, he, in his car, came up town, in Los Angeles, where, at Fourth and Spring streets, he had an appointment to meet a friend at 7 o'clock, who was to accompany him to a meeting of the lodge of Elks in Alhambra. During the time between his arrival up town, at about a quarter after 5 o'clock, and 7 o'clock, at which hour he met his friend, he wandered around town, "loafing and taking a drink here and there." At 7 o'clock he left Fourth and Spring streets, Los Angeles, for the lodge rooms at Alhambra, and at First street the automobile operated by Roberts collided with plaintiff, who was thereby injured.

Upon these facts the trial court found that it was untrue, as alleged in the answer of defendant Puente Oil Company, that John J. Roberts, at the time of said accident, was operating the car on and about a mission of his own and not within the course or scope of his employment as an employé of said oil company, or in the performance of any act for or on behalf of said oil company, and also found that "the defendant John J. Roberts, while engaged within the general scope of his said employment, carelessly and negligently drove and operated the said Ford automobile, then and there the property of the said Puente Oil Company."

[1, 2] In our opinion, appellants' challenge to these findings, upon the ground that they are not supported by the evidence, must be sustained. It is apparent the trial court, in making the findings, deemed the facts sufficient to establish a case for the application of the doctrine of respondeat superior; but this principle cannot be invoked unless at the time of the negligent act causing the injury the servant was engaged in performing a service for the master or incidental thereto. The doctrine rests upon the proposition that in doing the acts out of which the negligence arose the servant was representing the master at the time and engaged in his business. As said in Higgins v. Western Union Telegraph Co., 156 N. Y. 75, 50 N. E. 500, 66 Am. St. Rep. 537:

"Beyond the scope of his employment the servant is as much a stranger to his master as any third person. * * * And if the servant step aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended, and an act of the servant during such interval is not to be attributed to the master."

"The test," says the court in Chamberlain v. California Edison Co., 167 Cal. 500, 140 Pac. 25, "is, whether the act was done in the prosecution of the business in which the servant was employed to assist."

To the same effect see Gousse v. Lowe, 183 Pac. 295; Brown v. Chevrolet Motor Co., 179 Pac. 697; Stephenson v. Southern Pacific Co., 93 Cal. 558, 29 Pac. 234, 15 L. R. A. 475, 27 Am. St. Rep. 223.

Clearly Roberts was not engaged in the performance of any duty which he owed to his employer. Since the garage in which he was accustomed to keep the automobile was at his home, the taking of the car from his place of employment to such garage would

have been an act within the scope of his employment. Riordan v. Gas Consumers' Ass'n., 4 Cal. App. 639, 88 Pac. 809. The evidence, however, shows that he was not operating the car with a view of reaching such destination; and, while the testimony shows that he might have accepted an order for the delivery of oil by his empoyer at any time or place, he owed no duty to his employer so to do and was not seeking such sales and did not take any orders on the day of the accident after 5 o'clock, when his duties to his employer ended for the day. Neither, in our opinion, does the fact that the employer supplied the gasoline and oil required in the operation of the car affect the question in the slightest degree. After 5 o'clock p. m. on the day of the accident his time was his own to use as he pleased, and he likewise, with the consent of his employer, had the use of the car for his own purposes, and when the injury to plaintiff occurred he was engaged in a mission the purpose of which was his own pleasure, and which could have no possible connection with the duties which he owed to his employer, any more than if he had taken the car on a holiday or Sunday for a pleasure ride for himself and family or upon a fishing trip.

[3] Respondent lays much stress upon the fact that the use of the car by Roberts for his own purposes was with the consent of the Puente Oil Company, his employer. At most, this was a mere lending of the car to him for his own use, as to which, says the court in Brown v. Chevrolet Motor Co., supra, "it is uniformly held that the owner is not responsible for injuries resulting from the negligence of a driver whose only relation to the owner is that of borrower," in support of which the court cites Berry on Automobiles, § 684, Hartley v. Miller, 165 Mich. 115, 130 N. W. 336, 33 L. R. A. (N. S.) 81, and Segler v. Callister, 167 Cal. 377, 139 Pac. 819, 51 L. R. A. (N. S.) 772. We are unable to draw any distinction between a case where the use of the car by a servant for his own purpose is without the master's consent and that where such use is permissive. Carried to its logical conclusion, the contention of respondent, which was adopted by the trial court, would render the owner of a shotgun liable for the act of one to whom he had loaned it for use on a hunting trip and due to whose negligent use thereof he had shot another. Our conclusion, therefore, is that the findings of which appellants complain are not supported by the evidence.

[4] Appellants also predicate error upon the insufficiency of evidence to support the finding whereby the injury to plaintiff was by the court attributed to the negligence of Roberts, and exonerating plaintiff from contributory negligence. An examination of the record discloses no merit in this contention. At most, the evidence presents a conflict from which, and the circumstances shown to exist, different inferences might be deduced, and hence the determination of the trial court thereon must be deemed conclusive. Neither is there the slightest merit in the contention that the finding as to the extent of plaintiff's injury, is without support.

[5] Both defendants alleged the making of an agreement between plaintiff and Roberts whereby the latter agreed to pay him $15 per month for a period of 100 months, which plaintiff agreed to accept in full settlement of his damages, which allegation the court found to be untrue, but allowed upon the judgment rendered the sum of $60, which defendant had paid to another for plaintiff's benefit. There is nothing in the evidence upon which to base a finding other than that made. It appears from the evidence that plaintiff was not a party to any agreement touching the matter, but that in some criminal proceeding growing out of Roberts' negligent act Judge Craig, before whom he appeared, told defendant that he would have to make some reparation for the injury sustained by plaintiff, and left the matter in the hands of the probation officer of the court who, upon consulting Roberts and his wife and going over his income and his domestic expenses, concluded that he could pay plaintiff $15 a month, which sum, it seems, defendant paid for four months.

[6] There was no writing executed between plaintiff and Roberts evidencing such agreement, and, since the same was to cover a period of 100 months, it was not, in the absence of such writing, enforceable against Roberts. Section 1624, Civ. Code. In addition to all of this, the evidence touching the question is too vague and uncertain upon which to base a contract of such character.

As to the defendant Puente Oil Company, the judgment is reversed; and as to the defendant John J. Roberts, it is affirmed.

We concur: CONREY, P. J.; JAMES, J.

47 Cal. App. 564

BAILIFF v. HILDEBRANDT. (Civ. 2049.)

(District Court of Appeal, Third District, California. May 19, 1920.)

1. Judgment ⟸161—Application to set aside default must be accompanied with copy of answer.

An application, under Code Civ. Proc. § 473, as amended in 1917 (St. 1917, p. 242), to set aside a default upon the ground of mistake, inadvertence, and excusable neglect, must be accompanied with a copy of the answer or other pleading proposed to be filed, and it was not sufficient that, prior to default, the defendant had filed a demurrer; such demurrer having been overruled, and defendant having been given time to answer and having failed to do so.

2. Appeal and error ⟸938(4)—Not presumed that defendant filed answer with application to set aside default.

Where certificate of judge to bill of exceptions stated that it "contains the statement of all papers and evidence used in the above entitled matter," and a stipulation of attorneys was "that the foregoing bill of exceptions contains a true and correct statement of all the evidence introduced, etc.," it will not be presumed in support of an order of the court setting aside the default that defendant filed an answer with his application to set aside such default as required by Code Civ. Proc. § 473, as amended by St. 1917, p. 242, assuming that it is necessary that bill of exceptions affirmatively show that no other evidence was offered than that stated in the bill, and that, in absence of such showing, it would be presumed that an answer was filed.

Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Action by J. D. Bailiff against A. M. Hildebrandt. Judgment for plaintiff. From an order setting aside defendant's default and the judgment, plaintiff appeals. Reversed.

Hiram E. Casey, L. R. Lambert, and Casey & Lambert, all of Santa Rosa, for appellant.

W. F. Cowan, of Santa Rosa, for respondent.

NICOL, Presiding Judge pro tem. This is an appeal by plaintiff from an order vacating and setting aside the default of defendant and the judgment entered thereon against the said defendant.

The motion to set aside the default and judgment was one under section 473 of the Code of Civil Procedure and in substance was made upon the ground of mistake, inadvertence, and excusable neglect. The defendant's demurrer to the complaint was overruled by the court on December 9, 1918, and by the order he was given 10 days within which to answer. On December 26, 1918, the defendant not having answered in compliance with the said order, his default was entered, and on the same day judgment was duly entered for the amount prayed for in the complaint, together with costs; execution was issued and levied upon moneys belonging to the defendant, and the judgment by virtue thereof was fully paid and satisfied on the 26th day of December, 1918. On June 2, 1919, defendant filed his notice of motion to set aside the said default and judgment. The motion came on for hearing before the court on June 16, 1919, and was on said day by the court granted.

[1] The notice of motion stated that it would "be made and based upon all the records, papers and files and proceedings in this action, and upon this notice and the affidavit of defendant and of W. F. Cowan which is served and filed herewith, and upon such oral and documentary evidence as may be offered. * * *" No copy of any answer, or other pleading proposed to be filed, accompanied said notice of motion. Section 473, Code of Civil Procedure, as amended in 1917 (Stats. 1917, p. 242), provides that an application like the one in the case at bar "must be accompanied with a copy of the answer, or other pleading proposed to be filed therein, otherwise said application shall not be granted." The Supreme Court, in speaking of this amendment in the case of Los Angeles County v. Lewis, 179 Cal. 398, 177 Pac. 154, said:

"The plain object of the provision was simply to require the delinquent party seeking leave to contest on the merits, to show his good faith and readiness to at once file his answer in the event that leave is granted by producing a copy of the proposed answer for the inspection of his adversary and the court. Substantial compliance with the provision of course requires such production in connection with the application for relief."

In this case of Los Angeles County v. Lewis, no copy of the answer was served with the notice of motion to set aside the default, but the defendant two days before the giving of the notice of motion offered his proposed answer for filing and left the same in the custody of the clerk and served the same by delivery of a copy on the adverse party. The notice of motion stated that this was the answer that the defendant desired to file and that the motion would be based in part on the same and the affidavit of the defendant, a copy of which was served with the notice of motion, showed that the answer that the defendant desired to be filed was the one which the defendant had offered for filing and which had remained in the custody of the clerk. The Supreme Court held that this was a compliance with the said amendment, and that—

"The provision of section 473, Code of Civil Procedure, here involved, like the remainder of

the section, must be liberally construed with a view to substantial justice, and we are of the opinion that it must be held that, in view of the facts stated, the application for relief was 'accompanied' with a copy of the answer proposed to be filed."

In the case at bar, as before stated, no copy of any answer, or other pleading proposed to be filed, accompanied defendant's notice of motion, nor does the record anywhere show that any answer, or other pleading, was served upon the plaintiff or offered to the clerk for filing. There was no compliance made by defendant with the said provision.

[2] The respondent argues that the record or bill of exceptions must affirmatively show that no other evidence was offered than that stated in the bill of exceptions, and that in the absence of such showing it will be presumed in support of the order of the court that an answer was filed. Conceding that respondent's argument in this respect is sound, nevertheless we are of the opinion that the record in this case sufficiently shows that no other evidence was offered on this motion than that which is contained in the bill of exceptions. The certificate of the judge to the bill of exceptions states that it "contains the statement of all papers and evidence used in the above-entitled matter," and the stipulation of the attorneys is:

"That the foregoing bill of exceptions contains a true and correct statement of all the evidence introduced and of all of the proceedings had upon the hearing of the above-entitled motion."

It follows that the order appealed from should be reversed, and it is so ordered.

We concur: HART, J.; BURNETT, J.

47 Cal. App. 642

KOEHL et ux. v. CARPENTER et al.

(Civ. 3367.)

(District Court of Appeal, First District, Division 2, California. May 21, 1920. Hearing Denied by Supreme Court July 19, 1920.)

1. Municipal corporations ⟸706(5)—Alighting passenger held not shown to be negligent as to passing automobile.

In an action against an automobile owner for death of one alighting from a street car, evidence *held* sufficient to sustain finding that decedent was not guilty of contributory negligence.

2. Appeal and error ⟸1010(1)—Finding sustained by evidence not disturbed.

Where there was sufficient evidence to sustain the finding of the trial court, it will not be disturbed on appeal.

3. Municipal corporations ⟸705(10)—Pedestrians not under positive duty to stop, look, and listen.

There is no positive duty on the part of pedestrians about to cross a street to stop, look, and listen, and the question of negligence of such a pedestrian must be examined in the light of all the attending circumstances, one of which may be knowledge of existence of statute, or ordinance, prescribing fixed regulations for observance by automobile drivers.

4. Municipal corporations ⟸705(4) — Motorists should not trail street cars so closely they cannot stop.

In view of the obvious danger in an automobile passing a street car when it stops for accommodation of passengers, motorists should neither trail cars so closely that they cannot comply with city ordinance requiring that they stop, nor attempt to pass a car at a regular stopping point until they are sure it will not stop.

5. Appeal and error ⟸1004(1)—No reversal for amount of recovery for death unless conscience is shocked.

The amount of damages to be awarded for a death is a matter peculiarly within the province of the trial court, and its action will not be disturbed unless the amount is so disproportionate to the injury as to shock the conscience at first glance.

6. Death ⟸77—Evidence held to support allowance for funeral expenses.

Allegation of parents' complaint for death of daughter that funeral expenses had been incurred *held* sufficient to support finding that plaintiffs had been damaged to the amount of $1,000, including funeral expenses of $272.50, though the undertaker's bill was made out to the brother of the girl, colloquy between counsel regarding funeral expenses being sufficient to support implied finding expense was incurred by parents.

Appeal from Superior Court, Los Angeles County; Paul McCormick, Judge.

Action by John W. Koehl and Mary Koehl, his wife, against Adolph D. Carpenter and Julia L. Carpenter. From judgment for plaintiffs, defendants appeal. Affirmed.

E. B. Drake, of Los Angeles, for appellants.
G. C. De Garmo, of Los Angeles, for respondents.

BRITTAIN, J. The defendants, sued as husband and wife, by the parents as heirs of Mae C. Koehl, who died as the result of her being struck by an automobile driven by Mrs. Carpenter, appeal from a judgment for $1,000, rendered by the trial court sitting without a jury. The appellants rely on three grounds which will be disposed of in the order of their presentation, after the following statement of facts shown by the record:

Mae Koehl was between 21 and 22 years of age. She had previously been employed as a

cashier in a business concern in Los Angeles. She was out of employment for about a month, during which time she remained at home, helping with the household duties. She then went to work as an assistant bookkeeper in the office of her father, who, with his son, was engaged in the manufacturing business. She had been so occupied about a month, and was acquainted with the streets in Los Angeles and with the particular crossing, near her place of business, where the accident occurred.

At the time of the accident, in November, 1917, there was, and had been from some time in 1914, an ordinance of the city of Los Angeles which provided that it should be unlawful for the driver of any vehicle, "upon overtaking any street or interurban railway car which has stopped for the purpose of discharging or taking on any passengers, to fail, neglect or refuse to stop such vehicle at least ten feet in the rear of such * * * car and to keep such vehicle standing where so stopped until such pasengers or intending passengers have safely alighted from or boarded said * * * car, or until such * * * car shall have started."

About noon on November 27, 1917, Mae Koehl was a passenger on a street car running west on Seventh street, and told the conductor to stop the car at Anderson street. The car stopped on the east side of Anderson street at the corner and she alighted, starting to walk diagonally in a northwesterly direction toward the sidewalk at the corner of Seventh and Anderson streets. The conductor heard a scream, and the car, which had started and had gone a few feet, again stopped. The conductor saw her reach a point 3 or 4 feet from the curb line when she was struck.

Mrs. Carpenter was driving her motor west on Seventh street, trailing the street car, and had been following it for several blocks. At the time of the accident, she testified she was moving at the rate of about 10 miles per hour. She did not stop the automobile, nor did she sound any warning as she approached the crossing. She testified that she thought the car was slowing down for the crossing, that when she saw Miss Koehl in the act of alighting she screamed, and, being afraid that the brakes would not hold, she turned the machine sharply to the right to avoid the impending collision. She did not run it into the sidewalk, but turned it so that it continued its course westerly near the curb. She testified that the brakes were in good order, and that at the rate at which she was traveling she could have stopped the car in about 5 feet. The street car had been running at about 6 or 8 miles an hour, and as it reached Anderson street Mrs. Carpenter turned from immediately behind it to the north side to pass it while crossing Anderson street. She testified she had put on the foot brake, but when she struck Miss Koehl she lost control of herself, and did not know what happened. When she first saw Miss Koehl she was 10 or 15 feet away. Miss Koehl was struck when she was near the curb line of Anderson street and her body was carried nearly to the middle of the street, the automobile running over her and for 10 to 15 feet beyond.

During the trial the plaintiffs' attorney said: "Here is a list of the costs of burial, subject to your objections as to some items." The attorney for the appellants replied: "Yes, Bresee Brothers have put it in. I suppose we have to pay these things when we die. I will not raise any question about it." The document was marked Plaintiffs' Exhibit 3, and was in the form of a receipted bill of Bresee Brothers, undertakers, for $272.50, funeral expenses of Mary Koehl. It was made out to Albert Koehl, a brother of Miss Koehl.

[1-3] The appellants argue that Miss Koehl was guilty of contributory negligence. This court cannot so determine as a matter of law in view of all the circumstances. Considered as a question of fact it was determined by the trial court adversely to the appellants. There was sufficient evidence to sustain its finding. In such a case that finding will not be disturbed on appeal. The rules of law concerning the respective rights and obligations of persons using the public streets recently received lengthy consideration by the Supreme Court. It was there held that there is no positive duty on the part of pedestrians about to cross a street to stop, look, and listen, and that the question of negligence, under the usual rule of ordinary care that devolved upon foot travelers, must be examined in the light of all the attending circumstances, one of which may be knowledge of the existence of a statute or an ordinance prescribing fixed regulations for observance by automobile drivers. Mann v. Scott (Sup.) 182 Pac. 281.

[4] It is argued that the ordinance was only operative against those automobile drivers who are so far back of a street car as to be able to stop 10 feet in the rear of the street car when it stops for the purpose of taking on or discharging passengers. There are two answers to this contention. Cars ordinarily stop for those purposes at street corners. In view of the obvious danger of passing cars when they do stop for the accommodation of passengers, it behooves motorists neither to trail cars so closely that they cannot comply with the ordinance, nor to attempt, as Mrs. Carpenter did, to pass a car at a regular stopping point until they are sure that there will be no stop. Further, the court is of the opinion, that, regardless of the provisions of the ordinance, there is ample evidence to sustain the judgment.

[5] It is next contended that the damages are excessive, but the amount of damages is a matter peculiarly within the province of the trial court, and its action will not be dis-

turbed unless the amount is so disproportionate to the injury as at first glance to shock the conscience. This does not appear to be the case in the present instance. Martin v. Shea (Sup.) 187 Pac. 23.

[6] Lastly it is contended that the damages should not have included the amount paid to the undertaker, because the bill was not paid by either of the plaintiffs. The allegation of the complaint was that these expenses had been incurred. This was sufficient to support the finding that the plaintiffs had been damaged to the amount of $1,000, including funeral expenses of $272.50. The colloquy between counsel at the trial regarding the funeral expenses is sufficient to support the implied finding that though the bill was made out to the brother of Miss Koehl, the expense was incurred by her parents, the plaintiffs. If timely objection had been made, the plaintiffs might have supplied the missing proof. After the statement of counsel for the appellants that he would not raise any objection about it, referring to the list of costs of burial, that objection will not be seriously considered here.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

47 Cal. App. 560

FERRARIS v. SOUTHERN PAC. CO. et al.
(Civ. 2778.)

(District Court of Appeal, Second District, Division 1, California. May 19, 1920.)

1. Evidence ⟸13—Well recognized that cold for short time will not damage fruit.

It is a well-recognized fact that fruit for a short time will stand a low degree of temperature without damage, when under a temperature several degrees higher, but prevailing for a longer time, damage will result from the cold.

2. Carriers ⟸134—Finding that fruit was damaged by cold through carrier's negligence sustained.

In an action against a carrier for damage to fruit by cold, evidence *held* to justify finding that the damage resulted from negligence of the defendant in leaving a door open at destination all night, and not from cold weather encountered for a short time en route.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Peter Ferraris against the Southern Pacific Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Henry T. Gage, W. I. Gilbert, and Floyd S. Sisk, all of Los Angeles, for appellants.

Frederick R. Levee and W. R. Law, both of Los Angeles, for respondent.

SHAW, J. Action to recover damages alleged to have been sustained by plaintiff on account of defendants' negligence in transporting a car of bananas from New Orleans to Los Angeles. Judgment went for plaintiff, from which defendants appeal, claiming the evidence is insufficient to justify the finding of the court to the effect that the deterioration of the fruit, delivered to defendants at New Orleans in good condition, was due to the failure of defendants to keep the same under proper refrigeration.

Testimony received on the part of plaintiff was to the effect that in shipping bananas in carload lots it is necessary to place them in charge of a messenger, as was done in this instance, whose duty it is to maintain a temperature inside the car of 58 or 60 degrees, which is done by the opening and closing of plugs and vents, depending upon the outside temperature, which varies along the route of travel. The testimony also tends to show that the messenger in charge of the car properly looked after the ventilation thereof, which arrived in Los Angeles at 8:20 p. m. December 13, 1917, with the fruit in good condition; that the damage to the bananas occurred between the time of arrival on December 13th and 8:30 a. m. December 14th, and was caused by the fact that, due to defendants' negligence, one door of the car had during the night been opened and left in that condition, as a result of which the fruit was badly chilled and spoiled. As against this evidence, which, if true, was ample to justify the finding, defendants introduced a report made by the messenger in charge as to the degrees of temperature through which the fruit was transported from New Orleans to Los Angeles, and which, it is claimed, shows the inaccuracy of his testimony. From this report it appears that the outside temperature along the route of travel varied from 20 degrees to 68 degrees above zero, and that the inside temperature, so far as shown by the report, was not less than 54 degrees above zero, and the difference between the outside and inside temperature, so far as shown by this report, and in the absence of a stove or other means of heating, varied from 4 degrees to 18 degrees; for instance, at one point, when the outside temperature was 60 degrees, it was 64 degrees inside, and at another point, when the outside temperature was 36 degrees, it was 54 degrees inside. At one point along the line, however, the outside temperature is shown to have dropped to 20 degrees, and at another point 22 degrees, without any showing made by the report as to the inside temperature at such times, and hence appellants' claim that the inside temperature must have dropped to 40 degrees or less, which it is conceded was so low that the fruit would have been damaged, and that

such damage must be attributed to the negligence of the messenger. While the argument is plausible, it omits from consideration the length of time during which the low outside temperature of 20 degrees at one point and 22 at another prevailed, and also ignores the degree of heat generated inside the car by reason of the bananas being packed in bulk, the extent of which, according to the testimony, depends upon the density of the loading and other varying conditions.

[1] It is a well-recognized fact that fruit for a short time will stand a low degree of temperature without damage when, under a temperature several degrees higher, but prevailing for a longer time, damage will result from the cold. Hence, since the injury due to the low temperature would depend upon the duration thereof, we cannot assume the direct testimony overcome by the mere showing that en route the car passed through a zone where the outside temperature was 20 or 22 degrees, and therefore the temperature on the inside of the car dropped and continued at a point, as a result of which the fruit was damaged.

[2] We agree with the trial court that the direct testimony of the messenger in charge of the car and others, which tends to show that the damage resulted from leaving the car door open during the night of December 13th, after its arrival in Los Angeles, is not overcome by the inferences sought to be drawn from the report as to the varying outside temperature along the line of travel.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

47 Cal. App. 597

GLOCKNER v. PALACE AMUSEMENT CO.
(Civ. 3122.)

(District Court of Appeal, Second District, Division 1, California. May 20, 1920.)

1. Judgment ⊂⊃744—Defendant estopped to plead same fraud which in former action was adjudged unavailing.

In an action to recover installments upon a contract, the defendant is estopped to plead the same fraud which in a suit under the same contract for former installments was adjudged unavailing.

2. Judgment ⊂⊃948(1)—Where answer pleaded fraud already adjudged against defendant, plaintiff could prove the estoppel without pleading it.

Plaintiffs could not anticipate that defendant would plead a defense of fraud which had already been adjudged against defendant in a prior action, and hence was entitled without pleading the judgment to offer evidence of such facts as constituted estoppel.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by William L. Glockner, doing business under the name of the William L. Glockner Music Company, against the Palace Amusement Company. Judgment for defendant, and plaintiff appeals. Reversed.

Smith & Breslin, of Los Angeles, for appellant.

Wm. T. Blakely, of Los Angeles, and M. L. Haines, of San Francisco, for respondent.

SHAW, J. Action to recover certain unpaid monthly installments of money alleged to be due under a contract for the purchase by defendant from plaintiff of a motion picture orchestra.

Judgment went for defendant, from which plaintiff appeals.

For defense to the action defendant relied upon certain alleged fraudulent acts practiced by plaintiff, whereby defendant was induced to enter into the contract, as to all of which the court found in defendant's favor.

[1] It appears that prior to the institution of the action there had been another action between the same parties and upon the same contract to recover monthly installments of money theretofore accruing thereon and which defendant had failed to pay. In this first action the defendant, as here, pleaded in defense of recovery therein the same fraudulent acts of plaintiff which it sets up in its answer in the instant case, and, as shown by the judgment roll in said first action, introduced in evidence, the court, as to such defense, found adversely to defendant and gave judgment for plaintiff, which judgment had, at the time of filing the complaint herein, become final. Hence, the court having in the trial of the first case adjudged as unavailing the defense of fraud therein pleaded, defendant must, in the second suit, upon the principle of estoppel, be deemed concluded thereby. While the subject of the action in this case was different installments from those involved in the former action, the defense to recovery thereof was the same in both; hence, as said in Koehler v. Holt Manufacturing Co., 146 Cal. 335, 80 Pac. 73:

> "The case comes clearly within the principle that a judgment operates as an estoppel to preclude the parties and privies from contending to the contrary of that point or matter of fact, which, having been once distinctly put in issue by them, has been, on such issue joined, solemnly found against them."

Indeed, we know of no authority holding to the contrary, while the proposition is, among other cases, supported by Baker v. Eilers Music Co., 175 Cal. 657, 166 Pac. 1008; Wiese v. San Francisco Musical Society, 82

Cal. 645, 23 Pac. 212, 7 L. R. A. 577, and Williams v. Hawkins, 34 Cal. App. 146, 166 Pac. 869.

[2] Respondent attempts to avoid the result by suggesting that plaintiff did not plead the former judgment as an estoppel. A sufficient answer to this is that he could not anticipate that defendant would, as a defense, plead facts which had been theretofore, on issue joined, adjudged against it; and hence, when defendant by answer tendered the same issue, he was entitled, without pleading the judgment, to offer evidence of the facts constituting the estoppel.

Our views render it unnecessary to notice other points.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

47 Cal. App. 605

HYMAN v. KARL STERN CO. (Civ. 3135.)

(District Court of Appeal, Second District, Division 1, California. May 20, 1920.)

1. Corporations ⟸308(3) — Agreement between sole owners of corporation as to salaries, valid.

If two persons, who owned and controlled a corporation to all substantial effect, agreed on the salary to be paid to each, where the corporate form was adopted only as a convenient agency for the handling of the business, such an agreement was valid and binding.

2. Appeal and error ⟸1011(1)—Findings on conflicting evidence not disturbed.

Finding of the trial court based on conflicting evidence will not be disturbed on appeal.

3. Appeal and error ⟸1169(7) — Appellate court cannot direct an amendment of findings of fact, but must reverse.

Where judgment was too large by reason of an error in preparing findings of fact, a reversal was required in the appellate court, because such court cannot direct an amendment of findings of fact.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Almeda Bresee Hyman against the Karl Stern Company. Judgment for plaintiff, and defendant appeals. Reversed.

Benjamin W. Shipman and Henry O. Wackerbarth, both of Los Angeles, for appellant.

James E. Kelby, of Los Angeles, for respondent.

JAMES, J. Plaintiff brought this action to recover on two counts for amounts of salary alleged to be unpaid to her by the defendant corporation. Judgment was in her favor, and defendant has appealed.

It was shown in evidence that, about the 1st of April, 1917, Karl Stern, who was then conducting a business similar to that which was and theretofore had been engaged in by the plaintiff, proposed to the plaintiff that she consolidate her business with that of Stern. The terms of consolidation were agreed upon, and the defendant corporation was formed and shares issued in the proportion of ten to Stern and one to plaintiff. Some few shares were placed in the hands of an employé for the purpose of making a third director. Stern characterized himself as the manager of the concern. By-laws were adopted, among which was one containing the provision that salaries of the officers and employés should be fixed by the board of directors. It does not appear that the directors formally acted under that provision. As a part of the arrangement between the plaintiff and Stern, the matter of salaries to be drawn by each of them was considered, and it was agreed that Stern should receive $50 per week and the plaintiff $25. However, according to the plaintiff's testimony, Stern said that as the business needed capital he and the plaintiff should not draw the full amount of their salary at the start, and, agreeing to that suggestion, plaintiff for the first year drew but $15 per week. At the end of the first year a meeting of the stockholders was held, and an advance of $2.50 per week was allowed on account of the salary to be paid to the plaintiff. Plaintiff, from April 1 to August 10, 1918, drew $17.50 per week. At the latter date she ceased to render any services, and later brought this action. In her complaint she claimed the right to recover the unpaid $10 per week for the first year's work and $12.50 per week for that period of time from April 1, 1918, to August 10th of the same year.

[1-3] The first contention of appellant is that the condition of the by-law, declaring that the directors should fix the salaries of officers and employés, was not complied with, and that any arrangement entered into between Stern and the plaintiff as to salaries to be paid was invalid. We think there is no merit in this contention. If the two persons who owned and controlled the corporation to all substantial effect agreed upon the salaries to be paid, where the corporate form was adopted only as a convenient agency for the handling of the business, such an agreement we think was valid and binding. Plaintiff testified that Stern and she "were the only ones concerned," and further, that when she suggested that some minutes be made on the books of the corporation, setting forth the amount of salaries, Stern replied that it was not necessary, and that his attorney had so advised him. The association of the two individuals constituted practically a partnership; the corporate organization being a

mere agency to be used in conducting the business. As to whether the agreement to pay the added compensation had been made as alleged and testified to by the plaintiff, was for the trial court to determine, as the evidence was conflicting on that point. There was ample evidence to sustain the finding that such agreement had been made. However, the amount for which the court gave judgment is in excess of the amount shown by the evidence to be due the plaintiff. This condition, no doubt, arose through error in preparing the findings, but it necessitates a reversal of the judgment, as we cannot here direct an amendment of findings of fact. The court's findings followed the allegations of the complaint, particularly as to the second cause of action, which covered the period of service between April 1, 1918, and the 10th day of August, 1918. The complaint alleged that between those dates plaintiff received only $15 per week, when her own testimony showed that she received $17.50. Hence the findings are not sustained by the evidence, and the amount of the judgment, under the facts, should be reduced.

For the reason given, the judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

47 Cal. App. 646

PETERSON v. LIGHTFOOT. (Civ. 3373.)

(District Court of Appeal, First District, Division 2, California. May 21, 1920.)

1. Appeal and error ⟹80(3)—Judgment in accounting between partners held final and appealable.

A judgment in a suit for partnership accounting, providing that the assets of the partnership be sold by a commissioner and that upon the return of the commissioner and the equal division of the assets between the parties a final judgment should be entered dissolving the partnership or declaring it dissolved, was a final judgment from which an appeal could be taken.

2. Appeal and error ⟹1010(1)—Findings supported by evidence not disturbed.

Findings of the lower court when supported by evidence will not be disturbed on appeal.

3. Partnership ⟹318—Suit for accounting addressed to equitable jurisdiction.

A suit for partnership accounting is one addressed to the equitable jurisdiction of the court.

4. Partnership ⟹310—Partner on dissolution held entitled to interest in name of business owned by another partner.

Where one partner was in business under a certain name prior to the creation of the partnership, the name at such time having no value, but being made valuable by the joint efforts of the partners, in an accounting on dissolution the name should be considered an asset of the corporation, the partnership not having any other asset.

5. Partnership ⟹310—Recordation of name of partnership by partner in own name is in interest of partnership.

The relationship between partners is confidential, and the recordation by one partner, in his own name, of the name under which the partnership had been doing business for six months, in contemplation of law, was in the interest of the partnership.

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

Action by Gus A. Peterson against R. W. Lightfoot. Judgment for plaintiff, and defendant appeals. Affirmed.

W. A. Alderson, of Los Angeles, for appellant.

Halsey W. Allen, of Redlands, for respondent.

BRITTAIN, J. The defendant appeals from a judgment in a suit for partnership accounting. The judgment provided that the assets of the partnership be sold by a commissioner, and, upon the return of the commissioner and the equal division of the assets between the parties, a final judgment be entered dissolving the partnership or declaring it dissolved.

[1] The respondent contends that the judgment is a nonappealable interlocutory order. The findings and conclusions of law finally determined the rights of the parties, leaving only the transmutation of the assets into cash and their equal division to be done. The appellant claims that the court was in error in determining that the assets ordered to be sold belonged to the partnership and he claims ownership of them himself. If his contentions in this regard should be sustained by the appellate court after the sale of his property, he would be without remedy or find himself compelled to resort to a doubtful remedy against the purchaser at the commissioner's sale. For all practical purposes of disposing of the issues tried the judgment was final. "The question, as affecting the right of appeal is not what the form of the order may be but what is its legal effect." Estate of West, 162 Cal. 352, 122 Pac. 953; Byrne v. Hoag, 126 Cal. 283, 58 Pac. 688; People v. Bank of Mendocino County, 133 Cal. 107, 65 Pac. 124; Clark v. Dunnam, 46 Cal. 204.

[2] There was no written agreement by which the partnership was formed. From the oral testimony of the partners and others, the trial court found that the claim of the appellant that the partnership was one of

profits only was not sustained. There was evidence to support this finding and it is controlling on this appeal. The appellant states that there is but one question to be determined, and that is whether the name "Redlands Auto Service" was a part of the assets of the partnership.

From the findings it appears that in May, 1914, the defendant purchased an automobile on which he caused to be painted the name in question. For about three weeks he operated the machine for hire under that name to designate the business in which he was engaged. In June he associated with himself, his brother, who owned another automobile, which was thereafter similarly used. The partnership business was operated under the firm name of "Redlands Auto Service." Shortly after, during the same month, the plaintiff became a member of the partnership, he contributing $640 to the common fund, that being the value of each of the machines then used in the business. In April, 1915, the defendant's brother sold his interest to the partnership, then composed of the parties to this suit. Thereafter the business was carried on under the same name it had been carried on from the time the first partnership was formed. In December, 1914, while the partnership was composed of the three men the defendant caused the name "Redlands Auto Service" to be registered in the office of the secretary of state in his own name. This was done without the knowledge of the plaintiff, who was not informed of the fact until after the dissolution of the partnership in July, 1918. During all the intervening time the business of the partnership was carried on under that name. It was further found, and the finding is supported by the evidence and by reasonable inferences therefrom, that at the time of the formation of the partnership the name had no value, but by the joint efforts of the partners in conducting the business from June, 1914, to July, 1918, when the partnership was dissolved, "the good will of the partnership business, including the right, title and interest of said partnership in said firm name, became, and at the time of the dissolution of said partnership was, and now is, of the value of $800."

[3] The appellant's contentions that the adoption and use of a trade-name immediately fixes its status as personal property, and that a single act of use with the intent to continue that use confers a right in the original user, may be conceded without affecting the propriety of the judgment. The suit for partnership accounting is one addressed to the equitable jurisdiction of the court. Andrade v. Superior Court, 75 Cal. 459–463, 17 Pac. 531.

[4] Under the facts found, even though the name was originally owned by the appellant, the court, in adjusting the respective interests of the parties, properly considered all the circumstances. The name, which had been used for three weeks, was of no value. The respondent went into the business carried on by appellant at the request of the latter as a partner. It was agreed that the appellant's automobile, which had value, should be used in the business, but the ownership retained. It was also agreed that the money invested in the business by the respondent should be used for the purchase of a machine. Before the termination of the partnership each of the partners had in use in the business two automobiles owned by them separately. On dissolution each retained his own tangible property. The name which was worthless when the partnership was formed was an asset and apparently the only asset of the business at that time. It was made valuable by the joint efforts of the two partners. If it had been some other kind of tangible personal property so worthless as not to have been the subject of agreement, but a part of the business establishment when the partnership was formed, and had had bestowed upon it the work of both partners for a period of three years, in use constantly as partnership property and without claim by the original owner, until at the time of the dissolution it came to have a substantial value produced solely by their joint work, it would be manifestly inequitable that it should be given to only one of the two who had produced the value.

[5] It is said in the appellant's brief that the recordation of the name added nothing to his common-law rights. Neither could the secret recordation of the name by the appellant cause any diminution of the rights of his partner. The relationship was confidential and the recordation by one of the partners of the name under which the partnership had been doing business for six months, in contemplation of law, was in the interest of the partnership.

From an examination of the entire record it does not appear that incidental matters touched upon in the briefs require notice here.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

47 Cal. App. 666

IMPERIAL DEVELOPMENT CO. v. CITY OF CALEXICO et al. (Civ. 3356.)

(District Court of Appeal, First District, Division 2, California. May 22, 1920. Hearing Denied by Supreme Court July 19, 1920.)

1. Commerce ⟸77—Imported cotton in storage in original bales not taxable.

Flat bales of cotton and bales of bollies imported into California by a Mexican corporation authorized to do business there, and stored by it in a warehouse, *held* not subject to taxation by the state, though flat bales were not suitable for transportation, though the cotton was not stored all in one portion of the warehouse, but was stored with home-grown cotton and at different dates, and though no import duties were paid on it to the United States, cotton being on the free list.

2. Taxation ⟸543(8)—Taxpayer asking general relief entitled to relief warranted by facts shown.

Where plaintiff, a Mexican corporation seeking to be relieved from taxes by the state on imported cotton in storage in the original bales, has asked for general relief, it is entitled to such relief as the facts shown on trial warrant, whether by way of return of the goods or refund of the amount of tax paid under protest.

3. Appeal and error ⟸883 — Respondent on account of stipulation and lack of objection not in possession to urge exceptions tendered late.

Where counsel stipulated that the judgment roll, notice of intention to move for new trial, order denying motion for a new trial, and plaintiff's bill of exceptions, should constitute the record on appeal, and no objection was made to the power of the trial court to allow and determine motion of new trial, or to settle bill of exceptions, respondent is not in position to urge on appeal, in objecting to consideration of the bill of exceptions containing the agreed statement of facts, that the bill was not tendered until too late because appellant relied on pendency of his motion for new trial to interrupt running of time allowed for presenting bill.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by the Imperial Development Company, against the City of Calexico and others. From judgment for defendants, plaintiff appeals. Reversed, with instructions to render judgment for plaintiff.

Louis Lamy, of Calexico, for appellant.

M. C. Atchison, City Atty., of Calexico, for respondents.

J. W. Hocker, of Los Angeles, amicus curiæ.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment against it in an action to have certain taxes assessed against its property declared void, and for general relief. The trial was had upon an agreed statement of facts as follows:

"That at all times mentioned or referred to in plaintiff's amended complaint herein, the plaintiff was, and now is, a corporation duly formed and existing under the laws of the republic of Mexico, duly qualified and entitled to do business in the state of California, and having a branch office and place of business in the city of Calexico, in the county of Imperial and state of California.

"That the defendant city of Calexico is a municipal corporation of the sixth class in said state.

"That the defendant Paul B. Steintorf is, and at all times mentioned or referred to in said amended complaint was, the duly elected, qualified, and acting assessor of said city of Calexico.

"That the plaintiff at all said times and at noon of March 4, 1918, was the owner of, in the possession and entitled to the possession at and in said city of Calexico, county and state aforesaid, of 349 bales of cotton, and 14 bales of bollies; said cotton being of the value of, to wit, $63,000, and said bollies being of the value of, to wit, $2,000, at all the times mentioned or referred to in said amended complaint.

"That said cotton and bollies were owned and imported by plaintiff from said Republic of Mexico, and were duly entered through the port of Calexico aforesaid, after the payment by plaintiff of all the duties imposed by law. That said cotton and bollies were contained in unbroken original packages, to wit, in flat bales as same came from the gin; and, immediately after the entry of the same at said port, said merchandise was placed, for storage, in the Calexico Compress Company's yards at Calexico aforesaid, where it remained the property of plaintiff in the original forms and packages in which it was imported.

"That said cotton was not stored in any one place, or in one particular portion of said compress company's building or yards, but was scattered in different portions of said yards in different amounts in which it was brought in on different occasions. That although marked for identification, it was scattered here and there with the general mass of cotton stored in said yards. That said Calexico Compress Company had stored with it, and was storing thousands of bales of cotton owned by divers and many persons, much of which was produced in the United States. That plaintiff at different times since the said 4th day of March, 1918, and after payment by it under protest of the taxes levied and assessed against said cotton has sold and offered for sale portions of said cotton. That said cotton at the time of the assessment herein was not in transit, or in the possession of any railroad company for transit, but was being held indefinitely, subject to storage charges and sales. That there is no difference in the manner of storing and handling cotton of the plaintiff from the manner of storing and handling cotton of other producers storing cotton in said yards which last cotton has been raised and produced in the state of California.

"That said Calexico Compress Company is a public service corporation of the state of California, which offers, among other things, to the cotton growers, including this plaintiff, facilities for storing, compressing, exposing for sale, selling, transporting, shipping, and the general handling of cotton.

"That cotton as it comes from the gin in 'flat' bales is not in a suitable condition for shipping or transportation, except between points where the distances are very short, but, before said cotton is shipped any long distance, it is the custom to compress said bales into a more compact form by the Calexico Compress Company, before delivering same to the railroad for transportation.

"That while said imported property was so owned and possessed by plaintiff as aforesaid, and in the condition stated in this stipulation, on, to wit, March 4, 1918, the defendants levied an assessment and tax upon the same, of $1.12 per bale for said cotton, and of 90 cents per bale for said bollies.

"That plaintiff demanded of defendants the delivery of said imported property, but defendants always refused to deliver the same, and now refuse unless the taxes so levied and assessed against said property were and are first paid, which plaintiff refused and refuses to do."

[1] These facts, we think, make the present case closely analogous to the case of Low v. Austin, 13 Wall. 29, 20 L. Ed. 517. This was a California case which was carried to the United States Supreme Court on a writ of error, the contention there being the same as the contention here, i. e., that goods imported from a foreign country are not subject to state taxation while remaining in the original packages, unbroken and unsold in the hands of the importer, whether the tax be imposed upon the goods as imports, or upon the goods as part of the general property of the citizens of the state which is subject to an ad valorem tax.

In the present case, the respondent contends, as was done in the Low Case, that the goods have become a part of the general property of the state and are subject to ad valorem taxes; that they are stored with goods grown in the United States, and therefore have become mingled with such goods and are subject to the same taxes, etc. Almost precisely the same arguments appear in the decision of the state court in the Low Case, a considerable portion of which decision is set out in the opinion of the Supreme Court of the United States, at pages 30 and 31 thereof. But these contentions were held to be unsound by the highest court in the land. In said case of Low v. Austin, supra, the plaintiff had imported wines from France, which he had placed in his warehouse at San Francisco in the original cases, and had offered them for sale. While in the warehouse the wines were assessed for state, city, and county taxes. Low refused to pay the tax, and the collector levied upon the wines and was about to sell them, when Low paid the charges under protest, and brought an action to recover the amount so paid. The opinion of Mr. Justice Field in that case seems to us to answer all the contentions of the respondent here. It is based upon the well-known case of Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678, and reasserts the doctrine of that case that goods imported do not lose their character as imports and become incorporated into the mass of property of the state until they have passed out of the hands of the importer, or until they have been removed by said importer from the original packages in which they were imported.

It is admitted by the stipulation as to facts that the goods were in their original bales. Respondents seek to distinguish flat bales from other varieties of bales, and urge upon our attention that flat bales are not a suitable arrangement for long transportation. This seems to us quite immaterial. The pertinent fact is that the goods were in the bales in which they were imported. When the importer seeks to convey the goods any considerable distance, he will be obliged to change the original packages, and then become liable to state taxes.

Respondents seek aid from the admitted fact that the cotton was not all stored in one portion of the warehouse, and that it was stored in a warehouse in which homegrown cotton was also stored, and, further, that it was assembled and stored at different dates. The relevancy of these matters is not apparent to us. If the rule would be applicable to 349 bales of cotton considered as one lot, it would be applicable to one bale. Therefore, if each bale was stored in a different warehouse, or in a different part of the same warehouse, and if each bale had been brought to the warehouse at a different time, the principle would be none the less applicable, for it is admitted that the goods were marked for identification and were in the original bales. Under such circumstances, it could not become so mingled with the other goods stored in the warehouse as to lose its character as an import while it continued to be the property of the importer. In the case of Low v. Austin, supra, the state court assumed in its opinion that the imported wines might be stored with wines of home manufacture, which would be sold in the same kind of container, but the United States court held that, nevertheless, the goods, so long as contained in the original packages and remaining in the hands of the importer, were beyond the taxing power of the state. See, also, Brown v. Maryland, supra; Waring v. Mayor, 8 Wall. 110, 122, 19 L. Ed. 342.

The respondents ask us to take judicial notice that no duties were paid to the United

States on the cotton, as it is one of the articles upon the "free list," and they argue that since no duties were exacted by the United States, the state has power to tax. We cannot agree with the respondents that this fact changes the principle involved. We have been cited to no case involving this particular point; but it would seem reasonable that if the permission of the United States to import articles into the country, granted upon the payment of a tax, means immunity from state taxation under certain conditions, that permission to import goods is equally as efficacious when it is given without the payment of a special tax or duty. The duties upon imported articles are fixed in larger or smaller amounts, or are removed entirely, according to the policy adopted by the government for the best interests of the country, and the fact that the policy may vary in the case of different articles and at different times should not affect the principle applied to imported goods. We think goods are no less imported goods when the government permits them to be imported without exacting a duty for that privilege, than when the government imposes a heavy charge upon the privilege of importation.

[2] This disposes of the only question raised by the briefs which goes to the merits. The respondents interpose numerous technical objections. They argue that because the statement of facts shows that the plaintiffs paid the taxes under protest, therefore the goods are no longer held by the collector, and the question of whether the tax is illegal or not has become a moot question in this action, and that the plaintiff must bring another action to recover its money. Plaintiff has asked for general relief. It is entitled to such relief as the facts shown at the trial will warrant. The court has power to do full justice between the parties in disposing of this litigation. The determination of the validity of the tax sought to be levied is but the determination of the foundation of plaintiff's relief. If the facts had shown that the tax had not been paid, the court should have declared the tax illegal and ordered a return of the cotton, or the portion of the cotton, if any, held by the assessor. The stipulation as to facts is not clear. It seems contradictory. It does not show whether all or part of the cotton is being held by the assessor, or whether it has all been released. At one place it is stipulated that—

"After payment by it under protest of the taxes levied and assessed against said cotton, plaintiff has sold, and offered for sale, portions of said cotton."

In the last paragraph of the stipulation, the fact appears as follows:

"That plaintiff demanded of defendants the delivery of said imported property, but defendants always refused to deliver the same, and now refuse unless the taxes so levied and assessed against said property were, and are first paid, which plaintiff refused and refuses to do."

Findings of fact were waived, and this stipulation as to facts takes the place of findings by the court, but, because of its uncertainty in regard to this important matter, we are unable to tell whether judgment should be directed for a return of the property, or for a return of the tax collected. Plaintiff is entitled to some relief, but the record is not sufficiently definite to enable us to make anything but an alternative order.

[3] Respondent objects to a consideration of the bill of exceptions, containing this agreed statement of facts because the judgment was rendered and notice of entry given on August 30, and the bill of exceptions was not tendered until October 2. Appellant relied upon the pendency of its motion for a new trial to interrupt the running of the time allowed for presenting the bill of exceptions, and respondent contends that, as the case was tried upon an agreed statement of facts, plaintiff was not entitled to a new trial, and therefore the pendency of its motion would not serve to extend the time for appeal. The record contains a stipulation of counsel that the "judgment roll, notice of intention to move for a new trial, order denying motion for a new trial, and plaintiff's bill of exceptions shall constitute the record on appeal herein." No objection appears to have been made to the power of the trial court to hear and determine the motion for a new trial, or to settle the bill of exceptions. Under such circumstances, we do not think respondent is in a position to urge the point here, even though it were meritorious. Furthermore, even though we take respondent's position and consider only the judgment roll, we find that substantially all the facts set out in the stipulation of facts are admitted by the pleadings, and upon the judgment roll alone, with these admissions in the pleadings, we should reach the same conclusion.

The judgment is reversed with instructions to the trial court to render judgment for the plaintiff declaring the tax illegal and void, and for a return of the property held, or of the money collected by the assessor, as the facts may warrant.

We concur: NOURSE, J.; BRITTAIN, J.

47 Cal. App. 704

IMPERIAL DEVELOPMENT CO. v. IMPERIAL COUNTY et al. (Civ. 3357.)

(District Court of Appeal, First District, Division 2, California. May 22, 1920.)

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by the Imperial Development Company against the County of Imperial and others. From judgment for defendants, plaintiff appeals. Reversed, with instructions to render judgment for plaintiff.

Louis Lamy, of Calexico, for appellant.
E. R. Simon, Dist. Atty., of El Centro, for respondents.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment against it in an action to have certain taxes assessed against its property by the assessor of the county of Imperial declared illegal and void, and for general relief. The facts are identical with the facts in the case of Imperial Development Co. v. City of Calexico (No. 3356) 191 Pac. 50, this day decided by this court, except that this action involves a county tax sought to be levied, while No. 3356 involves a city tax sought to be levied. The questions of law involved are identical, and, for the reasons set forth in the decision this day rendered in case No. 3356, the judgment herein is reversed, with instructions to the trial court to render judgment for the plaintiff declaring the tax illegal and void, and for a return of the property held, or of the money collected by the assessor, as the facts may warrant.

We concur: NOURSE, J.; BRITTAIN, J.

47 Cal. App. 599

SECURITY MORTGAGE CO. v. DELFS et al. (Civ. 3368.)

(District Court of Appeal, First District, Division 2, California. May 20, 1920. Rehearing Denied June 17, 1920. Denied by Supreme Court July 19, 1920.)

1. Appeal and error ⟸1011(1)—Finding on conflicting evidence not disturbed.

Appellate court is bound by a finding of trial court based on conflicting evidence.

2. Estoppel ⟸72—Loss from fraud of third person borne by party rendering injury possible.

As between two innocent parties who have both suffered from fraud of a third person, the loss must fall where the course of business has placed it, if no fraud or negligence is imputable to either party; but where the fraud or negligence of either has furnished the means whereby the third party has perpetrated the fraud and occasioned the loss, equity demands that the loss must be borne by the one who by his conduct has rendered the injury possible, under Civ. Code, § 3543.

3. Pledges ⟸23—Claim of assignee of collateral prior to rights under prior unrecorded assignment.

An assignee of a note and mortgage as collateral for a loan did all that was required of him in the ordinary course of business when he made inquiry of the mortgagors to ascertain if they had any equitable defenses, and his rights were prior to rights under a prior unrecorded assignment.

4. Pledges ⟸23—Prior assignee not injured by failure of subsequent innocent assignee to record assignment.

An assignee of a note and mortgage, which failed to record the same, cannot maintain that the equities between itself and a subsequent assignee are equal because the subsequent assignee did not record its assignment.

5. Estoppel ⟸72—Second assignee had rights superior to first assignee because he caused the loss.

When a mortgage on realty is fraudulently transferred to two innocent assignees under separate assignments prior to recordation, or other notice, of either assignment, as between the two innocent parties, the priority of transfer and of the recordation, or other notice, is important only when the equities are equal, but where the assignee second in point of time takes without notice and for a valuable consideration through the negligence of the other, and the equities are otherwise equal, he by whose negligence the fraud occurred must be the sufferer.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by the Security Mortgage Company against John Delfs and others, in which the Continental National Bank of Los Angeles intervened. Judgment for plaintiff, and intervener appeals. Affirmed.

Kemp, Mitchell & Silberberg, of Los Angeles, for appellant.
Swanwick & Donnelly and S. E. Vermilyea, both of Los Angeles (J. W. Swanwick, of Los Angeles, of counsel), for respondent.

NOURSE, J. Defendant and cross-complainant appeals from a judgment in favor of plaintiff foreclosing a mortgage executed by the defendants John and Rosa Delfs to one Gore, in February, 1917, and assigned by him to appellant in March, 1917, and thereafter on July 26, 1917, assigned by Gore to respondent. The facts material to the case are that, after the execution and delivery of the note and mortgage, Gore, the payee thereof, assigned both on a separate paper to appellant as security for the payment of an independent debt due from Gore to appellant; that thereafter, and on July 18, 1917, appellant, acting through its regularly employed note teller, delivered the note and mortgage to Gore, taking his receipt therefor; that on July 26, 1917, Gore

assigned the note and mortgage to respondent as security for the payment of $10,000 borrowed by him from respondent at that time; that thereafter, and on the 21st day of September, 1917, appellant duly recorded its assignment of March, 1917, and four days later respondent's assignment of July 26th was recorded. The action was commenced by respondent to foreclose the mortgage so assigned to it, and appellant intervened, claiming to be the owner of the note and mortgage as a prior assignee.

The trial court found that respondent was the owner of the note and mortgage at the time of the trial, that appellant was estopped from claiming ownership, and that the note and mortgage had been voluntarily delivered to Gore by appellant. These findings are attacked by appellant, the first two as being insufficient to support the judgment, the last as not being supported by the evidence.

[1] First giving consideration to the attack upon the finding of voluntary delivery of the note and mortgage, it appears that the evidence was conflicting, a portion of it having been given by deposition, and this being contradicted by appellant's witnesses during the course of the trial. The evidence was that the documents were voluntarily delivered to Gore by the regularly employed note teller of the bank, who took Gore's receipt upon a printed form of receipt for collateral furnished him by the bank for the purpose. The teller testified that he had been specially authorized by the bank president to so deliver collateral to Gore whenever he wanted it, and that it was a customary and frequent thing to do if the particular form of receipt was signed. The only conflict in the evidence as to this point was in the testimony of one of the witnesses for appellant to the effect that the authority given the note teller was restricted, so that he should not permit Gore to take the documents away from the bank premises. Upon such conflict this court is bound by the finding of the trial court.

With this finding taken as conclusive, the evidence is that, on the 18th day of July, 1917, appellant, while then having possession of the note and mortgage as security for an indebtedness of Gore to appellant, voluntarily delivered them to Gore, indorsed in blank by Gore, the payee thereof, with nothing appearing upon either document to indicate that appellant, or any one other than Gore, had any interest in them; that appellant permitted the note and mortgage to remain in the possession of Gore without recordation of its assignment or notice to the mortgagors until some six months after its execution; that the loan of respondent to Gore was made in good faith, for a valuable consideration, and without notice or knowledge that any one other than Gore claimed any interest in the note and mortgage; and that the loan would not have been made by respondent if appellant had not permitted Gore to assume possession of the documents free from any notice of adverse claims.

Upon this showing it is argued that appellant was negligent in failing to record its assignment prior to the transfer to respondent, in failing to give notice to the mortgagors, and in delivering the documents to Gore without some notation thereon showing its claim. From this it is argued that, as respondent was an innocent purchaser for value and without notice, appellant is estopped by its own negligence from asserting its claim, or that, the loss having occurred through appellant's negligence, it must be the one to suffer.

[2] As between two innocent parties who have both suffered from the fraud of a third, the loss must fall where the course of business has placed it, if no fault or negligence is imputable to either party. But where the fault or negligence of either has furnished the means whereby the third party has perpetrated the fraud and occasioned the loss, equity demands that the loss must be borne by the one who by his conduct has rendered the injury possible. 10 R. C. L. p. 695. This is in effect a restatement of the well-known maxim of jurisprudence found in section 3543 of our Civil Code that—

"Where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer."

[3, 4] The doctrine so expressed is often referred to as estoppel by negligence, which is not strictly correct because some of the essential elements of estoppel are lacking in ordinary negligence. But it makes little difference by what term the rule is designated. If the facts found are sufficient to bring the conclusion of law within the rule, the judgment must be affirmed. Here the findings of fact amply support the conclusion that respondent was the innocent party, and that the loss occurred through the negligence of appellant. The note and mortgage were made payable to Gore, and bore every evidence of title and transferability in him. Respondent made inquiry of the mortgagors to ascertain if they had any equitable defenses against the apparent liability, and ascertained that they had none. This was all that prudence in the ordinary course of business required. If appellant had recorded its assignment or had given notice thereof to the mortgagors, its rights could have been protected. "The policy of the law is against upholding secret liens and charges to the injury of innocent subsequent purchasers and incumbrancers." Smitton v. McCullough (Sup.) 189 Pac. 686. But appellant argues that the equities are equal be-

cause respondent also was negligent. The only negligence ascribed to respondent in the briefs is its failure to record its assignment prior to recordation by appellant. But negligence without injury is of no avail to appellant. Upon its theory of the case, if respondent had so recorded its assignment, appellant would have been without any remedy whatsoever, while the failure to record did not injure appellant.

The facts of the case differ materially from those in Chase v. Whitmore, 68 Cal. 545, 9 Pac. 942, Kohn v. Sacramento Elec. Gas, etc., Co., 168 Cal. 1, 141 Pac. 626, and Crocker National Bank v. Byrne & McDonnell, 178 Cal. 329, 173 Pac. 752, because in each one of those cases the securities were taken from the true owner by fraud or theft, whereas in the case at bar the note and mortgage were assigned to appellant as security for the payment of another independent debt, and the pledgee voluntarily released its security to the pledgor without fraud on the part of any one acting for the pledgee. Furthermore, as Gore was the payee of the note, he was, so long as it remained in his possession at least, the apparent, if not the true, owner. Under such circumstances respondent was not required to make inquiry of all the world to see if others had some prior claim.

[5] There remains for consideration the question of the effect of the recordation acts upon the rights of the parties. Appellant contends that respondent's assignment must be held void because under section 1215, Civil Code, an assignment of a mortgage upon real property must be treated as a conveyance within the meaning of section 1214, Civil Code, which provides that every such conveyance is void "as against any subsequent purchaser * * * in good faith and for a valuable consideration, whose conveyance is first duly recorded." But assuming that the section includes an assignment of a mortgage, appellant was not a "subsequent purchaser" within the meaning of the section, the purpose of which is to protect the interests of the innocent purchaser as against the claim of the prior owner who has failed to avail himself of the protection afforded him by the statute of giving notice to the world by the recordation of the conveyance. But even so, these sections of the Code were enacted at the same time as section 2934 of the same Code, which provides that—

"An assignment of a mortgage may be recorded in like manner as a mortgage, and such record operates as notice to all persons subsequently deriving title to the mortgage from the assignor."

Here again is the evident purpose to make the recordation of the assignment notice to those subsequently deriving title. "There is no provision as to prior assignees, or that the recordation should have 'like effect' as recordations of grants." Adler v. Sargent, 109 Cal. 42, 49, 41 Pac. 799, 800. The effect of the recordation of a grant of real property is fixed by section 1107 of the Civil Code, which favors the one who in good faith and for a valuable consideration has acquired title by an instrument that is first duly recorded. There is no express provision in the Code to the effect that the recordation of an assignment of a mortgage on real property shall in itself operate to defeat the title of an innocent assignee for value who took without notice and prior to the recordation. Inasmuch as section 2934 relates specifically to assignments of mortgages and was adopted concurrently with sections 1214 and 1215, Civil Code, the effect of recordation of an assignment must be that prescribed therein, namely, notice to those subsequently deriving title. And such must be the rule in view of the decision in the Adler Case, which has been accepted as the judicial interpretation of that section. From this it follows as a rule of law that when a mortgage on realty is fraudulently transferred to two innocent assignees under separate assignments prior to recordation or other notice of either assignment, as between the two innocent parties the priority of the transfer and of the recordation or other notice is important only when the equities are equal. But where the assignee second in point of time takes without notice and for a valuable consideration through the negligence of the other, and the equities are otherwise equal, he by whose negligence the fraud occurred must be the sufferer.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

(47 Cal. App. 197)

GOULD v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 3434; S. F. 9501.)

(District Court of Appeal, First District, Division 2, California. April 22, 1920. Opinion of Supreme Court in Bank, Denying Hearing, June 21, 1920.)

1. Divorce ⟸156—Marital status not affected by interlocutory decree.

Under the provision of Civ. Code, § 132, the marital status of parties to a divorce action is not affected by the interlocutory decree, further than that it establishes conclusively, unless set aside on appeal or in some other manner expressly provided by statute, the right to divorce upon the expiration of the statutory period of one year.

2. Husband and wife ⟸266—May change character of community property by agreement.

Husband and wife may agree in regard to their real property rights, and may change community property to separate property.

3. Husband and wife ⟸266—Court may change community to separate property.

Court has the power to change community property to separate property in an action between husband and wife, where such disposition is essential to a proper determination of their relative rights.

4. Divorce ⟸156—Preliminary interlocutory order, when final.

Despite the old equity rules, under which preliminary interlocutory orders had none of the characteristics of a final decree, the statutory interlocutory decree in divorce suits is final, except as against such attack as is authorized by statute.

5. Divorce ⟸252 — Interlocutory decree of divorce a "contract" as to property rights.

An interlocutory decree of divorce, dividing the community property, constitutes a contract between the parties, especially where entered by consent, and settles the property rights of the parties for the time being, and until some proceeding is begun to change the status.

6. Divorce ⟸156—Death of husband after interlocutory decree terminated marital relations.

Death of husband after interlocutory decree of divorce terminated the marital relationship, and the entry of a final decree thereafter had no effect upon the personal status of the surviving wife.

7. Prohibition ⟸28—Legal effect of decree not reviewable.

On application for prohibition to prevent the setting aside of a final decree of divorce, it would not be proper to determine legal effect of contract evidenced by interlocutory decree upon property rights of the parties, if any, which vested in the wife on the death of the husband shortly after the entry of the interlocutory decree.

8. Prohibition ⟸27—Presumption in favor of action of trial court.

On application for prohibition to prevent setting aside of a final decree of divorce entered in accordance with the interlocutory decree, every presumption in favor of the action of the trial court in entering the final decree must be indulged.

9. Divorce ⟸156—Court may enter final decree after death of husband.

Where husband died shortly after entry of an interlocutory decree of divorce in his favor, the court, under Civ. Code, § 132, had jurisdiction thereafter to enter a final decree of divorce; the interlocutory decree having made a division of community property.

10. Divorce ⟸165(4)—No jurisdiction to set aside final decree of divorce after expiration of year.

One year having expired from entry of final decree of divorce, court had no jurisdiction to entertain a motion to set aside the decree under Code Civ. Proc. § 473.

On Hearing in Supreme Court.

11. Husband and wife ⟸266—Contracts dividing property valid.

Contracts between husband and wife respecting the division of property are valid, under Civ. Code, § 159, even though made in an action for divorce, and the rights thereunder do not of necessity cease upon the death of either party after interlocutory decree of divorce, and before final decree.

Angellotti, C. J., and Wilbur, J., dissenting.

Application by E. B. Gould, as special administrator of the estate of Frank H. Gould, deceased, for a writ of prohibition, prayed to be directed to the Superior Court of the State of California in and for the City and County of San Francisco and others. Writ granted in District Court of Appeal, and hearing denied in Supreme Court.

See, also, 183 Pac. 146.

Walter E. Drobisch, of San Francisco, and Frank Freeman, of Willows, for petitioner.

Joseph A. Brown and Fabian D. Brown, both of San Francisco, for respondents.

PER CURIAM. The petitioner, as the special administrator of the estate of Frank H. Gould, deceased, seeks by prohibition to prevent the superior court, and Hon. E. P. Shortall, one of its judges, in San Francisco, from setting aside a final decree of divorce, entered after the death of petitioner's intestate.

In his lifetime Frank H. Gould was the husband of Nettie Gould. There was one child of the marriage, a daughter, who was between 16 and 17 years old in October, 1916, when the husband sued for divorce. After answer and cross-complaint, the trial resulted in an interlocutory decree of divorce in favor of the wife. It was dated

January 19, 1918. The court found there was community property, which, except as hereinafter stated, was not described in the findings. The divorce was granted on the ground of willful desertion by the husband. The decree recited that the parties had agreed in open court "to the division of the community property and the provision for alimony as hereinafter provided." The provisions referred to were that the husband pay the wife as permanent alimony and for her support the sum of $75 per month, commencing on January 21, 1918; that he should pay her immediately $2,500 in cash; that out of the community property and the homestead there be assigned and allotted to the wife a certain lot of land in San Francisco, together with the dwelling house and other improvements thereon, and all the furniture and personal property contained therein, "the same to be her sole and separate property and estate." It was ordered that the plaintiff pay and discharge a certain incumbrance upon said real property within three years, and in the interim that he should pay all interest and other charges secured by mortgage; "it being the true intent of this decree to award said real property to the defendant, Nettie Gould, free and clear of incumbrances, but to allow the said Frank H. Gould the said period of three years from and after date hereof within which to discharge the said lien or incumbrance." All other property of the community was expressly assigned and allotted to the plaintiff, free and clear of all claim of the defendant. It was further decreed that each of the parties respectively should immediately execute and deliver to the other quitclaim deeds conveying the respective property, and providing that, if either party should fail or omit to make the deed within a period of 10 days after the date of the decree, the clerk of the court execute the deed to carry the decree into effect. The last clause of the decree provided that upon the expiration of one year final judgment granting the defendant a divorce, "and providing for the permanent alimony and support of defendant and the division and allotment of the community property, and other relief, as hereinbefore in this interlocutory decree provided, be entered herein." The decree was recorded on January 21, 1918.

[1] Under the provisions of section 132 of the Civil Code, the marital status of the parties was not affected by the interlocutory decree, further than that it established conclusively, unless set aside on appeal or in some other manner expressly provided by statute, the defendant's right to divorce upon the expiration of the statutory period of one year, which must elapse between the entry of the interlocutory decree and the final judgment dissolving the marriage. In re Seiler's Estate, 164 Cal. 181, 128 Pac. 334, Ann. Cas. 1914B, 1093; Pereira v. Pereira, 156 Cal. 9, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107; Estate of Walker, 169 Cal. 400, 146 Pac. 868; Brown v. Brown, 170 Cal. 1, 147 Pac. 1168; London Guaranty & Accident Co. v. Industrial Accident Commission, 184 Pac. 864.

[2-4] In so far as the interlocutory decree affected the property rights of the parties, it appears from the facts in the record that they agreed to the division of the community property in accordance with the terms of the decree. Husband and wife may agree in regard to their real property rights, and may change the character of community property to separate property. A court has the power to do so in an action between them, where such disposition is essential to a proper determination of their relative rights. Fay v. Fay, 165 Cal. 469–472, 132 Pac. 1040. Despite the old equity rules, under which preliminary interlocutory orders had none of the characteristics of final decrees, the statutory interlocutory decree in divorce suits in this state is final, except as against such attack as is authorized by statute. Suttman v. Superior Court, 174 Cal. 243, 162 Pac. 1032; Bancroft v. Bancroft, 178 Cal. 367, 173 Pac. 582.

[5] The interlocutory decree constituted a contract between the parties, both because the provisions for division of the community property were by consent and because "a judgment is a contract, in the highest sense of the term." Wallace v. Eldredge, 27 Cal. 498; Stuart v. Lander, 16 Cal. 372, 76 Am. Dec. 538; Bean v. Loryea, 81 Cal. 151, 22 Pac. 513; Dore v. Thornburgh, 90 Cal. 64, 27 Pac. 30, 25 Am. St. Rep. 100; Weaver v. San Francisco, 146 Cal. 728, 81 Pac. 119. The interlocutory decree, so far as it determined the rights of the parties, is a contract between them, temporary and provisional in its nature; but it settled the rights of the parties for the time being, "and until some action, proceeding, or motion is begun to change the status, and some order is made thereon which has that effect, or until they become reconciled and resume marital relations, in which event their mutual obligations are, for the time being, at least, restored." London Guaranty & Accident Co. v. Industrial Accident Commission, supra; Olson v. Superior Court, 175 Cal. 250, 165 Pac. 706, 1 A. L. R. 1589.

Frank H. Gould died after the entry of the interlocutory decree, and within one month after its date, on February 14, 1918, an order was made in the superior court reciting the fact that an affidavit and consent of Nettie Gould, special administratrix of the estate of Frank H. Gould, deceased, had been filed, and E. B. Gould, special administrator of the estate, was substituted and made a party plaintiff in the divorce action. On January 23, 1919, two days after the expiration of

the year following the entry of the interlocutory decree, on the court's own motion, the final decree of divorce was entered. It embodied all the provisions of the interlocutory decree. On January 4, 1920, Nettie Gould moved in said court for an order setting aside the final decree of divorce, which motion remained under submission until the application for writ of prohibition was filed in this court and the alternative writ issued on March 13, 1920, more than one year after the entry of the final decree.

[6, 7] The death of the husband terminated the marital relationship. The entry of the final decree thereafter had no effect upon the personal status of the surviving wife. Estate of Seiler, supra; Estate of Dargie, 162 Cal. 51, 121 Pac. 320. Upon the death of the husband, the rights of the wife under the laws of succession, if he died intestate, were fixed, unless those rights had theretofore been changed by contract with the husband. Since no appeal was taken from the interlocutory decree, and it was not set aside under section 473 of the Code of Civil Procedure, it became final and conclusive at the expiration of six months from its entry. It was a contract in regard to the community property. It is not necessary, nor would it be proper on this proceeding, to determine the legal effect of the contract evidenced by the interlocutory decree upon the property rights, if any, which vested in the wife on the death of the husband. It may be in a proper proceeding that it will be necessary for a court, called upon to construe the interlocutory decree, to determine whether the transfer of the property to the wife and her waiver of claim against other property of the husband barred her from claiming in his estate any property under the laws of succession, or whether the legal effect of the decree was simply to convert the portion of what had theretofore been community property into separate property of the husband, in which, if he died intestate, it may appear that she has a heritable right. These statements are not to be understood as conveying any expression of opinion on the part of this court upon these matters, but as a basis for the conclusions reached in regard to the power of the trial court to enter the final decree or to set it aside.

[8, 9] Because this court on this proceeding cannot determine the legal effect of the interlocutory decree, it must, under well-established rules, indulge in every presumption in favor of the action of the trial court in entering the final decree, if, indeed, that action requires support by presumption. In the absence of a showing to the contrary, it must be presumed that the deeds, required to be executed within ten days after the interlocutory decree was made, were in fact executed, and that to forestall any doubt which might arise as to the vesting of title under such deeds, or pursuant to the interlocutory decree, the final decree was entered. It does not seem necessary either to indulge in presumption upon this subject or to consider the reason which may have actuated the trial court to enter the final decree. The last clause of section 132 of the Civil Code expressly provides that "the death of either party after the entry of the interlocutory judgment does not impair the power of the court to enter final judgment as hereinbefore provided." Since the marriage was not dissolved by the entry of the final decree, but by the death of the husband, and since the interlocutory decree established the property rights to the extent above indicated, it would appear, on the one hand, that the entry of the final decree accomplished nothing; on the other, that it injured nobody. While the law neither does nor requires idle things, it cannot be said that, when the Legislature expressly reserved the power in the court to make the final decree, it was an idle act. Under the Code section, it is concluded that the court had jurisdiction to enter the final judgment.

[10] The decree not having been set aside until more than one year had elapsed, the application for the writ of prohibition is based on the ground that to grant the pending motion is beyond the jurisdiction of the trial court. The respondents resist the granting of the writ solely on the ground that a judgment, which appears on its face to have been made without jurisdiction, is void, and may be attacked at any time. The conclusion that the trial court had jurisdiction to make the final decree disposes of the respondents' contention. The time having expired within which the trial court might have set aside the final decree under section 473 of the Code of Civil Procedure, on motion, it has lost jurisdiction to entertain such a motion. Byrne v. Hoag, 116 Cal. 1, 47 Pac. 775.

Let the peremptory writ of prohibition issue as prayed for by the petitioner.

All three Justices concur.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition for rehearing is denied. The opinion of the District Court of Appeal does not mention the decision given by the District Court of Appeal of the Second District, filed on October 30, 1919, in Gloyd v. Superior Court, 185 Pac. 995. In that case a petition for a rehearing was denied by the Supreme Court. It is claimed in the present petition for rehearing that the opinion in this case is directly contrary to that in the Gloyd Case. We think there is a clear distinction between them, and one which takes away any apparent conflict. In the Gloyd Case the interlocutory decree of divorce was a simple declaration that the husband, who was plaintiff, was

entitled to a divorce. It did not purport to adjudicate property rights of any character. It was there held that in such a case, upon the death of the plaintiff during the ensuing year, the superior court lost jurisdiction to proceed further in the case, because the death dissolved the marriage, and extinguished the pre-existing marriage status which formed the subject-matter of the action, leaving nothing upon which the only final decree that could be made could operate.

[11] In the present case the interlocutory decree not only declared that the wife, who was cross-complainant, was entitled to a divorce, but also purported to confirm and provide for the performance of an agreement made by the husband and wife in open court dividing the community property between them and providing for the payment to the wife by the husband of a permanent monthly sum for her support. It was held that, although the court may have lost jurisdiction to make a final decree, after the death of the husband, dissolving the marriage status, the property rights fixed by the agreement and confirmed by the interlocutory decree still remained in existence, and that as to them the court retained jurisdiction to enter the final decree in the manner specified in the interlocutory decree. Inasmuch as a husband and wife may, even if no divorce action is pending, make such contracts as they may choose respecting property (Civ. Code, § 159), such contracts, whether made in an action for divorce or otherwise, are valid, and the rights thereunder do not of necessity cease upon the death of either party. Consequently the subject-matter of the interlocutory decree, so far as such rights are concerned, was not extinguished by the death of Gould during the year succeeding the interlocutory decree, and the court to that extent retained jurisdiction. This distinction is clearly indicated in the opinion of the District Court, and it was also intimated in the Gloyd Case, although in that case it was not necessary to say what the result would be as to the property relations inasmuch as none had been adjudicated by the interlocutory decree.

SHAW, OLNEY, SLOANE, LAWLOR, and LENNON, JJ., concur.

ANGELLOTTI, C. J., and WILBUR, J., dissent from order denying rehearing.

47 Cal. App. 742

MALOOF v. DAVIS et al. (Civ. 2134.)

(District Court of Appeal, Third District, California. May 26, 1920.)

1. Brokers ⇐86(4)—Evidence held to show broker the procuring cause of sale.

In real estate broker's action for commission, evidence *held* to sustain finding that broker was the procuring cause of the sale.

2. Appeal and error ⇐1010(1)—Court's finding conclusive where rational inference from evidence.

Questions of fact must be resolved in favor of court's finding if the finding is a rational inference from the showing.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by A. Maloof against Ona M. Davis and others. Judgment for plaintiff, and defendants appeal. Affirmed.

R. L. Thompson, of Santa Rosa, for appellants.

Kellogg & Kyle, of Santa Rosa, for respondent.

BURNETT, J. The action was for compensation for securing a purchaser of real estate belonging to defendants. The written contract, executed by the parties, upon which the action was brought, as far as necessary to quote, was in the following language:

"I hereby authorize A. Maloof, as my agent, for a term of ——— days from this date, and hereafter until notified by me in writing that the same is withdrawn (this is not exclusive), to offer for sale and sell for me for the sum of $35,000, my real property (describing it). And I further agree that if my said agent shall procure a buyer for said property, or if a sale or exchange is made by, or upon any information received through such agency, whether such sale or exchange be made before or after the expiration of this agreement, at the above or any other amount named or accepted by me, I will pay to said agents five per cent. of such selling price, as a commission and compensation for such services."

The court found that—

"The plaintiff interested one John Greott in the purchase of said property * * * and thereafter, the said defendants sold said ranch property to said John Greott and accepted and received from him, in payment thereof, the sum of thirty thousand dollars * * * That the said buyer of property, to wit, John Greott, was procured by plaintiff, and said sale to said John Greott was made by and upon information received by said defendants from plaintiff."

The foregoing findings present the only questions that are in controversy between the parties. In fact, during the progress of the trial the learned counsel for appellants declared, "I suppose the only question in this case is, was Mr. Gray or Mr. Greott the purchaser," and subsequently he said:

"Of course, the real issue in this case is what was the procuring cause of the sale; that is the real question in this case."

The record contains evidence of these facts as substantially stated by respondent: After the execution of this contract, and before any written notice of its withdrawal, plain-

tiff took several persons out to look at the property in an endeavor to interest them as buyers. Finally he did interest one John Greott, took him and his wife out to inspect the property in person, introduced them to the defendants as being possible purchasers, and spent with them some two or three hours while they examined and talked with the defendants about the entire property. Greott liked the place and was very much interested in it, but, having already an offer outstanding for another place, said he would make no offer until he heard from that, when he would talk business, would let them know and would make them an offer. Within a short time afterward plaintiff saw Greott twice, and each time was advised that Greott had not yet found out about his offer for the other place, and was not ready to talk business concerning the purchase of this. While plaintiff was still waiting for Greott to answer, he evidently learned that he was not to get the other place, and the transaction occurred by which the defendants conveyed their property to Greott by deed dated April 19, 1919, and on the same day taken by Greott himself to the recorder's office, and there recorded. Thereupon plaintiff sought out Greott and inquired why he had bought defendants' place from other agents, and he replied that it was because he could get it cheaper from Gray, the real estate agent with whom the property had been listed by defendants. Respondent thereupon went to one of the defendants, and demanded his commission on account of the sale to his customer, and was informed that appellants had obtained a contract from Gray that they should have no commission to pay, and if any was paid it was up to Gray. Greott paid the entire purchase price of $30,000, which was accepted by defendants, in the form of three personal checks, one April 12, 1919, for $5,000; two on April 19, 1919, the date of the execution and delivery of the deed, one for $12,640, and one for $12,360.

[1] Of course, we are not concerned with the fact that evidence was introduced on behalf of appellants to the effect that one Gray was the real purchaser of the property, and that the deed was taken in the name of Greott to secure him for the purchase price, which he advanced. It is sufficient for us to say that the court's conclusion to the contrary finds in the record sufficient legal support. Moreover, according to the testimony of Mr. Gray, he and Mr. Greott were partners in the transaction; in other words, the purchase was made by and for the benefit equally of both of them. Upon this theory the participation of Greott in the purchase is sufficient, in a legal sense, to satisfy the requirement that the purchaser must be one secured by the agent.

[2] The question whether the efforts of the agent were the procuring cause of the sale must be resolved in favor of the finding of the court, since such is a rational inference from the showing made. When an agent takes a prospective purchaser upon the land, introduces him to the owner, and succeeds in awakening his interest in the property, and the purchaser expresses a tentative or conditional purpose to buy the land, and a short time thereafter he does purchase it, no surprise should be occasioned if a court concludes that the agent's efforts were the procuring cause of the sale, or at least that the sale "was made by, through or upon information received through such agent."

Appellants have treated us to an interesting and instructive discussion of the principles governing brokers' commissions, but they are familiar to the profession and have been often considered by this and other appellate courts of the state, and we deem further consideration of them unnecessary.

The question here is one of evidence, and, since there is no legal objection to the validity of the contract made by the parties, and we are satisfied that there is support for the conclusion of the trial judge that plaintiff fully executed the terms and conditions of said contract entitling him to the compensation therein provided, we need to go no further.

The judgment is affirmed.

We concur: NICOL, Presiding Judge pro tem.; HART, J.

47 Cal. App. 650

SMITH v. SMITH et al. (Civ. 3374.)

(District Court of Appeal, First District, Division 2, California. May 21, 1920.)

1. Appeal and error ⇐1011(1)—Finding of trial court on conflicting evidence conclusive.

Where the testimony of plaintiff husband that an assignment was not made as a gift to his wife, a defendant, merely created a conflict of evidence on the point, the finding of trial court that it was a gift is conclusive as to the fact.

2. Husband and wife ⇐259, 266—Earnings of wife during marriage may be relinquished to her.

Though the earnings of a wife from her labor or business during marriage are as a rule community property, the husband may relinquish to the wife the right to such earnings without any consideration other than their mutual consent, and they then become her separate property.

3. Husband and wife ⇐266—Husband's agreement to relinquish wife's earnings to her may be inferred.

Agreement of a husband to relinquish to his wife her separate earnings may be proved

by evidence as to the acts and conduct of the husband, with relation to the earnings of the wife or business conducted by her as community property, indicating that he did not regard them as community property.

4. Husband and wife ⊂=266—Wife's earnings relinquished to her became separate property.

Wife's millinery business and earnings derived therefrom relinquished to her by her husband *held* to have become her separate property.

5. Husband and wife ⊂=258—Expenditure of community funds on wife's separate realty does not change title.

The expenditure by a husband of either his separate funds or the community funds of himself and wife in improving his wife's separate property does not change title to the realty as between them, in the absence of any specific agreement to the contrary; title to improvements following land.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by James E. Smith against Phelia L. P. Smith and others. From judgment for defendants, plaintiff appeals. Affirmed.

H. S. Laughlin and Muhleman & Crump, all of Los Angeles, for appellant.

Swaffield & Swaffield, of Long Beach, for respondents.

NOURSE, J. Action to quiet title. Judgment was rendered in favor of defendant on her cross-complaint, from which plaintiff appeals.

Plaintiff and defendant Phelia L. P. Smith are husband and wife. The property which is the subject of this litigation consists of a lot, with dwelling house thereon, situate in Long Beach, Cal. The complaint alleged that at the time of the commencement of this action plaintiff was the owner and in possession of the lot in question; that said lot was purchased and improved subsequent to the marriage of plaintiff and defendant Smith with the separate funds of plaintiff and the community funds of plaintiff and defendant Smith, and the deed for convenience was taken in the name of defendant Smith; that defendant Smith had incumbered the same by giving a trust deed to defendant the Title Insurance & Trust Company to secure the repayment of money had from defendant Long Beach Savings Bank & Trust Company, and had used the money thus acquired without the knowledge or consent of plaintiff to the detriment of plaintiff and his interests in said property. Defendant Smith answered and cross-complained, denying the allegations of the complaint and setting up title in herself as her separate property and estate. The trial court found that the property was neither purchased with the separate funds of plaintiff and the community funds of plaintiff and defendant Smith nor the separate funds of plaintiff. On the contrary, the court found that defendant Smith acquired, by assignment from her sister, as a gift, her equity in a contract for the purchase of lot 8, on which the sister had paid the sum of $335, leaving an unpaid balance of $165, which defendant Smith thereafter paid out of her separate funds.

[1] Appellant contends that the property in question is community property because it was acquired subsequent to marriage and with community funds. This contention is based upon the testimony of appellant that the assignment was not made as a gift to his wife, but that she purchased her sister's equity in the lot for $50 which he furnished for that purpose. This merely created a conflict in the evidence, and the finding of the court that it was a gift is conclusive as to that fact. Appellant further argues that the $165 balance paid by defendant Smith on the purchase price of the lot was money derived from a millinery business conducted by Mrs. Smith subsequent to their marriage and hence was community property.

[2, 3] Although the earnings of the wife during marriage are, as a rule, community property, the husband may relinquish to the wife the right to such earnings without any consideration other than their mutual consent, and they then become her separate property. Wren v. Wren, 100 Cal. 276, 279, 34 Pac. 775, 38 Am. St. Rep. 287; Larson v. Larson, 15 Cal. App. 531, 535, 115 Pac. 340. Such an agreement may be proved by evidence as to the acts and conduct of the husband with relation to the earnings of the wife or business conducted by her as community property indicating that he did not regard them as community property. Larson v. Larson, supra; Kaltschmidt v. Weber, 145 Cal. 593, 599, 79 Pac. 272. Respondent Smith testified that she started the millinery business with $200 received from the sale of property concededly her separate estate. This was denied by appellant, who claimed that he advanced the $200 to help her start the business. But, as significant of his attitude with relation to that business, he testified:

"The proceeds from that store were kept in her personal bank account. I had no access to that bank account. I knew when she started the business and ran the bank account along that way. * * * I knew that she started her bank account. The bank account was in her own name. * * * I had a bank account and she had hers, and I do not think either had access to the other's account. She paid the bills for that millinery business out of her account except the first one; that was the money I let her have to start it with, that is, the big bill, $200 or $250; except for that she paid the bills out of her own account and she ordered the goods, selected them and determined what they should be. That was the way it always was from the beginning."

[4] It is apparent from an examination of the entire evidence that plaintiff made no claim to the business, but treated it as his wife's separate property. The right to the millinery business and the earnings derived therefrom having been thus relinquished by plaintiff to his wife, they did, in fact, become her separate property.

The only other question for determination is whether the original character of the lot was changed by the improvements erected thereon, which consisted of a dwelling house costing in the neighborhood of $3,000. The trial court found on conflicting evidence that all improvements were made by respondent Smith out of her separate estate and property, that appellant from time to time advanced some moneys and funds out of his own separate estate and out of the community property, which were used in the improvements, that all such advancements were made by appellant as a gift to respondent Smith as and for her own separate estate and property; and that all improvements now on the real property are the sole and separate property and estate of respondent Smith, and that appellant has no interest in either the land or improvements thereon. The findings on the facts are conclusive. The conclusions of law drawn therefrom are supported by the authorities.

[5] The expenditure by a husband of either his separate funds or the community funds of himself and wife in improving his wife's separate property does not operate to change the title. As between them, in the absence of any specific agreement to the contrary, the title to the improvements follows the land. Carlson v. Carlson, 10 Cal. App. 300, 303, 101 Pac. 923; Shaw v. Bernal, 163 Cal. 262, 267, 268, 124 Pac. 1012. Appellant does not claim that there was any agreement that the property should become community property. Where no agreement has been made, "it must rather be presumed that it was the intention of the husband to advance the money paid for the benefit of the wife's estate and that it was intended to accrue to her interest." Carlson v. Carlson, supra.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

47 Cal. App. 571

GORDON et al. v. HILLMAN et ux.

(Civ. 3375.)

(District Court of Appeal, First District, Division 2, California. May 19, 1920.)

1. Judgment ⇐925—Suit maintainable on foreign judgment under full faith clause.

Under Fed. Const. art. 4, § 1, suit on a final judgment affirmed by the Supreme Court of the state of Washington can be maintained in California.

2. Judgment ⇐818(1)—Full faith clause applies only to records of courts having jurisdiction.

Federal Const. art. 4, § 1, requiring courts of one state to give full faith and credit to the judgments of a sister state, applies to records and proceedings of courts only in so far as they have jurisdiction, and the jurisdiction of the court rendering judgment sued on in another state is always open to inquiry under proper averments questioning its conclusiveness.

3. Judgment ⇐820—Judgment of other state now sued on may be resisted for fraud going to jurisdiction.

Since a fraud may go to the question of jurisdiction, judgment rendered in another state may be resisted for fraud going to the jurisdiction of the court of such other state, either with respect to the subject-matter or the person, or which constitutes a fraud on the law of the forum, or which operates to deprive a party against whom judgment was rendered of opportunity to present a meritorious defense.

4. Judgment ⇐946—Default in suit on judgment of other state reversed, where original judgment set aside.

If original judgment of the state of Washington sued on in California had been set aside prior to defendants' motion to vacate default judgment against them rendered in California, the default judgment would have been reversed as a matter of right, and restitution awarded defendants.

5. Judgment ⇐922 — Setting aside former judgment sued on has same effect as where suit brought on judgment subsequently reversed.

The effect of setting aside former judgment sued on is the same as where suit is brought on a judgment which is thereafter reversed on appeal, when the judgment debtor is entitled to have the second judgment set aside as of record and as of right.

6. Judgment ⇐946—Motion to vacate default judgment on judgment of other state sought to be vacated for fraud should have been granted.

While motion made under Code Civ. Proc. § 473, to vacate a default judgment is addressed to the discretion of the court, and its action will not be disturbed on appeal except for clear showing of abuse under particular circumstances shown, *held* that defendants' motion, made within the six months limited by the Code section to vacate default judgment against them on a judgment of the state of Washington, which they had instituted proceedings to set aside for fraud, should have been granted.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by E. M. Gordon, individually and as administrator of the estate of Eva P. Gordon, deceased, against C. D. Hillman and Bessie Olive Hillman, his wife. From an order denying defendants' motion to vacate default judgment against them, they appeal. Reversed.

Arthur C. Vaughan, of Los Angeles, for appellants.

R. B. Turnbull and Harold E. Thomas, both of Los Angeles, for respondents.

BRITTAIN, J. The defendants appeal from an order denying motion to vacate a default judgment in the superior court in Los Angeles in a suit to recover some $40,000 upon a judgment alleged to have been rendered in the superior court of King county, in the state of Washington, on January 5, 1918.

Judgment was entered on June 4, 1918. Notice of motion to vacate the default judgment was given on November 9, 1918. It was accompanied by an affidavit of the defendant and a copy of the proposed answer. The judgment of the Washington court was attacked on the ground of fraud. It is stated in the affidavit that the defendant, Hillman, was not aware of the fact that he and his codefendant had a good and substantial defense to the action in Los Angeles until May 20, 1918. It further appears that on May 25, 1918, proceedings were commenced in the Washington court to vacate and set aside the original judgment. The defendants advised their attorney that they had done so, and instructed him to file an answer on their behalf in the Los Angeles suit, setting up the alleged fraud upon them as a defense therein. It is alleged they relied entirely upon their attorney to protect their interests in this connection, and to prepare and file all necessary papers and pleadings, and that they believed he had taken and would take such steps as were necessary and proper to protect their interests; that they did not know of the entry of the default or of the judgment by default until June 20, 1918, when they were advised by their attorney that they might move at any time within six months to vacate the judgment; that this statement was coupled with the advice that the defendants should delay making their motion in the Los Angeles court, so that the Washington court might have an opportunity to pass upon the proceedings instituted there prior to the hearing of the motion in Los Angeles. It appears, inferentially, at least, that the proceedings to vacate the judgment were pending in the Washington court at the time of the hearing of the motion, which was denied on November 20, 1918. Reference is made in the appellants' brief to a decision rendered by the Supreme Court in the state of Washington on December 30, 1919, the effect of which was to cause the vacation of the judgment on which the suit in the Los Angeles court was based. Gordon v. Hillman (Wash.) 186 Pac. 651. Considered as a matter of fact, the action of the Washington court, after the determination of the motion in the Los Angeles court, can be given no consideration. When the motion was made, however, within the six months limited by section 473 of the Code of Civil Procedure, it appeared that the proceedings to vacate the Washington judgment were pending.

[1-3] From the showing made on behalf of the defendants, it appeared that the judgment on which the suit was brought was a final judgment, having been affirmed by the Supreme Court of Washington. Suit on such a judgment may be maintained under constitutional provisions requiring courts of one state to give full faith and credit to the judgments of a sister state. Const. art. 4, § 1. That clause of the Constitution applies to records and proceedings of courts only so far as they have jurisdiction. Board of Public Works v. Columbia College, 17 Wall. (U. S.) 521, 21 L. Ed. 687; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Renaud v. Abbott, 116 U. S. 277, 6 Sup. Ct. 1194, 29 L. Ed. 629. The jurisdiction of the court rendering the judgment is always open to inquiry under proper averments, where its conclusiveness is questioned in another state. Knowles v. Logansport, etc., 19 Wall. (U. S.) 58, 22 L. Ed. 70; Simmons v. Saul, 138 U. S. 439, 11 Sup. Ct. 369, 34 L. Ed. 1054; Brown v. Fletcher, 210 U. S. 82, 28 Sup. Ct. 702, 52 L. Ed. 966; Hancock's Estate, 156 Cal. 804, 106 Pac. 58, 134 Am. St. Rep. 177. Since fraud may go to the very question of jurisdiction, a judgment rendered in another state may be resisted on the ground of fraud which goes to the jurisdiction of the court to render the questioned judgment either with respect to the subject-matter or of the person, or which constitutes a fraud upon the law of the forum, or which operates to deprive the party against whom the judgment was rendered of an opportunity to defend the suit when he had a meritorious defense to it. 32 L. R. A. (N. S.) p. 939, note.

[4] Enough facts to resist a general demurrer appear in the answer proposed to be filed at the time of the hearing of the motion to vacate the default to show fraud in obtaining the judgment on which the suit was brought in a matter affecting the jurisdiction of the court. If the original judgment had been set aside prior to the motion, the default judgment rendered in this state would have been reversed as a matter of right, and restitution would have been awarded to the defendant. Merchants' Ins. Co. v. De Wolf, 33 Pa. 45, 75 Am. Dec. 577; Davidson v. Smith, 1 Bissel (U. S.) 352; Faber v. Hovey, 117 Mass. 108, 19 Am. Rep. 398.

[5] The effect of setting aside a former judgment is the same as where suit is brought on a judgment which is thereafter reversed on appeal, when the judgment debtor is entitled to have the second judgment set aside as of record and as of right. Heckling v. Allen (C. C.) 15 Fed. 196; Banning v. Taylor, 24 Pa. 297; Ætna Ins. Co. v. Aldrich,

38 Wis. 107; Mann v. Ætna Ins. Co., 38 Wis. 114; Ward v. Marshall, 96 Cal. 155, 30 Pac. 1113, 31 Am. St. Rep. 198; Dissenting Opinion, Justice Olney, in Re Vincent Riccardi (April 16, 1920) 59 Cal. Dec. 478, 484–485.

If within six months after the entry of the default judgment the Supreme Court of Washington had vacated the original judgment, that fact would have been a sufficient reason for vacating the default judgment. If the default judgment should be held good, the subsequent action of the Supreme Court of Washington would have required its vacation under the rules announced in the cases which have been last cited. If the Washington judgment had been set aside before the default was entered, that fact, properly pleaded, would have constituted a bar to the prosecution of the California suit. It is not the purpose of the law to deprive litigants of the right to have their cases determined upon their merits, nor to invite new litigation to overturn judgments. While the affirmative allegations of the proposed answer were denied in counter affidavits, the trial court was in no position to determine the merits of the case, nor to adjudge finally, in the absence of evidence, upon the truth of the formal allegations and denials. It clearly appeared both that proceedings were pending in Washington to set aside the judgment, which was the basis of the California suit, and that the issue of fraud was tendered by the proposed answer. The application amounted to a plea in abatement in a case where, but for the pendency of the Washington proceedings, a plea in bar must have been held good.

[6] While a motion made under section 473 of the Code of Civil Procedure is addressed to the discretion of the court, and its action will not be disturbed on appeal, unless it shall be made clearly to appear that such discretion has been abused, under the circumstances shown by the record, the motion to vacate the default judgment, made within the six months limited by the Code section, should have been granted.

The order appealed from is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

47 Cal. App. 660

JIMENO v. COMMONWEALTH HOME BUILDERS et al. (Civ. 3187.)

(District Court of Appeal, Second District, Division 2, California. May 21, 1920.)

1. Libel and slander ⟸89(1)—Allegation of special damages unnecessary.

If an alleged defamatory publication is libelous per se, no allegation of special damages is necessary.

2. Libel and slander ⟸16—Written or printed words, when "libelous per se."

Words written or printed may be libelous and actionable per se if they tend to expose the plaintiff to public hatred, contempt, ridicule, aversion, or disgrace, and to induce an evil opinion of him in the minds of right-thinking persons and deprive him of friendly intercourse and society, even though the same words, if spoken, would not have been actionable, and such is true where the publication is of a character that usually, ordinarily, and naturally detracts from the reputation and standing of the defamed person.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Libel.]

3. Libel and slander ⟸100(1)—Allegation sufficient to permit proof that words applied to plaintiff.

A broad allegation that the matter in articles was published of and concerning plaintiff was sufficient to permit proof that the readers, who knew the extrinsic circumstances, understood that the words referred to plaintiff, under Code Civ. Proc. § 460.

4. Libel and slander ⟸18—Charging stockholder with intent to wreck corporation libelous per se.

An article charging that a stockholder, who was chairman of a committee of stockholders organized to investigate the affairs of a corporation and protect the rights and interests of its stockholders, intended to wreck it and to do some coarse financiering, *held* libelous and actionable per se, under Civ. Code, § 45.

5. Libel and slander ⟸19—Article must be considered as a whole.

To test its libelous quality, a publication must be considered as a whole.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by F. D. Jimeno against the Commonwealth Home Builders, a corporation, and others. Judgment for defendants, and plaintiff appeals. Reversed.

N. C. Folsom, and Jesse A. Gyger, of Los Angeles, for appellant.

Fred W. Heatherly, N. Blackstock, and Alfred W. Allen, all of Los Angeles, for repondents.

FINLAYSON, P. J. This is an action for libel. Defendants demurred to plaintiff's second amended complaint upon the grounds that it does not state a cause of action and that, in certain particulars, it is uncertain, ambiguous, and unintelligible. The demurrer was sustained. Plaintiff declined further to amend, and judgment for defendants was entered accordingly. From that judgment plaintiff appeals.

The extrinsic circumstances alleged in the complaint by way of inducement, and to be considered in connection with the alleged libel, are these: Plaintiff, an investment broker, dealing in real estate and mining invest-

ments, was, at all times mentioned in the complaint, a stockholder in the defendant corporation, Commonwealth Home Builders, and chairman of a committee of stockholders organized to investigate the affairs of that corporation and protect the rights and interests of all its stockholders. The investigating committee was organized at the instance of plaintiff, with the advice and assistance of one C. E. Norton, a reputable auditor. Prior to the publication complained of, plaintiff was a stockholder in, and had been active in the promotion of, the Stone Chief Mining Company, a corporation.

The complaint alleges that, for the purpose of exposing plaintiff to contempt, hatred, ridicule, and obloquy, defendants maliciously published and circulated, in the American Globe, a magazine, among the stockholders of the defendant corporation, of and concerning plaintiff, the following false and defamatory articles:

"Norton's Filibuster Expedition on Commonwealth Home Builders—A Fizzle.

"C. E. Norton, president of Original Home Builders of Los Angeles, as well as trustee for a little more than half of the stock, also a director of the Southern California Home Builders, in conjunction with Mr. Jimeno, an official and promoter of the Stone Chief Mining Co., and a stockholder of Commonwealth Home Builders, entertained some twenty-five stockholders of Commonwealth Home Builders, in the office of the Stone Chief Mining Co. on the evening of December 1, 1916. The editor of the American Globe received no notice of this happening, but did manage to secure just the information desired by stockholders who do not desire their wealthy corporation wrecked. * * * The little gathering seemed to be a cooked and dried affair. * * * As usual money was desired. It seems that the 4,000 stockholders are to contribute on the assessment basis of so much per share (to these men) which has not the sanction of the present sane and responsible administration, and no statement rendered—no questions asked. An unauthorized bill for $150 was presented by Mr. Jimeno, of the Stone Chief Mining Co. * * *"

"Protective System of Ruining Stockholders.

"Money greed will cause some people to do anything as long as they are able to keep out of jail. * * * The stockholder calls on a so-called auditor about whose antecedents no one knows anything, and whose record in corporation activities has never shown a clean winding up of affairs for stockholders of the other corporations concerned. The master brain (?) so steeped with greed for gold as to care nothing for the majority of stockholders' interests, whom he terms 'boobs' autocratically rises to the occasion. He maps out the campaign in such a manner as to prevent himself from being caught on conspiracy-to-wreck-corporation charges. 'This will cost you nothing. I will get you in control of that corporation and between you and me we ought to milk it for a long time.' 'But I do not understand the building and investment company business,' replies the stockholder. 'I have had some experience in oil, mining and wildcat schemes, though, if that would do any good.' Any office boy can do what you are to do, replied the self-styled auditor. * * * I will have another man look for certain information which we twist into such shape as to put the management of that building and investment company on the defensive. Anything to arouse suspicion and shatter confidence and the credit of the company. We don't care how many business deals we knock out, thereby depriving the stockholders of future profits, neither do we care how much damage we may cause the company otherwise, or how much expense we put it to, all of which affects the assets of stockholders. * * * Stockholders who satisfy themselves about the character and former business records of such 'Money Greed Meddlers' and corporation wreckers * * * would hardly be inclined to give these 'Intolerance Individuals' their support, proxies or votes. They have nothing at stake. * * * Protective Committee (?) composed of so-called auditor and stockholder receive: (1) Contributions from stockholders to carry on campaign of wrecking their own company, of which no account is given and which could run into some thousands of dollars. * * * Fine business for the auditor and stockholder but rather coarse financiering."

[1, 2] Respondents have not favored us with any printed points or authorities, and we are, therefore, somewhat in the dark as to the precise reasons for their attack upon the complaint. At the oral argument, their counsel contented themselves with the bare statement that nowhere in the complaint has plaintiff alleged any special damages. From this we infer that the chief, if not the only, ground relied upon by respondents, is the absence of an allegation of special damages. If, as we believe, the alleged defamatory publication is libelous per se, then no allegation of special damages is necessary. The courts have long recognized a distinction between written and oral defamation. While whatever charge will sustain a suit for slander when the words are merely spoken will sustain a suit for libel if they are written or printed and published, yet many charges which if merely spoken of another would not be actionable without proof of special damages, will be libelous per se when written or printed and published. Accordingly, it may be stated as a general proposition that words written or printed may be libelous and actionable per se, that is, actionable without any allegations of special damages, if they tend to expose the plaintiff to public hatred, contempt, ridicule, aversion, or disgrace, and to induce an evil opinion of him in the minds of right-thinking persons and deprive him of their friendly intercourse and society, even though the same words, if spoken, would not have been actionable. 25 Cyc. 250. If, on its face, the publication is of a character that usually, ordinarily, and naturally detracts from the reputation and standing of the plaintiff, and tends proximately and naturally

to deprive him of the confidence and esteem of others, thus causing him to be shunned or avoided, it is libelous per se, and special damages need not be alleged or proved. From such a publication the law presumes general damages as a natural and probable consequence.

[3] Some of the defamatory language in the libelous articles published by defendants manifestly refers solely to the auditor, C. E. Norton. Other defamatory portions of the articles seem to be aimed at both plaintiff and Norton, as, for example, the reference to "money greed meddlers." Still other portions leave the reader, ignorant of the extrinsic facts, in doubt as to whether Norton or plaintiff is the one referred to. By no colloquium could the pleader make applicable to plaintiff those words that obviously apply to Norton only. As to all the other defamatory charges, the broad allegation that the matter in the articles was published of and concerning plaintiff is sufficient to permit proof that the readers who knew the extrinsic circumstances understood that the words referred to plaintiff. Code Civ. Proc. § 460; Harris v. Zanone, 93 Cal. 59, 28 Pac. 845.

[4] We think the article is libelous and is actionable per se. Our Code defines libel as follows:

"Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Civ. Code, § 45.

As said in Tonini v. Cevasco, 114 Cal. 272, 46 Pac. 105, this definition "is very broad, and includes almost any language which upon its face has a natural tendency to injure a man's reputation either generally or with respect to his occupation."

If, as alleged, the defamatory matters were printed and published of and concerning plaintiff, no unprejudicial person of ordinary intelligence, reading the publication, could avoid the conclusion that it imputed to him grave and reprehensible misconduct—dishonest practices which, if established, would justly bring him into general contempt and disgrace. Upon its face, the language charged, if published of and concerning plaintiff, tended naturally, necessarily and proximately to produce some, at least, of the results mentioned in section 45 of the Civil Code.

[5] To test its libelous quality a publication must be considered as a whole. "The construction which it behooves a court of jutsice to put on a publication which is alleged to be libelous is to be derived as well from the expressions used as from the whole scope and apparent object of the writer." Cooper v. Greeley, 1 Denio (N. Y.) 358. Thus in the case cited, the charge was not "made in an open and direct manner," "but," it was said by the court, "an imputation made in that form is not the less actionable." In our opinion the innuendoes, as alleged in the complaint in this case, affix to the words their true meaning. It is alleged, by way of innuendo, that the language of the publication was intended to mean, and that the persons who read it understood it to mean, that "plaintiff had been connected with wildcat or fraudulent schemes in the past, and that plaintiff would 'do anything' so long as he should be 'able to keep out of jail'; that he had conspired with another to obtain information concerning the corporation Commonwealth Home Builders, and 'twist' such information into such shape as to rouse suspicion and shatter confidence and the credit of the company and to decrease the assets thereof for the purpose of obtaining a profit for himself, and that said plaintiff and one other are 'money greed meddlers and corporation wreckers'; that the plaintiff was attempting to get on a 'big pay roll,' and that the plaintiff was attempting unconscientious and 'coarse financiering.'" We think the language of the articles warrants the construction thus put upon it by plaintiff, and that the effect of the publication was to expose plaintiff to "obloquy," which is defined by Webster as "blame; reprehension." Surely no intelligent person could read this publication without understanding that it was meant to charge that plaintiff is not an honorable man—that he is a person who had been guilty of such reprehensible misconduct as should deter others from trusting him. As chairman of a stockholders' investigating committee, organized for the purpose of protecting the rights and interests of the stockholders of the defendant corporation, plaintiff held an important position of trust and confidence that demanded of him the exercise of the utmost good faith. And yet, if the charges be true, he has grossly violated that trust and treacherously betrayed the confidence of of those whose interests it was his duty to protect. Such an implication of lack of integrity is unquestionably actionable per se. A writing that charges another with violating a confidence that has been reposed in him or with treachery to his associates is actionable per se. 18 Am. & Eng. Ency. of Law (2d Ed.) 912.

In our opinion the complaint states a cause of action; and, as we see nothing in it that is ambiguous, uncertain, or unintelligible, we think it was not demurrable upon any of the grounds set forth in the special demurrer.

The judgment is reversed, and cause remanded, with directions to overrule the demurrer.

We concur: THOMAS, J.; WELLER, J.

(47 Cal. App. 683)

GLOS v. McBRIDE. (Civ. 3309.)

(District Court of Appeal, Second District, Division 1, California. May 22, 1920. Hearing Denied by Supreme Court July 19, 1920.)

1. Appeal and error ⊜907(5)—Presumed that lease absent from record, which plaintiff sought to set aside for illegality, did not show same on face.

Where a complaint seeking to set aside a lease, part of the consideration of which was that plaintiff and defendant though unmarried should cohabit as husband and wife, it will be presumed, the lease not being set forth, that the same did not on its face show the illegal consideration so as to be void under Civ. Code, § 1608, declaring that, if any part of a single consideration or of several considerations for a single object is unlawful, the entire contract is void.

2. Evidence ⊜60 — Parties presumed not to have entered into immoral relation.

In a suit to set aside as illegal a lease on the ground that part of the consideration was that the parties, though unmarried, should cohabit, it will not, in the absence of evidence or allegation to that effect, be presumed that the parties had entered into the immoral relation.

3. Landlord and tenant ⊜34(2)—Lessor may repudiate lease made in consideration of immoral relations, and have title quieted to remainder of term.

Where the parties to a lease agreed as one of the considerations that they should, though unmarried, cohabit, the owner of the land may, though she had begun the immoral relation, repudiate the lease and have her title quieted as to the remainder of the term, notwithstanding parties to an executed contract which is illegal will be left as the court finds them.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Amelia Glos against J. A. McBride. From a judgment for defendant after the sustaining of a demurrer to the complaint, plaintiff appeals. Reversed.

B. F. Thomas, of Santa Barbara, for appellant.

Benjamin P. Oakford, of Santa Barbara, for respondent.

SHAW, J. Action to quiet title. In addition to an allegation that plaintiff is owner of the land in fee simple and in possession thereof, it is alleged in the complaint that defendant, basing his right thereto upon a lease thereof made by plaintiff to defendant, the consideration of which "was in part that said plaintiff and said defendant (though not husband and wife) should live together on said parcel of land and should cohabit as man and wife," unjustly and without right claims an interest in the land adverse to plaintiff; followed by the usual prayer for relief. To this complaint the court sustained a general demurrer without leave to amend and gave judgment for defendant, from which plaintiff appeals.

[1] The ground of this ruling, as stated by the trial court, is that section 1608 of the Civil Code provides that "if any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void"; and that, since it appeared from the complaint that a part of the consideration for the lease was unlawful, its existence did not cast a cloud upon plaintiff's title. Conceding that no cloud is cast upon a plaintiff's title to land by an instrument which on its face discloses that it is void, we cannot in this case, since the lease is not exhibited by the record, assume the existence of such fact. On the contrary, upon the allegations of the complaint, the presumption is that on its face nothing appears affecting the validity of the instrument. It is the extrinsic facts alleged which render the lease void.

[2, 3] The chief ground upon which counsel for respondent insists upon the correctness of the ruling is that, as shown by the complaint, the contract had for its object the creation and continuance during the term of the lease, of an illicit relation between plaintiff and defendant, thus exhibiting her own turpitude, which constituted the consideration for the transfer of the leasehold. In other words, the complaint presents a case where the doors of the court are, as to both parties to the contract, closed; it will neither aid the one in the enforcement of the contract, nor give aid to the other in avoiding it. Abee v. Marr, 14 Cal. 210; Schmitt v. Gibson, 12 Cal. App. 407, 107 Pac. 571. While as to executed contracts of such nature, this is a rule of almost universal application, it is equally true that as to like contracts, which are executory, the law recognizes what is termed a locus penitentiæ accorded to a plaintiff, which, as applied to the facts here presented, is an opportunity to repudiate the agreement and refuse to be a party to the acts contemplated thereby. 2 Bouvier's Law Dictionary, p. 2043. Thus, it is generally held that a party to a wager, where the money is deposited with a stakeholder, may at any time before the event is determined repudiate the wager and demand the return of his money. Falkenburg v. Allen, 18 Okl. 210, 90 Pac. 415, 10 L. R. A. (N. S.) 494; Johnston v. Russell, 37 Cal. 670; Gridley v. Dorn, 57 Cal. 79, 80 Am. Rep. 110; Wright v. Stewart (C. C.) 130 Fed. 905.

Plaintiff, no doubt, intended to enter into the immoral relation and continue therein for the duration of the term of the lease, but persons may not be punished, either criminally or civilly, for wrongful intentions. It is the consummation of such intentions

that subjects them to the effects of the law. As to whether plaintiff and defendant lived together or cohabited as man and wife in accordance with the agreement made is not disclosed by the complaint, and, since the doing so would be contra bonos mores, we cannot, in the absence of allegation to that effect, assume they did. Indeed, the presumption is to the contrary. Conceding, however, that she did enter upon the life with defendant, as contemplated in the agreement, we do not think it can be said her day of repentance was past. The contract contemplated a continuing immoral relation, which, in our opinion, even though entered upon, plaintiff, in the locus penitentiæ accorded to her, might at any time repudiate and discontinue; and while the law would afford her no relief for the use of the leasehold estate covering the expired portion thereof, it should, as to the unexpired term thereof, and upon a showing of repentance, abandonment, and discontinuance of the shameful relation, grant her redress. In our opinion, the court erred in sustaining the demurrer.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

47 Cal. App. 685

WRIGHT-CALLENDER-ANDREWS CO. v. EATON. (Civ. 2935.)

(District Court of Appeal, Second District, Division 1, California. May 22, 1920. Hearing Denied by Supreme Court July 19, 1920.)

1. Brokers ⟸64(2)—Automobile not furnishing of house placed with broker for sale; "completely furnished."

An automobile *held* not included as part of the property to be sold under an agreement with a broker to furnish a buyer for a house "completely furnished," except certain articles named, and the broker was not entitled to compensation where the purchaser furnished refused to buy where the automobile was not included.

2. Evidence ⟸460(5)—Parol evidence inadmissible to vary broker's contract.

In an action by a broker for compensation for furnishing a purchaser under a contract, whereby he was to furnish a purchaser for "property completely furnished," parol evidence was inadmissible to show that an automobile was to be included in the furnishings, in view of Code Civ. Proc. §§ 1856, 1858.

3. Evidence ⟸442(1) — Contracts importing whole agreement not added to by parol.

Where parties deliberately and solemnly put their agreement in writing, using language which imports a complete expression of the agreement, the law presumes that they have introduced into it every material item and term intended to be inserted therein, and parol evidence cannot be admitted for the purpose of adding other terms or items thereto, in view of Code Civ. Proc. § 1858.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by the Wright-Callender-Andrews Company against Marie S. Eaton. Judgment for plaintiff, and defendant appeals. Reversed.

William Ellis Lady, of Los Angeles, for appellant.

Leonard B. Slosson and Slosson & Mitchell, all of Los Angeles, for respondent.

SHAW, J. In this action the trial court gave plaintiff judgment for services rendered in procuring a purchaser of certain real and personal property pursuant to the terms of a written contract executed by defendant, who appeals from the judgment.

The property is described in the contract as "3828 Wilshire Boulevard (city of Los Angeles), being lot 20 Western Wilshire Heights Tract. Property as is completely furnished except piano player, music, cuckoo clock, sewing machine and (picture) boat. Old silver, family pictures, pier glass and books." Within the time fixed therefor in said contract, plaintiff, claiming to have acted in pursuance of authority conferred thereby, and representing to him that the personal property included an automobile owned by defendant, presented a party ready, able, and willing to purchase the property, if the automobile was included, at the price specified. Defendant refused to transfer the automobile, by reason of which fact the proposed sale was not consummated. The question is whether the contract covered the automobile. The error of the court upon which appellant argues for a reversal occurred in the trial of this issue, as to which the court found adversely to defendant.

[1, 2] No mention of the automobile is made in the contract. Nevertheless, counsel for respondent argue that, since the property was located in the "fashionable Wilshire residence district," an automobile might very well be deemed a part of the furnishing of "property completely furnished." With equal propriety, as said by counsel for appellant, they might insist that an areoplane or pair of horses and carriage should be deemed a part thereof. We cannot believe the trial judge in making the findings was influenced in so doing by such argument; but that, deeming the case a proper one therefor, the court, over defendant's objection, and not for the purpose of reforming the contract, permitted the introduction of parol testimony, upon which, since the contract by its terms did not include the automobile, it is clear the court based its decision. In so

doing we think it erred. Section 1856, Code of Civil Procedure, provides that—

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases: (1) Where a mistake or imperfection of the writing is put in issue by the pleadings."

As stated, no such question is in issue here. This section further provides that, in ascertaining the proper construction of an instrument, other evidence as to the circumstances under which it was made may be received for the purpose of placing the judge in the position of those whose language he is to interpret; and further provides that where the contract is of doubtful meaning, or it is necessary to explain an extrinsic ambiguity, other evidence may be received.

[3] To our minds, the terms of the contract are perfectly clear, and it should be construed in accordance with the plain import of the language used therein. No reason was presented for the reception of parol evidence other than to add thereto terms which it did not, as written, include; and, as provided by section 1858, Code of Civil Procedure, when construing contracts of such character, "the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted." Including the automobile was clearly doing that which the judge is prohibited from doing by the provisions of the statute. Upon like evidence, since a written contract, however carefully drawn, would afford a party no protection, he could be completely divested of his substance. Authorities in support of the proposition would seem unnecessary. Suffice it to say that where parties deliberately and solemnly put their agreement in writing, using language which imports a complete expression of the whole agreement, the law presumes that they have introduced into it every material item and term intended to be inserted therein, and parol evidence cannot be admitted for the purpose of adding other terms or items thereto. Thompson v. Libby, 34 Minn. 374, 26 N. W. 1; Greenleaf on Ev., § 275; Harrison v. McCormick, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469. In our opinion, the court erred in admitting parol evidence upon which it based the finding that, under the terms of the contract, plaintiff was authorized to include in the sale of the property described in the contract the automobile, which was not specified therein.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

47 Cal. App. 637

FEDERAL CONST. CO. v. RYAN, Superintendent of Streets. (Civ. 3325.)

(District Court of Appeal, Second District, Division 2, California. May 21, 1920.)

1. Municipal corporations ⟸306—Resolution as to street work sufficient as to bonds.

Resolution of intention to order street work done under Improvement Act of 1911, and Improvement Bond Act of 1915, stating that bonds would be issued as provided by the act, and reciting that "a" serial "bond," to represent unpaid "assessment" and bear interest, would be issued, *held* sufficient as incorporating the provisions of the act and therefore preventing property owner from being misled into belief one bond was to be issued for entire improvement.

2. Municipal corporations ⟸336(1) — Reference to bonds in prior proceedings confers jurisdiction on council to award contract.

Under Improvement Act 1911, § 61, as amended in 1915, requiring the first specific mention of amount of street improvement bonds to be included in the warrant, a general reference in prior proceedings adopting the provisions of the act is sufficient to confer jurisdiction on the city council for the purpose of a resolution awarding contract to lowest bidder.

3. Municipal corporations ⟸336(1)—Council had jurisdiction to pass amended resolution of award of street work correcting prior reference to bonds.

Under Improvement Act 1911, § 16, as amended in 1915, city council had jurisdiction to pass amended resolution of an award of street work correcting reference to bonds in original resolution of intention to order work.

4. Municipal corporations ⟸336(1)—Resolution and notice of award of street work sufficient in recital of award to lowest bidder.

City council's resolution and notice of award of street improvement work under Improvement Act 1911, as amended in 1915, reciting respectively that contract was awarded to a company at prices named in its bid, and that the board of trustees awarded the contract to the lowest regular responsible bidder, the particular company, at the prices named for the work in its bid, *held* in substantial compliance with the law, in view of section 10.

Application for writ of mandate by the Federal Construction Company against William Ryan, Superintendent of Streets of the City of Paso Robles. Peremptory writ directed to issue.

Frank H. Powers and Heller, Powers & Ehrman, all of San Francisco, for petitioner.

Paul S. Honberger, of Los Angeles, for respondent.

WELLER, J. Mandate to compel the respondent as street superintendent to execute a contract for the improvement of certain streets in the city of Paso Robles.

The petition recites that on January 19, 1920, the board of trustees of the city of Paso Robles passed a resolution of intention to order certain work done, under the provisions of the "Improvement Act of 1911" (St. 1911, p. 730), and "Improvement Bond Act of 1915" (St. 1915, p. 1464), and amendments thereto, and caused notice of the passage of the resolution to be published and posted according to law. No protests having been received, on the 4th day of February, 1920, the board adopted a resolution ordering the work to be done, and caused a notice inviting proposals for doing the work to be given, in accordance with the provisions of the acts above mentioned. Pursuant to that notice, petitioner presented its bid, and was found to be the lowest responsible bidder, whereupon the board, on February 24, 1920, passed a resolution awarding to petitioner the contract for doing the work.

By its resolution of intention, the board declared that serial bonds should be issued to represent the expenses of the improvement, specifying the rate of interest the bonds should bear, and also caused a similar description to be inserted in the resolution ordering the work to be done, as well as in all notices posted and published in connection with the prior proceedings; but no reference to bonds was contained in the resolution of award. On March 9, 1920, the city clerk posted a notice of award, which referred to the issuance of bonds substantially as did the resolution of intention. The owners of three-fourths of the frontage liable to be assessed for the improvement did not elect to take the work, and no person interested in the lands filed with the clerk a notice specifying any irregularity in the previous proceedings.

On April 5, 1920, the board adopted an amended resolution of award, including notice of the proposed issuance of bonds, and ordered the notice of award to be reposted and republished. In accordance with this order, the clerk posted notice of award on the 7th day of April, 1920, and caused it to be published.

On April 17, 1920, the petitioner presented to the street superintendent a contract for his signature, and tendered bonds duly approved, together with the necessary costs, all in accordance with the provisions of the act. Respondent declined to execute the contract, basing his refusal on the ground that the proceedings theretofore taken were void, and sets forth in his answer filed herein the reasons for his claim, which we will consider in their order.

1. That portion of the resolution of intention which declares that bonds shall issue, contains the recital:

"Notice is hereby given that a serial bond to represent unpaid assessment and bear interest at the rate of 7 per cent. per annum will be issued hereunder in the manner provided by the Improvement Bond Act of 1915."

[1] Respondent contends that reference to bonds in the singular vitiates the resolution, arguing that the property owner might be misled into the belief that one bond was to be issued to represent the cost of the entire improvement, and thus be unable to determine or segregate his individual liability. In answer to this it is sufficient to say that the resolution states that the bonds will be issued in the manner provided by the act, and thereby incorporates the provisions of the statute into the resolution.

Section 61 of the Improvement Act of 1911, as amended in 1915 (page 1464), reads as follows:

"When said city council shall determine that serial bonds shall be issued to represent the expenses of any proposed work or improvement under this act, it shall so declare in the resolution of intention to do said work, and shall specify the rate of interest which they shall bear. The like description of said bonds shall be inserted in the resolution ordering the work, in the resolution of award, and in all notices of said proceedings required by this act to be either posted or published; and also a notice that a bond will issue to represent each assessment of twenty-five dollars or more remaining unpaid for thirty days after the date of the warrant, or five days after the decision of said council upon an appeal, shall be included in the warrant provided for in section twenty-two of this act."

[2] The first specific mention of the amount of the bonds is to be included in the warrant; hence, a general reference in prior proceedings adopting the provisions of the act is sufficient to confer jurisdiction. In proceedings under the Vrooman Act,[1] which contains provisions similar in effect to the Improvement Act of 1911, it has been held that the city council may fix the term the bonds are to run at any time prior to the issuance of the warrant. Cohn v. Federal Construction Co., 171 Cal. 547, 153 Pac. 916.

[3] 2. It is claimed that the council had no jurisdiction to pass the amended resolution of award on the 5th of April, 1920, on the theory that it had exhausted its powers by the adoption of the original resolution of February 24, 1920. No authority is cited in support of this proposition, and we have found none. On the contrary, in our opinion, the act itself contemplates such a procedure as that taken by the board. Section 16 provides:

"At any time within ten days from the date of the first publication of the notice of award of contract, any owner of, or other person having any interest in any lot or land liable to assessment, who claims that any of the previous acts or proceedings, relating to said improvement are irregular, defective, erroneous or faulty, may file with the clerk of the

[1] St. 1885, p. 147.

city council a written notice specifying in what respect said acts and proceedings are irregular, defective, erroneous or faulty. Said notice shall state that it is made in pursuance of this section. All objections to any act or proceeding occurring prior to the date of the first publication of the aforesaid notice of award, in relation to said improvement, not made in writing and in the manner and at the time aforesaid, shall be waived; provided, the resolution of intention to do the work has been actually published and the notices of improvement posted as provided in this act."

While there is no express authorization in the act for the correction of errors in the proceedings, the natural inference must necessarily be that it was intended that the council should have power to remedy defects occurring after it had acquired jurisdiction to order the work done, when its attention was directed to them. Any other conclusion would render the section nugatory; and we deem it our duty to construe the statute so as to carry into effect the intention of the Legislature as therein expressed.

At the time of the adoption of the amended resolution of award no rights of third persons had vested. It is as much to the interest of the property owner as of the contractor that the proper reference to the bonds be made in the proceedings wherever required, in order that he may legally avail himself of the election to pay his assessment in cash or to permit bonds to issue against his property. The effect of reposting the notice of award would be to extend the time within which the property owners might enter into the contract, and no possible injury could result therefrom.

[4] 3. It is urged that the resolution and notice of award are insufficient in that neither the resolution nor the notice contains a statement of the amount of the bid or the contract price. The resolution of award recited that the contract for doing the work was awarded to the Federal Construction Company "at the prices named in its bid." The notice of award as posted and published declared that the board of trustees "awarded the contract for said work to the lowest regular responsible bidder, to wit, Federal Construction Company, at the prices named for said work in said proposal or bid on file." This, we think, is a substantial compliance with the law. Section 10 of the act provides that the city council "may award the contract for said work or improvement to the lowest responsible bidder at the prices named in his bid." This was done, and nothing more was required. Any person interested could readily ascertain the contents of the bid by an inspection of the document on file in the clerk's office to which the notice of award refers.

No other points are made by respondent, and we believe the objections we have discussed are without merit.

Let the peremptory writ issue.

We concur: FINLAYSON, P. J.; THOMAS, J.

47 Cal. App. 750

MITCHELL v. MERCHANTS' FIRE ASSUR. CORPORATION OF NEW YORK.

(Civ. 3283.)

(District Court of Appeal, Second District, Division 1, California. May 27, 1920.)

Insurance ⟸621—Action on fire policy prematurely brought.

Where, under a fire policy, insurer was entitled to 20 days within which to accept or object to amount of loss claimed, and, in absence of objection, was deemed to have assented to amount claimed in preliminary proof, and such loss became payable 30 days from expiration of the 20 days, action instituted 48 days after furnishing a preliminary proof of loss was prematurely brought.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Mrs. Rose D. Mitchell against the Merchants' Fire Assurance Corporation of New York, a corporation. From judgment for plaintiff, defendant appeals. Reversed.

W. W. Hindman, of Los Angeles, for appellant.

Duke Stone, of Los Angeles, for respondent.

CONREY, P. J. Action to recover for loss incurred by fire and covered by a fire insurance policy issued to the plaintiff by the defendant. Judgment in favor of the plaintiff, from which the defendant appeals.

It was provided in the policy that—

"This company shall be deemed to have assented to the amount of loss claimed by the insured in his preliminary proof of loss, unless within twenty days after the receipt thereof, * * * the company shall notify the insured in writing of its partial or total disagreement with the amount of loss claimed by him. * * *"

Further provision was made for appraisal in case of disagreement of the parties as to the amount of loss. It was further provided:

"*Loss when Payable.* A loss hereunder shall be payable in thirty days after the amount thereof has been ascertained either by agreement or by appraisement; but if such ascertainment is not had or made within sixty days after the receipt by the company of the preliminary proof of loss, then the loss shall be payable in ninety days after such receipt."

The complaint alleged that on or about March 19, 1919, the plaintiff furnished the defendant with her proof of loss, and that the defendant refuses to pay the same, and has not paid the same or any part thereof. The complaint is silent as to any notice of disagreement as to the amount of loss, or any appraisal or attempt to obtain an appraisal.

The defendant demurred to the complaint on the ground that the complaint did not state a cause of action, and that demurrer was overruled. Thereafter the defendant filed its answer, in which it was denied "that any sum or sums of money were due, owing, or unpaid by the defendant to the plaintiff at the time of the commencement of this action, or at any other time or at all." The court found that—

"On March 19, 1919, and within the time and terms provided by said policy, plaintiff furnished the defendant with her proof of loss, but that defendant has at all times refused to pay the plaintiff any sum whatever under said policy, and that in truth and in fact by reason of said loss that the defendant became liable to pay the plaintiff the said sum of $350, being the reasonable value of the furniture and personal effects so destroyed."

On the record thus produced, consisting of the judgment roll alone, it appears that the action was instituted prematurely. The complaint was filed on May 5, 1919, which was only 48 days after the preliminary proof had been furnished by the plaintiff to the defendant. The defendant was entitled to a period of 20 days within which to accept or object to the amount of the loss as claimed by the plaintiff. In the absence of any objection made, the company was "deemed to have assented to the amount of loss claimed by the insured in his preliminary proof of loss"; in other words, the amount was thus ascertained by agreement. Under those circumstances, the loss became payable in 30 days from the expiration of the 20 days. No right of action could accrue until the expiration of that period of 30 days. In Borger v. Connecticut Fire Ins. Co., 24 Cal. App. 696, 142 Pac. 115, the action appears to have been based upon the same form of policy as that before the court in the case at bar; the complaint was subject to similar defects, and it was held that, the action having been commenced within less than 30 days after the expiration of 20 days from the presentation of the proofs of loss, the action was prematurely brought. On that ground the judgment was reversed. On the authority of that decision, and without discussing the other ground of appeal relied upon by appellant, the judgment is reversed.

We concur: SHAW, J.; JAMES, J.

47 Cal. App. 781

LEWIS v. CRENSHAW et al. (Civ. 2946.)

(District Court of Appeal, Second District, Division 1, California. May 28, 1920.)

1. Vendor and purchaser ⟸212—Grantee and assignee of sellers' contract as security did not assume obligation of sellers.

Where the transactions between the sellers of land and a party obligated for them, whereby deed was made and delivered to such party, and assignment of the sellers' contract with a purchaser was made, were as security only, such party did not assume the obligation of the sellers toward the buyer.

2. Trial ⟸29(4)—Court's manner in making rulings did not deny plaintiff fair trial.

The trial court's manner in making proper rulings adverse to plaintiff laconically, decisively, and with great brevity did not prevent plaintiff from having full and fair consideration of his action.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by E. P. Lewis against G. L. Crenshaw, the Brent Investment Company, a corporation, and the Crenshaw Security Company, a corporation. From judgment of nonsuit, plaintiff appeals. Affirmed.

M. O. Graves, of Los Angeles, for appellant.

Hickcox & Crenshaw, of Los Angeles, for respondents.

JAMES, J. In this case, at the conclusion of the hearing of the testimony on behalf of the plaintiff, the court granted a motion for judgment of nonsuit as to Crenshaw Security Company. At the conclusion of all the evidence, the court directed the jury to find a verdict in favor of the defendant G. L. Crenshaw. The cause was not tried as to the defendant Brent Investment Company; that defendant apparently not having been required to answer the complaint of the plaintiff. The appeal is from the judgment. Originally there were several suits brought against the same defendants by different individuals, all the claims being based upon similar facts and, by stipulation, all of said causes were agreed to be considered and determined at the trial had under the title first above given. As no useful purpose will be served in treating the matter otherwise, we will refer to the case in general as though there were but the one plaintiff interested herein.

In May, 1914, the plaintiff entered into a contract with defendant Brent Investment Company, a corporation, by which contract, in consideration of the initial payment of a certain sum of money and monthly payments thereafter to be made until the whole sum mentioned in the contract was discharged, the Brent Investment Company agreed to convey to the plaintiff a certain parcel of land.

Plaintiff made payment for a time of the various installments required, to the Brent Investment Company. A notice was then received by him, which was in part as follows:

"Your contract with the Brent Investment Company for the purchase of lot No. 52, in tract 909, has been turned over to us. * * * Your future payments must be made to us, and we wish you to be prompt according to the terms of your agreement. We wish you would bring your contract with you when you make next payment, so that we may compare amounts paid and see if the duplicate and original contracts agree. This will be a convenience to us as well as yourself. Yours truly, G. L. Crenshaw."

That notice was dated May 30, 1916, and for a number of months thereafter plaintiff made payments to Crenshaw, and received receipts for the account. After having so made payments to Crenshaw, plaintiff was notified by Crenshaw at his office that no more payments would be received, as there was some question about the title of the land. It appeared that on the 12th of October, 1911, Brent and his wife, who were evidently the owners of the entire tract, a parcel of which plaintiff had later contracted to buy, had created a lien by mortgage against the same to secure a promissory note in the sum of $29,507; that at about the time Crenshaw notified plaintiff that he would no longer receive payments on account of the contract referred to, foreclosure proceedings had been instituted on this mortgage. Having tendered payment of an installment, and meeting with Crenshaw's refusal to accept the same, plaintiff brought this action to recover back the money theretofore paid to Brent Investment Company and to Crenshaw. It was shown in evidence that Crenshaw had become surety on a bond for a large amount for the benefit of the Brents in connection with the leasing of property in the city of Los Angeles by the Brents; the lease transaction being wholly disconnected from the property affected by the contract of plaintiff. Crenshaw had been required to pay out a large amount of money—a sum in excess of $10,000—on account of his surety liability, and in order to protect him the Brents, at Crenshaw's suggestion and as security for the repayment of the amounts which Crenshaw had paid out under the bond referred to, executed their deed to the tract of land affected by the contract of plaintiff, conveying the same to Crenshaw, and also for the same purpose made assignment of the contracts of plaintiff and other similar holders. Crenshaw did not become a party to the contract of plaintiff, unless the effect of the assignment imposed that relation upon him. The evidence as heard by the court, however, was uncontradicted to the point that the transaction between the Brents and Crenshaw, whereby the deed was made and delivered and the assignment of the contract made, were as security only.

[1] It was upon this state of the evidence that the court held as a matter of law that Crenshaw did not assume the obligation of the Brents toward the plaintiff; and upon that evidence we cannot perceive why any different conclusion should be contended for. The plaintiff and the other contract holders made their contracts with the Brent Investment Company, relying upon the ability of that company to perform its obligations, with full knowledge or means by which knowledge might be obtained as to the condition of the title to the property contemplated to be conveyed. They made no new contract with Crenshaw; Crenshaw did not indorse his name upon the contracts as assuming the obligations imposed upon the vendors thereunder. The Brent Investment Company at all times remained liable as the contracting party and the only contracting party against whom the plaintiff was entitled to seek redress. If the plaintiff at the time of the transfer of the contract so made by the Brent Investment Company to Crenshaw had ascertained that the Brent Investment Company would be unable to comply with its contract, and had been persuaded and induced fraudulently by Crenshaw to continue to make payments, it is possible some cause of action might have arisen in plaintiff's favor. No such cause of action is claimed or pleaded. Nor was there anything in the evidence to show that plaintiff no longer placed reliance upon the Brent Investment Company because of any reputed insolvency, or that he had any knowledge which gave him reason to believe that Crenshaw was financially responsible, and his grantor was not. There was some testimony given on the part of the plaintiff and other contract holders to the effect that Crenshaw had stated that they would get their deed or their money back; but this was neither predicated upon any pleading proposing the issue suggested, nor upon any further evidence showing that the plaintiff was induced because of such representation to continue making payments which he would otherwse not have made or been legally bound to make. On the statement of the case as the record shows it and as we have epitomized it in the foregoing, it must at once be clear that no right of recovery in the plaintiff existed as against Crenshaw or the Crenshaw Security Company; hence the court was entirely justified in the action taken.

[2] An objection is made that the court erred in admitting certain testimony and excluding other evidence offered; further, that the peremptory manner of the trial judge prevented plaintiff from having full and fair consideration in the presentation of his case. The trial judge, it may be stated, in expressing his rulings, spoke laconically, decisively,

and with great brevity. However much the abrupt manner of the judge may have been disconcerting to plaintiff's counsel, there is nothing to show that the disposition of the court was other than usual, or that any prejudice resulted to the plaintiff which prevented him from showing that the facts were different from those as we have stated them. The trial judge was headed in the right direction, and if he reached a legally logical conclusion, it makes little difference whether this end was arrived at by a short cut or otherwise.

We have examined all of the assignments for error, and are satisfied that no miscarriage of justice is expressed in the judgment as rendered.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(47 Cal. App. 785)

KROGH MFG. CO. v. CHURCHILL et al. (Civ. 3409.)

(District Court of Appeal, First District, Division 1, California. May 28, 1920.)

1. Appeal and error ⊂⊃992—Determination of qualifications of expert for court.

Whether a witness was qualified to testify as an expert as to the reasonable value of the mechanical labor expended on a pump, installation of which was sued for, was a matter for the determination of the trial court.

2. Evidence ⊂⊃543(2)—Witness qualified as expert on value of labor on pump.

In an action for installation of a pump, the trial court properly determined to be qualified as an expert on the reasonable value of the mechanical labor expended on the pump plaintiff's manager, shown to have been engaged in the pump and engine business for many years, and as designer and chief engineer of an iron works.

3. Evidence ⊂⊃558(1)—Question to expert relative to speed of pump in operation proper.

In an action for installation of a pump, question propounded to expert witness for defendants on cross-examination regarding the speed of the pump in operation in relation to the amount of water in the well *held* proper.

4. Appeal and error ⊂⊃1011(1)—Conflicting evidence for trial court.

In an action for installation of a pump, where there was competent evidence on each side as to whether the pump had been properly installed, the contradictions in the testimony, and the weight to be given each witness, were matters addressed to the discretionary consideration of the court.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Action by the Krogh Manufacturing Company, a corporation, against H. C. Churchill and another, in which defendants filed a cross-complaint. From a judgment for plaintiff, defendants and cross-complainants appeal. Affirmed.

E. O. Leake and Goudge, Williams, Chandler & Hughes, all of Los Angeles, for appellants.

Seth B. Smith, of Los Angeles, for respondent.

WASTE, P. J. This is an appeal by the defendants from a judgment in favor of the plaintiff for the sum of $1,384, the value of a pump, installed on the defendants' ranch, pursuant to a contract for the purchase of the same, and for services and accessories in connection with its operation.

The defendants denied any indebtedness to the plaintiff, and alleged that, by reason of the poor quality of the materials used in it, the bad workmanship thereon, and the improper, negligent, and careless manner of installing the machinery which was the basis of the second and third counts of the complaint, the pump broke down, never at any time ran in a satisfactory manner or reasonably well, and was absolutely worthless to the defendants. By reason of these facts, defendants claimed to have suffered a loss of their lemon crop for the year 1913, amounting to the sum of $2,500; their orange and lemon groves being also damaged to the extent of $720, by reason of their being unable to secure water to irrigate the same. To these amounts defendants added the amounts of various repair bills, and by way of cross-complaint prayed for judgment against the plaintiff in the sum of $3,701.16.

The lower court found that the plaintiff installed the pump and machinery on the defendants' ranch in a first-class and workmanlike condition, and duly performed all the conditions of its contract, with the exception that the 8-inch cylinder, which the plaintiff first placed in the well, became broken, by reason of inevitable accident, whereupon plaintiff replaced it with a 7-inch cylinder; that the pump thus equipped was accepted by the defendants, and was, at the time of its installation and at the time of the trial, capable of pumping all the water in defendants' well, and of pumping 20 inches of water per minute, when pumping against a total head of 250 feet, as specified in the contract. It further found that the alleged breakdown, and interruptions in the operation of the pump, subsequent to its installation, were not due to any defects in materials used by plaintiff in the construction of the pump, and were not due to, and did not result from, the manner in which the pump was constructed or installed, but, on the contrary, were due to the negligent and careless manner in which the defendants operated the pump, and to the negligence of the defendants' employés in overhauling same, and

were further aggravated by lack of water in the defendants' well. The further findings were against the allegations of the cross-complaint, and the plaintiff was awarded judgment for the price of the pump as installed, together with $74 for certain services, material, and pump accessories.

In seeking a reversal of the judgment, the appellants specify certain errors in the admission of testimony, insufficiency of the evidence to sustain the findings, and that the decision was against law.

[1-3] Whether or not the witness F. L. Emerson, manager of the plaintiff, was sufficiently qualified to testify as an expert as to the reasonable value of the mechanical labor expended on the pump, was a matter for the determination of the trial court, and in the instant case its determination of the question was undoubtedly correct. Before becoming manager for the plaintiff the witness had for many years been engaged in the pumping and engine business, and as a designer and chief engineer of an iron works. The question propounded to Joseph Darracq, a witness for the defendants on cross-examination, regarding the speed of the pump in operation in relation to the amount of water in the well, was proper. He was called by the defendants to testify to certain work he had done on the pump after its installation, and gave his expert opinion as to its construction. He also testified that in installing a pump it was necessary to regulate its capacity in accordance with the volume of water in the well. While, as argued by the appellants, the question of exhausting the water in the well was not an issue, the successful method of the installation and operation of the pump under varying conditions was testified to by the witness on his direct examination.

[4] As to the alleged insufficiency of the evidence, a careful reading of the testimony of the various witnesses, experts and others, called to testify as to the manner in which the pump was installed, and its working when in operation, develops only a marked conflict of testimony, which it was the province of the trial judge to consider and determine. There was competent evidence, on the one side, that the pump was workmanlike in its construction and properly installed in a first-class manner, and that if properly handled it would give satisfaction. On the other hand, witnesses for defendants testified to the contrary. The contradictions in the testimony and the weight to be given each of the witnesses was a matter addressed to the discretionary consideration of the trial court.

The judgment is affirmed.

We concur: RICHARDS, J.; WELCH, Judge pro tem.

47 Cal. App. 768

MILLER v. HUNT, HATCH & CO.

(Civ. 2958.)

(District Court of Appeal, Second District, Division 1, California. May 27, 1920.)

1. Sales ⟸214—Contract held a sale, and not mere agreement to sell oranges, to be gathered by buyer.

A contract for the sale of an entire crop of oranges on the trees, fruit to be picked by the buyer and removed before December 25th, is a sale, and not a mere agreement to sell; and, where the fruit matured before the final date fixed for removal, and it was necessary to gather the same to insure good condition of the oranges, the buyer must bear the loss, where it failed to gather the fruit.

2. Sales ⟸359(1)—Findings that orange crop had matured before frost, and that injured oranges could be separated warranted.

In an action by seller of a crop of oranges to recover unpaid balance of purchase price, evidence *held* to warrant finding that the good oranges, the crop having been previously damaged, could have been separated, and that, before the killing frost, the oranges were in a fit condition to gather.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by S. T. Miller against Hunt, Hatch & Co. From a judgment for plaintiff, defendant appeals. Affirmed.

Farnsworth, McClure & Burke, of Visalia, for appellant.

Charles W. Braswell, of Lindsay, and Middlecoff, Scott & Ham, of Visalia, for respondent.

CONREY, P. J. Action to recover an unpaid balance alleged to be due on the sale by plaintiff to the defendant of a crop of oranges. Judgment in favor of the plaintiff, from which the defendant appeals.

In a written agreement, of date April 20, 1916, it was stated that the plaintiff "has this day sold" to the defendant his entire crop of oranges, now on the trees growing on his ranch at Lindsay, Cal., at a stated price per hundredweight. "All fruit is to be weighed at the Hunt, Hatch & Co.'s Packing house and paid for upon the delivery of duplicate weight receipts at their office at the said packing house at Lindsay. Hunt, Hatch & Co. are to furnish all boxes to put the said fruit in and agree to pick and haul the said fruit free of all costs to the said S. T. Miller. Fruit is to be of merchantable quality and picked at the option of the said Hunt, Hatch & Co., provided same is removed on or before December 25, 1916." The court found that on the 13th day of December 1916, there remained in plaintiff's orchard 380 trees which were unpicked; the amount of unpicked oranges thereon being 85,500 pounds. Finding 5 reads as follows:

"That on November 16, 1916, some of said oranges were injured by frost but at least 80 per cent. of said oranges were from November 16, 1916, to December 13, 1916, uninjured, and were ripe, in good condition, ready for harvest, and merchantable; that between said November 16, 1916, and December 13, 1916, defendant had sufficient time to pick and haul said ripe and merchantable oranges, and could and should have done so, but defendant failed and neglected to pick or haul or pay plaintiff for said merchantable portion of said fruit within said time or at all; that said merchantable oranges were readily and easily separable from the injured oranges; that on the night of December 13, 1916, said merchantable oranges were injured by frost, and later about January 6, 1917, were totally destroyed by frost, and the amount of merchantable fruit which the defendant so left on said trees unpicked and unharvested in a ripened and merchantable condition and quality, which defendant should and could have picked in such merchantable condition, was 68,400 pounds."

Finding 7 is as follows:

"That from November 16 to the 13th day of December, 1916, all of said 68,400 pounds of fruit above mentioned came up to the test of an ordinance of the board of supervisors of the county of Tulare, mentioned in the answer of defendant, and none of said 68,400 pounds had been frozen prior to December 13, 1916, to such an extent as to render the same wholly unfit or unfit at all for consumption or merchantable."

[1] Appellant contends that there was only an agreement for sale, and not an actual sale of the crop; and that under the contract the purchaser had the right, at his own option, to defer the time of picking the fruit until the 25th day of December, 1916, provided only that it was all picked not later than that date. The effect of this contention, if allowed as appellant insists upon it, would be that, even if the fruit was mature and ready for the market on and after November 16th, the loss caused by its destruction by frost at any time prior to December 25th would have to be suffered by the plaintiff. With this contention and its claimed effect we do not agree. In Bill v. Fuller, 146 Cal. 50, 79 Pac. 592, the contract was for the sale of a crop of oranges not yet matured, and it was provided therein that the vendee "has this day bought" a described crop of oranges. It was provided that all of the oranges were to be taken by the purchaser on or before a stated date, and the vendor was to deliver at a certain station when wanted by the purchaser. Of this contract the Supreme Court said:

"Nor do we wish to be understood as holding that the title to the crop did not pass as soon as the contract was executed. The agreement in form imports a present sale, the thing sold was in existence and was identified and separate from other things."

The contract in that case limited the time of delivery in a similar manner as in the case at bar; the language used being, "all oranges to be taken by H. Fuller on or before April 1st, 1901." The court found that the oranges became ripe and ready for market in January, 1901, but the defendant refused to receive them until March, at which time, without fault of the vendor, some of the fruit had become unmerchantable by becoming too ripe and puffy for the market. Under these circumstances it was held by the Supreme Court that the contract should not be construed to give Fuller the absolute right to defer the delivery of the oranges to the injury of the plaintiff; that it must be construed to mean that the oranges were to be taken by Fuller on or before April 1, 1901, and at such reasonable time as should be necessary to insure their good condition with respect to maturity and fitness for the market. "The merchantability which was warranted by the contract, if there was any such warranty, was nothing more than a warranty that the fruit should be merchantable on the tree, and that when gathered in due season it should be handled and delivered with proper care. This being the case, under the findings we think the defendant was not justified in refusing to accept the oranges which he culled from the crop because of his claim that they were too ripe and puffy for the market." So here, assuming the facts to be as found by the court, the appellant was obligated to take the oranges on or before the 25th day of December, 1916, and at such reasonable time as should be necessary to insure their good condition.

[2] Appellant contends that the evidence is not sufficient to support the finding that the portion of the fruit which was marketable on November 16th was easily and readily separable from that which had been frozen, and that the evidence is not sufficient to support the finding that the fruit for which compensation has been allowed was merchantable from November 16 to December 13, 1916. From the testimony of defendant's manager, Mr. Sparks, it appears that in November or December, 1916, the defendant procured for use in its packing house a machine called a separator, which was used for the purpose of separating frozen fruit from the better fruit. This machine was first put in operation by the defendant on the 13th day of December. It does not clearly appear from his testimony that the oranges which were run through the separator at that time were from the Miller orchard, nor was the time stated at which such fruit had been picked. He states that the result of the operation was that the fruit was so badly frozen that it was hard to separate the best from the worst of it; it was so badly frozen that they could not separate the fruit properly. Mr. Sparks states that the first frost occurred on November 16th, and the second, which was the disastrous frost, occurred on December 13th. There is no evi-

dence that fruit picked from the Miller orchard prior to December 13th could not have been successfully graded by means of this separator so as to pick out the frosted fruit from that which was not frosted. Frank Brann, horticultural commissioner, a county officer, who, in co-operation with an officer of the United States government, appears to have made examinations of the fruit in this packing house and exercised some authority over shipments, testified that all of the fruit from the Miller orchard that came into the defendant's packing house (although some of it was held up temporarily) was passed and certified as marketable before the 1st day of January. There was introduced in evidence an ordinance of the county of Tulare which prescribes a test of maturity of oranges, which is commonly known as the 8 to 1 test, and refers to the quantity of soluble solids in the orange as compared with the quantity of acid contained in the juice. The plaintiff testified that, on December 10th or 12th, he took from the orchard samples for testing, and had them tested by S. Kohner, a tester employed in the packing house of the Randolph-Martin Fruit Company. Mr. Kohner testified that the tests which he made of these samples were, on December 14th, 8.2 to 1, and on December 21st, 7.5 to 1. Mr. Sparks testified that the defendant caused some tests to be made by one E. G. Rooke about November 20th. The actual results of those tests were not given in evidence. Sparks says that they were "not satisfactory." Referring again to the same matter, he said:

"There was a difference in the fruit; some of the fruit on the outer side of the orchard gave a different test from trees inside the orchard."

In another place Mr. Sparks testified that none of it tested 8 to 1. It is to be observed here that there was a sharp contradiction between the testimony of plaintiff and the testimony of Sparks concerning certain conversations between them. It may be that the court, as was its right, placed the greater confidence in the testimony of the plaintiff as to those conversations, and for that reason discounted the testimony of Sparks on the subject of the 8 to 1 test and the other conditions of the fruit. The plaintiff testified that the fruit was, on the 20th of November, of fair size and color, and in good condition; that beginning on November 20th the defendant picked the fruit from the northern part of the grove, and all of that fruit was paid for; that the fruit was merchantable from November 20th to January 6th; that Mr. Sparks did not tell him at any time prior to December 25th that the fruit was frozen; that after December 25th, at a time when defendant had stopped picking from this orchard, plaintiff asked Mr. Sparks when he expected to finish packing the fruit, and Sparks replied that he would pack it as fast as he could get to it—as fast as he could handle it he would take it; that the plaintiff used fruit daily from this orchard at his house from the time they commenced picking on November 20th until after January 1st, and it was in good condition. Answering the question, "Was it frozen?" he replied, "Not that I could tell." Plaintiff further testified that the fruit on the south portion of the orchard which was not picked was as good as that on the northern portion which was picked by the defendant; that it was practically the same.

From the foregoing summary of a part of the evidence our conclusion is that the evidence is sufficient to support the findings of fact to which we have referred and which are challenged by appellant. There is on several of these points evidence to the contrary of that which has been stated, but this is no more than sufficient to produce a conflict in the evidence. On such state of the record, under the well-established rule, the findings must be sustained.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

47 Cal. App. 678

Ex parte PHILBROOK. (Cr. 906.)

(District Court of Appeal, First District, Division 2, California. May 22, 1920.)

1. Habeas corpus ⟸30(1)—Error in exercising jurisdiction not considered.

On habeas corpus, error in the exercise of jurisdiction cannot be considered.

2. Contempt ⟸34—Superior court may punish for contempt.

The superior court has power to punish for contempt under Code Civ. Proc. § 1209.

3. Contempt ⟸20—Refusal to obey lawful order of court in the court's presence.

A warrant of commitment, reciting that petitioner for habeas corpus in the presence of the court while in session refused to obey a court order to render a final account, that petitioner was by its order adjudged guilty of contempt therefore must be sustained, if at all, under Code Civ. Proc. § 1209, subd. 5, relating to disobedience of lawful judgment, order, or process of court.

4. Habeas corpus ⟸85(3)—Presumption that order was lawful in absence of counter showing.

Where petitioner for habeas corpus does not set forth the nature of his answer, nor state that in the answer there was any attempt either to render the account ordered or to show excusing facts or circumstances, it must be presumed that the court's order of commitment for contempt was in the lawful and proper exercise

of the judicial functions (Code Civ. Proc. § 1963, subds. 15 and 16).

5. Habeas corpus ⟸29—Record held to show ample grounds for commitment for contempt.

On petition for habeas corpus by one committed for contempt of court for refusal to obey an order to render an accounting and as administrator of petitioner's deceased wife's estate in another state for which the deceased wife was administratrix, record *held* to show ample grounds for the issuance of the attachment and commitment, unless the court was without jurisdiction.

6. Habeas corpus ⟸53—Every essential fact must be pleaded.

Every essential fact must be pleaded in a habeas corpus proceeding, as the allegation to the petition cannot be strengthened in opposition to the general presumption attaching to the regularity of judgments and orders of court.

7. Executors and administrators ⟸224—Right to accounting not barred by failure to demand within time.

Proceedings under Code Civ. Proc. § 1639, take the place of a suit for an accounting in equity to compel an executrix's administrator to account in the former estate, and such are alternate remedies, and the statutory remedy is not barred by the expiration of time without a claim having been presented in the former estate.

8. Habeas corpus ⟸96—Proceeding held not appeal or error, and investigation confined to jurisdiction.

A proceeding in habeas corpus by petitioner committed for contempt is not in the nature of an appeal or writ of error, and inquiry must be confined wholly to the jurisdiction.

9. Executors and administrators ⟸464—Where removed executrix died before accounting, her administrator must account.

Where the letters of an executrix had been revoked during her lifetime, but she had made no accounting, her husband, as administrator of her estate, may be required to make the accounting, in view of Code Civ. Proc. §§ 1629, 1639.

Application by Horace W. Philbrook for writ of habeas corpus prayed to be directed to the Sheriff of Alameda County to secure release of petitioner from custody under a commitment for contempt of court. Writ discharged, and petitioner remanded.

Horace W. Philbrook, of San Franciso, in pro. per.

Ezra W. Decoto, Dist. Atty., and Fitzgerald, Abbott & Beardsley, all of Oakland, for respondent.

LANGDON, P. J. A writ of habeas corpus was granted by Mr. Justice Lawlor of the Supreme Court returnable to this court, the petitioner claiming that he was restrained of his liberty under an order of the superior court in Alameda county adjudging him guilty of contempt upon his refusal to account as the administrator of the estate of his deceased wife, Florence E. Philbrook, who had formerly been the administratrix with the will annexed of the estate of Humphrey A. Randall, ancillary administration of whose estate is pending in the superior court, the main estate having been administered, or being in the course of administration, in the state of Maine at the place of death of Randall.

In 1917 the letters of Florence E. Philbrook were revoked, and she was succeeded in her administration by Anne Bates Randall, the widow of Humphrey A. Randall. During her administration Mrs. Philbrook filed her first account, but did not file the final account of her administration. She died in November, 1918, and the petitioner herein was appointed and now is the administrator of her estate.

In December, 1919, Anne Bates Randall, the executrix of the Randall will, instituted proceedings under section 1639 of the Code of Civil Procedure, to compel the administrator of the estate of Florence E. Philbrook to render a final account of this intestate's administration of the Randall estate. He was cited to account, and his motion to dismiss the petition of the executrix and to quash the order of the court directing the issuance of the citation and the citation itself was denied. His demurrer to the petition for the citation was overruled, and he was granted leave to answer. The citation to account was continued from time to time until February 24, 1920. The court thereupon ordered the writ of attachment to issue, and Mr. Philbrook was arrested and brought into court on March 12, 1920. Upon his promise that he would appear in open court on March 22, 1920, and file a final account he was released upon his own recognizance. He failed to appear on March 22d and failed to file any final account. New attachment proceedings were instituted; Mr. Philbrook was again brought into court and directed to file his final account pursuant to the court's order, and upon his refusal so to do he was committed to the county jail until he should comply with the court's order.

The petitioner, in his lengthy briefs, set forth a great number of grounds to show that the commitment was without warrant of law.

[1] It is fundamental that on habeas corpus error in the exercise of jurisdiction cannot be considered. Ex parte Perkins, 18 Cal. 60; Ex parte Gibson, 31 Cal. 619, 91 Am. Dec. 546; Ex parte McCullough, 35 Cal. 97; Ex parte Cottrell, 59 Cal. 421; Ex parte Sternes, 77 Cal. 156, 19 Pac. 275, 11 Am. St. Rep. 251; Ex parte Ah Men, 77 Cal. 198, 19 Pac. 380, 11 Am. St. Rep. 263; Ex parte Joutsen, 154 Cal. 540, 98 Pac. 391; Matter of the Application of La Duc, 161 Cal. 663,

120 Pac. 13. While the writ was issued during the time the petitioner was under arrest under a writ of attachment, when it was served and he was released he was in custody not under the attachment but under a warrant of commitment. The return, however, shows that the order for the warrant of commitment and the warrant of commitment were but further steps in the same proceedings and upon the same facts as the arrest under the attachment under which the writ of habeas corpus was issued.

[2, 3] The superior court has power to punish for contempt. Code Civ. Proc. § 1209. The warrant of commitment recites that the petitioner in the immediate view, presence, and hearing of the court and while the court was in session, refused to obey the "order of the court that he render the said final account," and that the court at the same time by its order adjudged and declared the petitioner "had been guilty of a contempt of said court by his refusal to obey the said order of said court that he render said final account," so that the commitment must be sustained, if at all, under subdivision 5 of section 1209 of the Code of Civil Procedure as to disobedience of a lawful judgment, order, or process of the court.

[4] The particular contentions of the petitioner are three: (1) That the court was without general jurisdiction to require him to account as the administrator of his deceased wife's estate; (2) that if it ever had such jurisdiction, the right of Mrs. Randall to invoke it had been lost by her failure to present a claim against Mrs. Philbrook's estate and the lapse of time; and (3) that upon his answer to the citation the court was not empowered to make the order for the disobedience of which the commitment was made. These contentions will be considered in their inverse order.

If the court had jurisdiction of the proceeding and the right of the executrix of the Randall will had not been lost, there could be no question in regard to the propriety of the commitment. The original citation addressed to the petitioner was dated December 12, 1919. From the petition for the writ of habeas corpus it appears that the present petitioner appeared specially on December 30, 1919, and moved the court to dismiss the petition, and on January 9, 1920, he filed a demurrer to the original petition, which demurrer was overruled on January 20, 1920, time being granted to the petitioner here to answer, which was extended by seccessive orders until February 24, 1920, at which time the present petitioner filed his answer to the petition. The petitioner does not in any way set forth the nature of his answer, nor does he state that in the answer there was any attempt on his part either to render the account he was ordered to render or facts or circumstances shown to explain why the account was not rendered.

It is then alleged that on February 26, 1920, in his absence and without notice the superior court ordered the petitioner to be arrested on the ground that he had refused to obey the citation. The allegations of fact are interspersed with statements such as that the order was made "upon the utterly false and insolently impertinent ground that I have refused to obey the said citation." Such statements add nothing to the fact that the order of February 26, 1920, was made. In the absence of a showing of any facts concerning the contents of the answer filed by the petitioner, it must be presumed that the order of February 26th was in the lawful and proper exercise of the judicial function. Code Civ. Proc. § 1963, subds. 15, 16; People v. Blackwell, 27 Cal. 67.

[5] Attachment was issued on February 26, 1920, and the petitioner was arrested under the attachment and brought before the court on March 12, 1920. It appears from the copy of the order made on the last-mentioned day that it was ordered that Mr. Philbrook render and file the final account of the sums of money and other property of the Randall estate for which Florence E. Philbrook, deceased, as such administratrix, was chargeable and accountable to said estate. The order recites that "upon the stipulation and promise of the said Horace W. Philbrook, the said administrator appearing in propria persona, and upon the stipulation and promise of the said Lloyd M. Robbins, Esq., his said attorney, made in open court, that the said Horace W. Philbrook will, upon the 22d day of March, 1920, at 2 o'clock p. m. of said day, personally file said final account in open court, in department 4, by delivering the same to the clerk thereof, and the said Lloyd M. Robbins, Esq., his said attorney then and there waiving any irregularities growing out of said continuance and at the request of the said Horace W. Philbrook, said administrator, and of his said attorney said Lloyd M. Robbins, Esq.," it was ordered that the petitioner here be released on his own recognizance until March 22, 1920, at which time he was ordered to appear before the court to render and file the final account. It is contended by the petitioner here that the promise which he admits was made under the conditions stated was made under duress, because he claims he was illegally under arrest. The claimed illegality of that arrest will be considered under the other two contentions of the petitioner. He did not appear on March 22d in accordance with his promise, and did not render the account he was then ordered to render. The attachment under which the petitioner was arrested for disobedience of the order of March 12, 1920, was issued on March 26, 1920, and the petitioner was arrested. The writ of habeas corpus was issued on March 24, 1920. The petitioner was arrested on

that day, and was taken before the court, and the order of commitment was made. The entire record shows ample ground for the issuance of the attachment and the commitment if the petitioner's contentions in regard to the two jurisdictional questions are not well taken.

[6] The petitioner alleges that Florence E. Philbrook died on November 17, 1918, and that the petitioner was duly appointed administrator of her estate and qualified as such administrator on Janpary 9, 1919. There is no allegation that he ever published notice to creditors in said estate, but it is argued that it must be presumed that he did what he should have done, and therefore that the time for presentation of a claim on the part of the estate of Randall must have expired between the time of his qualification as administrator of the estate of Florence E. Philbrook and the issuance of the citation on December 12, 1919. It is a fundamental rule of law that every essential fact must be stated in a pleading, and this is true even in a habeas corpus proceeding. The allegations of the petition cannot be strengthened by this contention in opposition to the general presumption attaching to the regularity of judgments and orders of courts.

[7, 8] Even though it appeared that notice to creditors had been given in all respects as required by law in the estate of Philbrook, the petitioner would be in no better position on this branch of the case. He relies on In re Smith, 108 Cal. 115, 40 Pac. 1037, to support his proposition that if the time for presentation of claims expired without a claim having been presented on the part of the Randall estate, it is barred forever. Without making lengthy analysis of the opinion in Re Smith, it is sufficient to show that it does not sustain the petitioner's contention. In that opinion it was said that it was the duty of the surviving executor "to have presented a claim in his brother's estate, or to have compelled an accounting of his brother's trust in equity." In re Smith, 108 Cal. 121, 40 Pac. 1039. At that time section 1639 of the Code of Civil Procedure had not been adopted, but as was determined in King v. Chase, 159 Cal. 420, 115 Pac. 207, proceedings under that section take the place of the suit for accounting in equity. Under the decision in Re Smith, the executrix of the will in the Randall estate had open to her alternative remedies, and she is pursuing one of those remedies. Furthermore, the present proceeding in this court is not in the nature of an appeal or writ of error, but the investigation is confined solely to the question of jurisdiction.

[9] The principal contention of the petitioner is that because the letters of administration originally granted to Mrs. Philbrook in the estate of Randall were revoked before her death, there is no jurisdiction in the superior court in the estate of Randall to require the personal representative of Mrs. Philbrook to account. Prior to 1905, the statutes of this state contained no provision authorizing the superior court sitting in probate to require or settle accounts. King v. Chase, supra. Under that case, the sole method of requiring such an account is under the provisions of section 1639 of the Code of Civil Procedure. It provides that if any executor, administrator, or guardian dies, upon petition of the successor of such deceased executor, administrator, or guardian, the court may compel the personal representative of the deceased executor, administrator, or guardian to render an account of the administration of their testator or intestate, and must settle such account as in other cases. Section 1629 of the Code of Civil Procedure provides that where the authority of the executor or administrator ceases or is revoked for any reason, he may be cited to account. After the revocation of the letters of Mrs. Philbrook, proceedings were instituted to require her to file her final account. These proceedings terminated by her death. The present proceedings are under section 1639, Code of Civil Procedure. The contention of the petitioner is that he is not the personal representative of a deceased administrator, for the reason that Mrs. Philbrook had ceased to be the administratrix of the estate of Randall prior to her death. While her letters had been revoked in her lifetime, and she had no further authority to act as administratrix, she had not rendered her final account, and had not been discharged as administratrix. The liability of Mrs. Philbrook was her liability as administratrix. It appears to this court that to construe section 1639, Code of Civil Procedure, in accordance with the petitioner's contentions would be extremely narrow, and the facts of this case as disclosed by the record support the construction placed upon the section by the superior court of Alameda county.

The multiplicity of other contentions made by the petitioner do not appear to require mention. They have been examined, and in the opinion of the court, none of them warrants the release of the petitioner on this proceeding.

It is ordered that the writ be discharged, and the petitioner remanded to the custody of the sheriff of Alameda county.

We concur: BRITTAIN, J.; NOURSE, J.

47 Cal. App. 575

KIBBE et al. v. GRAVES et al.

GRAVES v. McMAHAN et al.

(Civ. 3369.)

(District Court of Appeal, First District, Division 2, California. May 20, 1920.)

1. Appeal and error ⊂=612(2)—Judge's certificate must be attached to transcript.

Where the judge's certificate is not attached to transcript in accordance with the provisions of Code Civ. Proc. § 953a, only the certificate of the clerk being attached, the appeal must be considered merely as an appeal upon the judgment roll alone.

2. Judgment ⊂=585(5)—Not res adjudicata under changed conditions.

A judgment, in an action by one holding land in trust for benefit of certain creditors to enjoin sale of land under an execution issued on a judgment in an action against the debtor, denying such trustee an injunction, and stating that the sheriff could sell the debtor's beneficial interest therein, was not res adjudicata in an action by a purchaser for value from the trustee to quiet title and to restrain the sheriff from executing a deed to purchaser at the execution sale, for at the time of the first injunction suit, the debtor had a contingent beneficial interest, contingent upon the possibility that it would not be necessary for the trustee to sell all of the land to satisfy the debts set out in the trust agreement, and, by the trustee's sale of all the land, the debtor's beneficial interest in the land was wiped out.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Susie M. Kibbe and others against Amy Graves and another in which the named defendant filed a cross-complaint against Thomas T. McMahan and others. From a judgment for plaintiffs and orders denying new trial and refusing to vacate judgment, defendants and cross-complainant appeal. Affirmed.

Chas. M. Ackerman, of Los Angeles, for appellants.

C. Franklin Baxter and A. J. Mitchell, both of Los Angeles, for respondents.

LANGDON, P. J. This is an appeal by the defendants from a judgment in favor of the plaintiffs in an action to quiet title to certain real estate in the county of Los Angeles, and also from orders denying a new trial and refusing to vacate the judgment.

[1] The respondent, at the outset, objects to a consideration of the reporter's transcript for the reason that the judge's certificate is not attached thereto, in accordance with the provisions of section 953a, Code of Civil Procedure. It is contended that as only the certificate of the clerk is attached to the transcript, and as the clerk is only qualified to certify to the judgment roll, therefore this appeal must be considered by this court merely as an appeal upon the judgment roll alone. We think this objection is well taken, and that the appeal can be considered only upon the judgment roll. Christenson Lumber Co. v. Seawall, 157 Cal. 405, 108 Pac. 276; Knoch v. Haizlip, 163 Cal. 20, 124 Pac. 997; Lane v. Tanner, 156 Cal. 135, 103 Pac. 846. However, in the present case, as pointed out by the appellant, the consideration of the judgment roll involves a consideration of practically all the material evidence contained in the reporter's transcript. The transcript contains the judgment roll in the present action, and also a grant deed, judgment rolls in two prior actions, and a sheriff's return upon execution in yet another action between the parties. These documents are substantially set out, in their legal effect, in the pleadings, and the facts with reference to them were found by the court. The effect of judgments in cases Nos. B-38190 and B-40999 are pleaded, the grant deed from McMahan, trustee, to the plaintiffs is referred to in the pleadings, and is described therein, except as to the consideration stated in said deed. The recital of a consideration of $36,641.85 in said deed (which deed is set out in the transcript) is the one point excluded from our consideration upon this appeal by the absence of the judge's certificate, which the appellant contends is material to her case. It may not be inappropriate for us to say, in passing, that we think a consideration even of this matter would not change our determination in any way for the reasons which shall appear hereinafter.

The facts of the case are complex. Many matters are set up in the pleadings which occurred in actions between the same parties previous to this action, and in the interest of clarity, we shall discuss the events as found by the court, in the order of their occurrence, and without regard to the order in which they are pleaded.

On August 21, 1915, one Florence E. Rickershauser was the owner of the real property involved in the present action. At that time she was insolvent, and executed a deed to one McMahan covering said property, which conveyance was duly recorded on December 3, 1915. On August 27, 1915, McMahan executed a declaration of trust with reference to said property, declaring that he held the same, not in his own right, but as trustee for certain creditors of the grantor, the names of the creditors and the amounts of their claims being set out in the declaration of trust; that he held the same for the benefit of said creditors with power to manage and sell said property and to apply the proceeds to the payment of said debts, and to pay the balance, if any, over to the grantor, Florence E. Rickershauser.

On May 18, 1916, defendant Amy Graves instituted an action (No. B–38190) against E. E. Denton and Florence E. Rickershauser, and recovered a judgment therein for $3,474.24. On July 11, 1916, a writ of execution was issued upon said judgment, and the sheriff levied upon the property involved herein, as the property of Florence E. Rickershauser, and published a notice of sale to be held on August 31, 1916. On August 8, 1916, McMahan instituted an action (No. B–40999) against the sheriff to restrain him from selling said property, and alleged that the property was held by him in trust for the benefit of certain creditors of Florence E. Rickershauser, and that Florence E. Rickershauser had no right, title, or interest therein. In this action Amy Graves intervened, and by her complaint in intervention and the answer thereto there was put in issue the questions of the validity of the deed from Florence E. Rickershauser to McMahan, and the validity and purposes of the trust declared by him to attach to said property. It was adjudicated in that action that the conveyance from Rickershauser to McMahan was bona fide and not in fraud of creditors; that it was impressed with a trust in accordance with the trust declaration hereinbefore referred to; that Florence E. Rickershauser was entitled to whatever beneficial interest remained in the trust property after the payment of the claims enumerated in the trust declarations, and that McMahan was therefore not entitled to a permanent injunction against the sheriff to restrain him from selling whatever beneficial interest Florence E. Rickershauser had in the property.

Thereafter, in pursuance of the trust agreement, the property was sold by the trustee, McMahan, on July 30, 1917, and the sale confirmed by the court, and the purposes of the trust accomplished by the payment of the debts. On August 30, 1917, the sheriff proceeded with the execution sale to satisfy the judgment in said action No. B–38190, in accordance with the judgment in case No. B–40999. Amy Graves purchased at said sale, all the right, title, and interest of Florence E. Rickershauser in and to said property. A certificate evidencing said sale was issued to the purchaser by the sheriff, but a deed has not yet been executed by the sheriff conveying said interest so purchased. It will be observed from this statement of facts that before Amy Graves made her purchase at the sheriff's sale, the property had already been sold to the plaintiffs under the power given in the trust agreement, and the proceeds from said sale had been used in the extinguishment of the debts of Florence E. Rickershauser, the said sale under the trust deed had been confirmed by the court, and the trustee discharged, according to the allegations of the pleadings and the findings of the court. At the time Amy Graves purchased the beneficial interest of Florence E. Rickershauser she had notice of the conveyance to plaintiffs made under the power contained in the trust agreement, as said conveyance to plaintiffs was duly recorded.

All of the above facts are preliminary to a discussion of the present suit, but they all appear from the pleadings and findings in the present action. In the present action the plaintiffs, who are the grantees of McMahan under the power given him in the trust agreement, seek to quiet title to the land against the defendant, and they also set out in their complaint the facts regarding the execution sale under which the right, title, and interest of Florence E. Rickershauser was sold to Amy Graves, and allege that the sheriff will execute a deed to said Amy Graves on August 30, 1918, in consummation of said sale, unless restrained by the court, and that such deed, if executed, will cloud the title of the plaintiffs to their property, and they ask that the sheriff be restrained from executing this deed. In other words, the plaintiffs seek to litigate the question of whether or not Florence E. Rickershauser had any beneficial interest in the land in controversy at the time of defendant's purchase, and to restrain the sheriff from executing the deed to defendant until such matter may be determined, so as to keep unclouded the title of the plaintiffs to the land. It is also alleged that the value of the property is something over $30,000, and that the interest of Florence E. Rickershauser was sold at sheriff's sale for about $2,600, and plaintiffs offer to redeem from said sale if it be adjudged that Florence E. Rickershauser had any beneficial interest in said property at the time of the purported sale to Amy Graves. It is also alleged that the plaintiffs purchased the property in good faith from Thomas T. McMahan, trustee, and paid therefor $33,641.85. Amy Graves filed an answer, denying the title of plaintiff and setting up title in herself by virtue of the execution sale. She also makes various allegations in her answer and cross-complaint, as to matters decided in action B–40999 with reference to the fraud of Florence E. Rickershauser in conveying to McMahan, and the validity of McMahan's conveyance to plaintiffs, all of which we need not discuss here, as these questions were decided adversely to the defendant Amy Graves in said action No. B–40999, and such matters are res adjudicata as between these parties.

The trial court in the present action issued a permanent injunction restraining the sheriff from clouding the title of the plaintiffs by issuing the deed to the defendant.

[2] One of the main contentions of the appellant is that the injunction should not have been issued, because she asserts that it was decided in said action B–40999 that the sheriff might proceed with the sale and sell the beneficial interest of Florence E. Rickershau-

ser in the property. The facts bearing upon this question as they existed at the time of the determination in action B–40999 and as they exist in the present action are materially different, and therefore the question is not res adjudicata here. In action B–40999, McMahan was the plaintiff. He held the legal title then to the property in controversy, holding the same under specific trusts as found by the court, and Florence E. Rickershauser was a possible beneficiary under the trust. She had a contingent interest in the property, for at that time it had not yet been sold under the power given to the trustee. This possible beneficial interest of Florence E. Rickershauser was an asset, upon which it was proper for Amy Graves to levy at that time, and she could not be restrained from doing this. If it had been necessary to sell only a part of the property to satisfy the debts set out in the trust agreement, then the residue would have belonged to Florence E. Rickershauser under the terms of the trust agreement, and her contingent interest would have become vested. This contingent interest was something which could have been reached by the judgment creditor of said Florence E. Rickershauser. In the present action, however, the situation has changed. McMahan no longer holds the property under a trust in which Florence E. Rickershauser has any possible interest. The property has been sold. Plaintiffs have purchased the property at the trustee's sale. They allege and the court found that they paid value for it. There is no longer in existence any interest of Florence E. Rickershauser in the property, for it was necessary to sell all of the property to pay the debts. The error of the appellant is in assuming that, when McMahan sold under the trust deed to the plaintiffs in execution of the trust, the plaintiffs took only the legal title, subject to the beneficial interest of Florence E. Rickershauser. The plaintiffs took both the legal and equitable title—the full and complete title, discharged of all trusts. This being true, the interest of Florence E. Rickershauser in the property, became changed into an interest in the proceeds of the sale, provided any surplus existed after the purposes of the trust had been fulfilled. Whether there is such a surplus, and, if so, who is holding it, and whether or not Amy Graves may levy upon it, are questions not in issue here. We are dealing merely with the title to this real property. As it has been found that it was regularly and properly sold to the plaintiffs for value in execution of a valid instrument of trust, the interest of Florence E. Rickershauser in said property is forever wiped out, and there was nothing, at the time of the purported sale by the sheriff, to convey to the defendant Amy Graves. In other words, the issuance of the deed by the sheriff would be a meaningless proceeding, conveying nothing, and merely involving the plaintiffs in lawsuits to clear the record. Whatever interest Florence E. Rickershauser may have had in the property was converted into an interest in the proceeds of the sale, if such proceeds were more than the amount necessary for the payment of the debts. Appellant, however, does not attempt to pursue this possible interest in the proceeds of the sale, but insists upon having the property. It is for this reason that it becomes immaterial to the appellant that we may not consider upon this appeal the recital in the deed from McMahan to plaintiffs of the consideration of $36,641.85—$3,000 more than the amount of the debts specified in the trust declaration. Even though it be conceded that the trustee received for the property more than the amount of the claims specified in the declaration of trust, and that, therefore, there was a balance due Florence E. Rickershauser, yet we are not concerned with that balance here, and we do not see how the injunction granted in the present case interferes in any way with defendant's right to pursue said money if it exists. The injunction restrains the sheriff "from executing a deed in favor of the said Amy Graves which if executed would purport to convey to her any beneficial interest of Florence E. Rickershauser in and to the land or any part thereof involved in this action."

One further point is argued by the appellant, which has reference to the descriptions of the property contained in the various instruments involved in this action. The point is made merely with reference to the last parcel of real property set out in the complaint, parcel G. This parcel of land when it was conveyed by Florence E. Rickershauser to McMahan, trustee, was described as follows:

"An undivided one-half interest in lots 1, 8, 9, 10, 11, 12, 13, 14, 16 and 24 in block 15 of the Breen tract, Wilmington."

This same description was used in the deed from McMahan to plaintiffs; it was also used in the complaint to quiet title herein. It was the description found by the court to cover the land in controversy, in its findings of fact and conclusions of law, and in its judgment herein. It is the description contained in the injunction against the sheriff, and he is enjoined from executing a deed to defendant Graves of land described in that manner.

However, in the cross-complaint of Amy Graves filed herein, in which she sought to quiet title to this land to have the deeds from Rickershauser to McMahan, and from McMahan to plaintiffs, declared void, this particular parcel of land is described as follows:

"An undivided one-half interest in lots 1, 8, 9, 10, 11, 12, 13, 14, 16 and 24 of the Breen

tract as per book fifteen, page forty-two of maps."

The execution in action No. B–38190 had been issued against this parcel described in this manner, and the sale by the sheriff was made to the defendant Graves under this description.

Because of this variation in the descriptions of the 10 lots in the Breen tract, appellant is taking the position that the property to which the plaintiffs are entitled under the deed from McMahan, and under the decree of the court quieting title, is not the same property under which execution was issued in action B–38190, and not the same property which defendant Graves purchased at the sheriff's sale. Therefore they contend that, regardless of the judgment quieting title according to the prayer of plaintiffs' complaint, defendant Graves is entitled to a deed to 10 lots in the Breen tract. There is nothing in the record from which this court can determine whether these certain 10 lots "in the Breen tract" and the 10 lots numbered the same "in block 15 of the Breen tract" are the same lots. If they are not, then obviously defendant may have her deed to the lots "in the Breen tract," while the plaintiffs have their title quieted to the lots "in block 15 of the Breen tract." But it requires no modification of the judgment to bring about such a result, because the injunction merely restrains the sheriff from executing a deed to these certain lots "in block 15 of the Breen tract." It in no way interferes with his action in executing to the defendant Graves a deed to any different lots "in the Breen tract," which she may have purchased.

The judgment is affirmed.

We concur: NOURSE, J.; BRITTAIN, J.

47 Cal. App. 583

BUXTON v. INTERNATIONAL INDEMNITY CO. (Civ. 3366.)

(District Court of Appeal, First District, Division 2, California. May 20, 1920. Hearing Denied by Supreme Court July 19, 1920.)

1. Insurance ⟸151(1) — Letters written by insurer held part of insurance contract.

An agreement contained in a letter written by an insurance company as to what a policy against theft, robbery, or pilferage should cover, which was relied on by insured, *held* to become a part of each and every contract of insurance entered into between the parties after its date, unless expressly excluded.

2. Contracts ⟸9(1)—Technical terms not required.

It is not necessary that parties to a contract should express themselves in the most technical and precise terms; it being sufficient if their meaning clearly appears, in view of Civ. Code, § 3401.

3. Insurance ⟸425—Word "steal," in agreement as to theft policy, included conversion by conditional vendee.

An insurance company's agreement that its policy should cover theft of automobile by vendee in possession under conditional sale *held* to include embezzlement or unlawful conversion by such a vendee; "stealing" being a larger term than robbery, and including unlawful appropriation of things which are not technically a subject of larceny.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Steal.]

4. Action ⟸38(2)—Complaint seeking to reform and to recover on contract states one cause of action.

A complaint seeking to revise or reform a contract, and also to recover on or enforce the same, states but one cause of action.

5. Insurance ⟸635—In action on theft policy, allegation as to embezzlement sufficient.

An allegation in an action on a theft policy that conditional vendee of an insured automobile removed the same from the state, and ever since has and does now conceal the same, with the intent to injure and defraud the plaintiff, was an allegation of sufficient facts to constitute embezzlement, under Pen. Code, § 504a.

6. Pleading ⟸68—Allegation on information or belief sufficient.

An allegation of material facts on information or belief is a sufficient allegation, under Code Civ. Proc. § 446.

7. Pleading ⟸205(2)—Allegation on information or belief sufficient as against general demurrer.

In a vendor's action on an insurance policy protecting his equity in an automobile, allegations that the purchaser without the knowledge or consent of plaintiff, removed the automobile from the state, and conceals the same with the intent to injure and defraud plaintiff, and that the purchaser had converted the automobile, though made on information and belief, were sufficient, where objection was by general demurrer.

8. Insurance ⟸559(1)—Insurer waived proof of loss by denying liability.

Where insured notified insurer in writing of the loss or disappearance of an automobile, and within 60 days from the date of the loss the insurer denied liability on the policy on the ground that it did not cover embezzlement or wrongful conversion, proof of loss was waived, although insurer did not have in contemplation a letter of the company which modified the policy, so as to include conversion by a conditional vendee; the two instruments constituting one contract.

9. Trial ⟸396(3)—Finding as to intent of parties to contract held not outside issues.

In an action under a policy against theft, etc., a finding of the trial court with relation to the intention of the parties to the contract

in using the word "steal" in a letter modifying the policy was not outside the issues, where the plaintiff alleged that defendant delivered a policy of insurance against all direct loss or damage which he might sustain, caused by the wrongful conversion of an automobile by a vendee under an executory contract; the court necessarily determining the meaning of such word when construing the contract.

10. Insurance ⟸665(4)—Evidence justifying finding that third party embezzled automobile.

In action against an insurance company to recover under a policy by reason of embezzlement of an automobile by a conditional vendee, evidence *held* to justify a finding that the conditional vendee converted the automobile to his own use, and removed it from the state, and retained and concealed the same, with intent to injure and defraud the plaintiff.

11. Insurance ⟸665(1)—Insured required to prove case only by preponderance of evidence.

An action to recover under a policy against theft is a civil action, and plaintiff is required to prove his case only by a preponderance of the evidence; the rule being the same as it is in civil cases generally.

12. Insurance ⟸506—Insured may recover expenses of attempting to recover stolen property.

In an action under a policy of insurance against conversion of an automobile by a conditional vendee, plaintiff was entitled to recover money paid to a detective agency in attempting to recover the automobile, where the policy provided that any act of the assured in recovering, saving, and preserving the property should be considered as done for the benefit of all concerned, and all reasonable expenses should constitute a claim, etc.

13. Insurance ⟸503—Policy insuring dealer's equity in conditionally sold automobile entitled insured to interest on payments due.

Under a policy of insurance undertaking to protect a dealer's equity in automobiles sold under conditional contract and embezzled by conditional vendees, insured was entitled, on conversion of a car by a vendee, to recover the unpaid installments, plus interest thereon, where the terms of the conditional contract of sale provided for the payment of interest on all deferred payments from the date of the contract.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Lynn C. Buxton against the International Indemnity Company. Judgment for plaintiff, and defendant appeals. Affirmed.

N. Blackstock, Edward M. Selby, and W. I. Gilbert, all of Los Angeles, for appellant.

John B. Yakey, of Los Angeles, Jack M. Hendrick, of Trinidad, Colo., for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment for the plaintiff in an action to recover upon a contract of insurance. The court found that the contract of insurance entered into between the parties to this action consisted of a written agreement in the form of a letter, dated June 8, 1916, signed by the secretary of the defendant company, and addressed to the plaintiff, and of a policy of insurance set out in the complaint.

Plaintiff was a dealer in automobiles, and entered into a contract with one Suttle, by which Suttle was to purchase a Stearns-Knight automobile for $2,250; the purchase price to be paid in installments as provided in the contract, and the automobile to remain the property of the vendor until all payments had been made. Plaintiff applied to the defendant for insurance upon this automobile so contracted to be sold, and a policy was issued by the defendant on June 12, 1917. The insured named in the policy was "W. A. Suttle and/or N. R. Vail." According to the testimony and the findings, at the time of the issuance of the policy, the automobile covered thereby was the property of the plaintiff, and said N. R. Vail had no interest whatever therein; but his name was inserted in the policy at the suggestion of the defendant's agent, because plaintiff stated to said agent of the defendant that Vail would advance money upon this purchase contract. The premium upon the policy was paid by the plaintiff, and the policy was delivered to him. Vail for some reason did not advance money upon the contract, and on June 26, 1916, an indorsement was made on said policy by the defendant company that it had received notice that the interest of Vail in the policy had been assigned to plaintiff, and loss, if any, was payable to W. A. Suttle and/or Lynn C. Buxton, as their interests may appear. Later the policy was assigned by plaintiff to T. E. Newlin as collateral security, and this assignment was approved by the insurance company. After the loss of the automobile, Newlin assigned his interest in said policy to plaintiff.

The testimony upon which the findings of the trial court are based shows that prior to June 8, 1916, Mr. Hallenbeck, who was soliciting business for the defendant, had a conversation with the plaintiff regarding his insurance business. Hallenbeck was seeking plaintiff's business, and plaintiff complained to him about the technical defenses raised by insurance companies and the inadequate protection given by their policies, and told him that he desired to be fully protected in all cases of lease contracts. Hallenbeck promised that his company would fully protect the plaintiff if he would insure his automobiles with it, and stated, according to the plaintiff's testimony, that the policies of his company would be protection against "fire, theft, and wrongful conversion," and that he would have the company write to plaintiff to this effect. In accordance with this understand-

ing, on June 8, 1916, H. Perk, Jr., secretary of defendant company, wrote to the plaintiff as follows:

"I wish to advise you that the International Indemnity Company will from this date extend policies on all cars in which you may have an equity to cover any claims arising under the following conditions: * * * Third. If the conditional buyer of an automobile, or any member of his immediate family, should steal any automobile insured under our policies, and thereby commit a felony, upon warrant being secured for the arrest of such party or parties, the company hereby agrees that your equity in any automobile insured by this company will be fully protected."

Plaintiff's secretary testified that reliance was placed upon this letter, and policies of insurance were ordered from the defendant company with this understanding. This instrument was never recalled, and plaintiff had received no notice, at the time the policy in suit here was issued, nor thereafter, that this communication was not in full force and effect.

[1] On or about September 15, 1917, Suttle, the vendee of the car, disappeared from Los Angeles, taking the car with him. The evidence regarding his alleged misconduct we shall discuss later. Our first consideration is the contention of the appellant that the evidence does not support the finding of the trial court that the two documents mentioned here—the letter of June 8, 1916, and the policy issued June 12, 1917—constitute one contract. We think it clearly appears from the testimony of the plaintiff and his secretary that the policy was taken out in reliance upon and in consideration of the agreement made in the letter of June 8, and that said letter became a part of each and every contract of insurance entered into between the parties after its date, unless expressly excluded from said contracts. The policy of insurance itself provides, among other things, insurance against—

"theft, robbery, or pilferage, excepting by any person or persons in the assured's household or in the assured's service or employment whether the theft, robbery, or pilferage occur during the hours of such service or employment or not, *and excepting also the wrongful conversion or secretion by a* mortgagor or *vendee in possession* under mortgage, *conditional sale, or lease agreement.* * * *"

[2] It was the contention of the plaintiff upon the trial that the language hereinbefore quoted from the letter of June 8 was intended to obviate the exception italicized above with reference to wrongful conversion or secretion by vendee in possession under conditional sale; and that the language of said letter, "If the conditional buyer * * * should steal any automobile insured under our policies, * * * your equity will be fully protected," was intended by the parties and understood by them to cover wrongful conversion by said conditional buyer; that the word "steal" is used in its broad, general sense, and not in the technical sense of larceny. Plaintiff asked that the portion of the contract of insurance appearing in the letter be reformed to express the true intent and understanding of the parties. The court found that the word "steal" was used by the parties to express the idea of wrongful conversion, and reformed the contract accordingly.

The matter could have been disposed of, as pointed out by respondent, under the power of the court to interpret contracts, for it appears from the testimony of the plaintiff's witnesses that the word "steal" must have been used by the parties in its broad and colloquial sense. It is unlikely that the plaintiff would have cared for an extension of insurance to cover a contingency which is almost impossible of occurrence. If appellant's view be taken, the defendant assumed practically no risk at all in guaranteeing the plaintiff against larceny by a conditional vendee of an automobile covered by his contract of purchase. The conditional vendee would have lawful possession of the car, and his misappropriation thereof would be embezzlement or wrongful conversion. It is difficult to imagine how he could commit larceny in connection therewith, for this offense involves unlawfulness in taking possession. Appellant enlightens us upon this point by arguing that, if the contract of purchase was entered into for the purpose of stealing the car, then the original possession would be unlawful, and the act would be larceny. It seems unlikely that the plaintiff desired insurance against a situation such as this. The necessary elements of such an offense, to bring it within the terms of such a policy, would be most difficult of proof. Furthermore, the direct testimony of the plaintiff is that he desired, and was assured that he would receive, protection against wrongful conversion by his vendee. It is not surprising that a layman, upon reading the letter of June 8, would think its language covered this situation. It is also not necessary that parties to a contract should express themselves in the most technical and precise terms; it is sufficient if their meaning clearly appears.

[3] Section 3401, Civil Code, provides that in revising a written instrument the court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be. Section 504a, Penal Code, provides that every person who shall fraudulently remove, conceal, or dispose of any personal property or effects of another, in his possession under a contract of purchase not yet fulfilled, is guilty of embezzle-

ment. Although the word "steal" ordinarily imports larceny, it may be shown to import a charge of embezzlement. Taylor v. Short, 40 Ind. 511. The word "steal" can be shown, in the connection in which it is used, not to import larceny. 26 Am. & Eng. Ency. of Law (2d. Ed.) 770; Dunnell v. Fiske, 52 Mass. (11 Metc.) 551, 554.

"The term 'steal' is commonly used in indictments for larceny, and denotes a commission of theft; but, in a popular usage, 'stealing' is a wider term than larceny, inasmuch as it may include unlawful appropriation of things which are not technically a subject of larceny." Black's Law Dictionary.

It is said in Darling v. Clement, 69 Vt. 292, 297, 37 Atl. 779, that the natural and obvious meaning of the word "steal" is a felonious taking of property by larceny, but it may be qualified by accompanying words, so as to show that such was not the meaning. In the present case, we think that, when the word "steal" was accompanied by the qualifying words, "by a conditional buyer," these qualifying words clearly extended the word "steal," so as to make it include embezzlement, a crime which is consistent with the legal right of possession in the vendee under a conditional contract of purchase.

Furthermore, if the contract contained in said letter be construed as appellant desires, merely to cover a technical theft by a conditional purchaser, or, as stated by the appellant, "only to cover a case where there was a felonious intent at the time that the automobile purchaser acquired possession," then the owner was already protected against such a situation by the policy proper, and without the addition of the letter of June 8, and therefore the portion of the contract contained in the letter is meaningless and useless; for the policy itself provides against theft by any and every one, excepting only persons in the assured's household or employment. There is no exception made as to theft by one having a conditional contract of purchase, and, if we concede the possibility of such an offense, then no exception is made of it in the policy. The only thing that is excepted with regard to the conditional purchaser is "wrongful conversion." Therefore it appears that, if the letter of June 8 added any protection against the actions of the conditional purchaser, it must have been by making inoperative this exception against wrongful conversion. We therefore agree with the trial court in its holding that the contract was intended by the parties to cover unlawful conversion by the vendee.

It may be appropriate to point out here, in answer to certain arguments made by appellant, that the finding of the trial court is that, in drawing the contract between the parties to this action, it was the intention of the parties that this contract should cover and fully protect the plaintiff against the embezzlement or wrongful conversion of any automobile covered by any insurance policy issued by the defendant, and that said letter or contract of June 8, 1916, was given by defendant company to the plaintiff for the purpose and with the intention to protect the said plaintiff against wrongful conversion or embezzlement of any automobile so sold by plaintiff under conditional sales contract. This finding is sufficient to sustain the judgment, and it is immaterial whether or not the other portion of the finding, to the effect that by inadvertence and mistake the word "steal" was used, instead of the words "wrongful conversion and embezzlement," is technically sustained by the evidence or not. If the parties intended that the word "steal" should be used in its broad and coloquial sense, and cover certain risks out of which this loss grew, that is sufficient, and it is unnecessary that the record show the parties actually intended to use the express words "wrongful conversion," but by mistake used the word "steal."

[4] Many of the other objections of the appellant are technical ones, and we shall discuss them briefly. Appellant contends that its demurrer should have been sustained, because the complaint contains two causes of action, which were not separately stated. The court found, contrary to appellant's premise upon this argument, that the letter and contract constituted one and the same contract. As before stated, we are in accord with this conclusion. A complaint seeking to revise or reform a contract, and also to recover upon or enforce the same, states but one cause of action. Messer v. Hibernian Savings & Loan Society, 149 Cal. 122, 84 Pac. 835.

[5-7] Appellant also contends that the complaint does not sufficiently allege the conversion of the automobile by Suttle, and therefore fails to allege loss. The complaint alleges:

"As this plaintiff is informed and believes, and therefore alleges the fact to be, the said W. A. Suttle, without the knowledge or consent of this plaintiff, removed from Los Angeles, and the state of California, the said automobile, and ever since has and does now conceal the same, with the intent to injure and defraud this plaintiff."

This is an allegation upon information and belief of sufficient facts to constitute embezzlement under our code. And it is further alleged in the complaint, upon information and belief, that the said Suttle "embezzled said automobile and wrongfully converted the same to his own use." An allegation of material facts upon information or belief is a sufficient allegation. Section 446, Code Civ. Proc.; McDermont v. Anaheim, etc., Water Co., 124 Cal. 112, 115, 56 Pac. 779. The objection to this allegation was taken by

general demurrer, and the allegations of the complaint, we think, are sufficient against such attack.

[8] Appellant also contends that the complaint is insufficient because no proof of loss is pleaded. Plaintiff pleaded facts which constitute a waiver of proof of loss, and these facts were not denied by the defendant. Plaintiff alleged that on September 24, 1917, he notified the defendant in writing of the loss or disappearance of the automobile, and that within 60 days from the date of the loss the defendant denied liability upon the policy, upon the ground that the policy did not cover embezzlement or wrongful conversion. Appellant seeks to avoid the effect of this waiver by asserting that its denial of liability was under the policy alone, and it did not have in contemplation the letter of June 8, 1916, which was held by the trial court to be a part of the policy; that therefore they never denied liability under the contract recovered upon here, and therefore never waived proof of loss. The answer to this contention is that the defendant was aware of all the facts and is presumed to know the law. Since the court has held that the two instruments constituted one contract, defendant's denial of liability under the contract was a denial of liability under both instruments.

[9] Another objection of appellant is that the finding of the trial court with relation to the intention of the parties to the contract in using the word "steal" is outside of the issues made by the pleadings. This argument is made because the complaint alleged, among other things, that the defendant had contracted and agreed with the plaintiff, in consideration of the plaintiff purchasing insurance from the defendant, to attach to each and every policy then in existence held by plaintiff, or that might thereafter be issued, a rider or agreement protecting the plaintiff against wrongful conversion by purchasers under conditional contracts of sale. It is true that the trial court found against this allegation of the complaint, and plaintiff did not recover upon this theory of the case. But it is not true that the complaint contained no allegations sufficient to place in issue the question of the meaning of the word "steal" as contained in the letter of June 8, 1916. Upon examination of the complaint, we find an allegation that the defendant, in consideration of the payment of a certain premium, "executed and delivered to the plaintiff a policy of insurance * * * against all direct loss or damage which he might sustain caused by the wrongful conversion of said automobile by the vendee under said executory contract." This is pleading the contract according to its legal effect, and these allegations were denied by the defendant. In determining the legal effect of this contract, which was found to be made up of the policy and letter of June 8, 1916, the court necessarily determined the meaning of the language used in the light of the intention of the parties to the contract. This portion of finding 4 was therefore in issue, and it is the basis of the judgment.

[10, 11] The only other objection of the appellant which we find it necessary to discuss here is that the evidence does not justify the finding that Suttle converted the automobile to his own use, and removed the same from the state of California, and does now retain and conceal the same, with intent to injure and defraud the plaintiff. The evidence in the case shows (and there is no evidence to the contrary) that Suttle took the automobile out of this state without the consent or knowledge of the plaintiff; that he concealed the same, so that the plaintiff is unable to locate it, although he employed detectives, who followed Suttle about to several cities and endeavored to locate the car; that plaintiff demanded of Suttle either payment of the installments due or possession of the car, and this demand has not been complied with; that the payment due on September 15, 1917, the day when the automobile was taken from the state, has not been made, and no subsequent payment has been made, although several months elapsed between the time of its disappearance and the institution of this action. It is apparent from this testimony that Suttle exercised dominion over the automobile which was inconsistent with the rights of the true owner. Fitzgerald v. State, 50 N. J. Law, 475, 477, 14 Atl. 746; People v. Goodrich, 142 Cal. 220, 75 Pac. 796. An action to recover under a policy of automobile insurance against theft is a civil action, and plaintiff is required to prove his case only by a preponderance of the evidence; the rule being the same as it is in civil cases generally.

[12, 13] The objection that the plaintiff should not have recovered the $126.26 paid to the detective agency in attempting to recover the automobile is met by the express terms of the policy that any act of the assured in recovering, saving, and preserving the property, in case of loss or damage, shall be "considered as done for the benefit of all concerned, * * * and all reasonable expenses thus incurred shall constitute a claim under this policy." The portion of the contract contained in the letter of June 8 provides for the protection of plaintiff's equity in the car. Plaintiff's equity in the car was the amount of the unpaid installments, plus interest thereon, for the terms of the conditional contract of sale provided for the payment of interest upon all deferred payments from the date of the contract. Appellant may not, therefore, object to the allowance of such interest in the judgment.

The judgment is affirmed.

We concur: BRITTAIN, J.; NOURSE, J.

47 Cal. App. 717

McCORD et al. v. MARTIN et al. (Civ. 2159.)

(District Court of Appeal, Third District, California. May 24, 1920. Hearing Denied by Supreme Court July 23, 1920.)

1. Corporations ⊜187—Stockholder pooling stock could not fraudulently sell pool above agreed price and retain difference.

If a stockholder falsely represented to other stockholders that if they would pool their stock they could sell to a certain purchaser for $5 a share, and such stockholders acted upon such representation, whereas the former knew that the stock would be sold for $8, and had an agreement to that effect, and did actually consummate the sale for that price and retained the difference of $3, which the purchaser paid direct to him, the other stockholders could recover from him the $3 per share which he fraudulently obtained.

2. Pleading ⊜387—Plaintiff must recover on case made by pleadings.

The plaintiff must recover, if at all, upon the case made by the pleadings, and not upon the case which may be developed by the proofs.

3. Pleading ⊜430(2)—No complaint that fact was not in issue after judgment.

Where a cause is tried on the theory that a certain fact is in issue, and evidence is received thereon without objections, it is too late after judgment to complain that no such issue was presented by the pleadings.

4. Appeal and error ⊜907(2)—Presumption in favor of regularity of proceedings below.

On appeal, in the absence of the evidence, it must be presumed that a finding of fact not within the issues made by the pleadings was treated as a fact in issue; the presumption being in favor of the regularity of the proceedings below.

5. Corporations ⊜187—Secretary receiving more than other stockholders for stock in pool not liable to other stockholders.

Where secretary of a corporation was offered $15 per share for his stock if other stockholders would sell at $5, to the extent that the purchaser might secure 20,000 shares, and the other stockholders, uninfluenced by the secretary, were willing and agreed to sell at the lower price, and the sale was carried out, such other stockholders have no claim upon the additional price or bonus thereafter received by the secretary, the secretary not sustaining to the others any relation of confidence which made it his duty to disclose his prospect of a larger price, under Civ. Code, § 1710, subd. 3.

6. Joint adventures ⊜1—Stockholders selling stock in pool not joint adventurers.

Stockholders of a corporation pooling their shares to sell them to a purchaser at a certain price were not joint adventurers; the reason for the pool being that the purchaser did not care to purchase unless he obtained a certain number of shares.

7. Judgment ⊜570(6)—Dismissal by stipulation bar to another suit.

Where the parties to an action stipulate in open court for the dismissal of the action and the payment of their respective costs, a judgment of dismissal entered thereon is a bar to another suit upon the same cause of action.

8. Judgment ⊜525—Recitals conclusive in absence of other evidence.

Recitals in a judgment of dismissal of a prior action, that it was entered upon stipulation of the parties for the dismissal and the payment of their respective costs is conclusive upon the parties, in the absence of evidence to the contrary.

9. Courts ⊜97(6)—Interpretation of state statute by federal court not binding.

The interpretation by the federal courts of a state statute is not binding upon the state courts.

10. Judgment ⊜570(6)—Dismissal upon stipulation when judgment on merits.

Where the parties appear in open court and stipulate for a dismissal, the situation is not covered by Code Civ. Proc. § 581, but a judgment entered thereon is a judgment on the merits as contemplated by section 582.

11. Appeal and error ⊜1175(7)—On reversal, judgment directed for defendant where facts require it.

On appeal from a judgment for plaintiffs, where the findings do not support a finding for plaintiff, but require a conclusion in favor of defendant, the proper proceeding is to direct a judgment for the defendant, under Code Civ. Proc. § 53.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by Sarah McCord, administratrix, etc., against J. D. Martin and William Lindemann. From an adverse judgment the last-named defendant appeals. Reversed.

Lamberson & Lamberson, of Visalia, for appellant.

Bradley & Bradley and W. B. Wallace, all of Visalia, for respondents.

BURNETT, J. The action was begun in the superior court of the county of Santa Clara on the 22d of December, 1913. On the 8th day of October, 1914, an amendment to the complaint was filed, to which the defendant, William Lindemann, filed a demurrer. The demurrer was sustained without leave to amend on the 28th day of December, 1914, and thereafter, on the 18th day of January, 1915, judgment was entered in favor of defendant Lindemann. An appeal from such judgment was thereafter taken by the plaintiffs, and the judgment was reversed by the District Court of Appeal of the First District. McCord v. Martin, 34 Cal. App. 129, 166 Pac. 1014. The remittitur was filed in the court below on the 6th day of August, 1917, and thereafter an order was made by said superior court that the defendant answer within 10 days after notice of said order. Within time the answer was filed, and

thereafter, on motion of plaintiffs, the action was transferred for trial to the superior court of Kings county. On January 15, 1918, the plaintiffs gave notice of a motion to strike out portions of the answer of defendant Lindemann, including paragraph 16 thereof, which set up as res judicata a judgment of dismissal in an action between the same parties, entered by the superior court of the city and county of San Francisco on the 16th day of May, 1913, as follows:

"It appearing to the court from the stipulation filed herein on the 12th day of May, 1913, signed by the attorneys of record of all of the respective parties in interest, that plaintiffs (naming them), through their attorneys, Messrs. Bradley & Bradley and F. H. Gould, and that defendant and cross-complainant J. D. Martin, through his attorneys, Messrs. Morrison, Dunne & Brobeck, and that defendant William Lindemann, through his attorney Alfred Daggett, and that cross-defendants (naming them), through their attorneys, Messrs. Bradley & Bradley and F. H. Gould, have, and each of them has, stipulated that the above-entitled action and every part thereof shall be dismissed as against each and all of the parties to the above-entitled action, and that all of said parties have further stipulated that each and all of the parties to said action shall pay their costs of suit incurred by them respectively; and each and all of the above-named parties, through their said respective attorneys having stipulated in open court on the 12th day of May, 1913, that said action and every part thereof shall be dismissed pursuant to the terms of the aforesaid stipulation on file herein, and good cause appearing therefor.

"Now therefore, it is ordered that the above-entitled action and every part thereof be, and the same is hereby, dismissed as to all the parties to said action.

"It is further ordered that each and all of the above-named plaintiffs, and each of said defendants and said cross-complainant and each and all of said cross-defendants pay his or their own costs incurred by him or them respectively in said action.

"It is further ordered that this judgment of dismissal be duly entered by the clerk."

Paragraph 17 of said answer, to the effect that said judgment has never been reversed, modified, or appealed from, and has become final, and that the cause of action therein was the same as the action admitted to be set up by the complaint herein, was also stricken out.

The plaintiff J. W. McCord having died, his administratrix was substituted by order of said court. The cause was tried without a jury, and on the 1st day of March, 1919, the court filed its findings of fact and conclusions of law, and judgment was entered thereon in favor of plaintiffs as against William Lindemann on the 11th day of March, 1919. Two days later the defendant Lindemann gave notice of a motion to enter a different judgment, which motion was denied on the 24th day of March, 1919. The proceedings upon this motion have been preserved in a bill of exceptions. Defendant Lindemann has appealed from said judgment and said order denying his said motion.

The first point made by appellant worthy of serious consideration is stated as follows:

"The findings of fact are not responsive to the issues made by the complaint and answer, and are outside the pleadings, and if the findings justify any judgment at all against appellant it is for a cause of action wholly different from that stated in the complaint."

The theory of the complaint is that defendant Martin knew that one George T. Cameron, of San Francisco, desired to purchase at least 20,000 shares of the stock of the Lost Hills Mining Company, belonging to the assignors of plaintiffs, and was willing to pay therefor "a large sum of money in excess of $5 per share"; that thereafter said Martin devised a scheme to induce said stockholders to pool their stock to sell in one block to an undisclosed purchaser for $5 per share; that to enable Martin to carry out said scheme he sought the aid of Lindemann, and paid the latter a large sum of money for his assistance; that thereafter defendants represented to said joint stockholders that they knew a man, whose name they did not disclose, who would buy all of the stock of said Lost Hills Mining Company, but not less than 20,000 shares, for $5 per share, and no more; that it was worth no more than $5 per share, and could not be sold for more; "that it would be necessary to pool said stock and place it in escrow in a bank to the amount of at least 20,000 shares, in order to induce said proposed purchaser to come to Hanford and buy the same; that defendants and said E. L. Lindemann would join with said joint stockholders in pooling their said shares and placing them in escrow to be sold in one lot at the price of $5 per share"; that said representations were false, but were believed and relied upon by said joint stockholders, and they did thereupon so pool their stock and placed it in escrow with the First National Bank of Hanford to be delivered in one block to a purchaser to be produced by defendant Martin, upon the payment of $5 per share therefor; "that thereafter said proposed purchaser, who was said Cameron, upon being notified by defendants that said stock had been placed in escrow as alleged, went to Hanford, and in accordance with a secret agreement with defendants bought all the said stock so placed in escrow, for $8 per share, of which he placed $5 per share in said bank for all thereof, and paid the balance of the aggregate value thereof at $8 per share to defendants; that the value of said stock as so pooled to be sold in one block, was, at the time it was so pooled and sold, $8 per share."

[1] Being stated concisely, then, the only cause of action appearing in the complaint rested upon these facts: Both defendants

Martin and Lindemann, falsely represented to other stockholders that if they would pool their shares of stock they could sell to a certain purchaser for $5 per share; said stockholders believed and acted upon said representations; whereas, said Martin and Lindemann knew that the stock could be sold for $8 per share, and had an agreement to that effect, and did actually consummate the sale for that price, but the other stockholders in accordance with the terms of said pooling arrangement received only the sum of $5 per share, said Martin and Lindemann appropriating to their own use the balance of some $91,000. If these facts had been shown and found, it could hardly be seriously argued that plaintiffs were not entitled to a judgment against defendants. The proper legal characterization of the transaction might be in some doubt, but at any rate the principles of equity as formulated in the Code and administered by the courts are ample to reach and defeat such iniquitous conduct. But the trouble is, the trial court found that Cameron agreed with Martin "to purchase not less than 20,000 shares for a price not exceeding $5 per share; that Martin then communicated to a few of plaintiff's assignors the information, and they in turn conveyed it to the other stockholders; that defendants did not devise any scheme for effecting a sale of the interest of said Martin & Dudley in said mining claims and said Lake Shore Oil Company stock and the stock of Lost Hills Mining Company to Cameron, and Lindemann at no time knew of the plans or expectations of the firm of Martin & Dudley to sell the interest of said Martin & Dudley in said claims to Cameron." It is further found in reference to a certain sum of money that was paid by Martin to Lindemann that it "was paid to Lindemann not in pursuance of the scheme alleged in paragraph 7 of the complaint, but was paid to Lindemann in order to remove Lindemann's opposition to the sale by him of his stock and that of his wife in the Lost Hills Mining Company, and that said Lindemann might not oppose the sale by plaintiff's assignors of their stock owned by them respectively in said Lost Hills Mining Company. * * * Lindemann did not have any agreement wth defendant Martin or with the firm of Martin & Dudley for a share, nor did Lindemann receive from defendant Martin or from the firm of Martin & Dudley any share in any profits which were made by defendant Martin or by the firm of Martin & Dudley in the sale to Cameron, * * * nor did Lindemann agree with defendant Martin to aid and abet, or aid or abet, nor did he in fact aid and abet, or aid or abet, defendant Martin in carrying into effect the scheme alleged in paragraph 7 of the complaint," said scheme contemplating, as we have seen, the fraudulent claim and sale of the stock for $5 per share. It is thus apparent that the findings negative every material allegation of the complaint upon which a judgment against Lindemann could possibly be justified. In fact, he is expressly acquitted of any improper or reprehensible conduct within the scope and intent of the attempted cause of action. The judgment would necessarily, therefore, have been in favor of Lindemann (as it was actually in favor of Martin), had not the trial court gone outside the pleadings and determined certain facts to which the issues were not addressed. Appellant states the gist of these findings substantially as follows: About a week prior to March 20, 1911 (the latter date being the time when the so-called escrow agreement was signed), appellant received a letter from the Mercantile Trust Company of San Francisco, representing that if a certain client whom they represented purchased at least a majority of the stock of the Lost Hills Mining Company at the price of $5 per share, their client would pay Mr. Lindemann $15 per share for his stock. On March 20th following the said escrow agreement was signed and delivered, authorizing said First National Bank of Hanford to deliver the stock to the purchaser for $5 per share. Up to this time appellant did not know who the purchaser was, or whether said offer was genuine. After said escrow agreement was made appellant ascertained who was the prospective purchaser. Subsequently on March 30 Mr. Cameron came to Hanford and bought at $5 per share the stock of several of plaintiffs' assignors who had signed the escrow agreement; also appellant's stock at $15 per share; and also the stock at $5 per share of several others of plaintiffs' assignors, who brought their stock to the bank. Lindemann was secretary of the company, and the court's reason for imposing upon him this liability is disclosed in the finding that he "owed a duty to the other stockholders of said corporation to inform them as to the reception of said letter, and of his interview with the said Cameron, and of his reception of $15 per share for said stock, and that it was fraudulent on his part to sign the said escrow agreement, whereby he had promised to sell his stock for $5 per share, when, in fact, he had received said letter, and expected to receive $15 per share for said stock, and it was fraudulent on his part to conceal the fact that he had received said letter."

[2] It is quite apparent that thus is presented an entirely different story from that set forth in the complaint. It is sufficient to say that the so-called fraud herein does not at all involve any fraudulent representation to induce the other stockholders to pool their stock, nor the actual sale of said stock, for a price in excess of $5 per share—the two essential elements that characterized the cause of action as set forth. But it is

well settled by a long line of decisions in this state that—

"The plaintiff must recover, if at all, upon the case made by the pleadings, and not upon a case which may be developed by the proofs." Kredo v. Phelps, 145 Cal. 526, 78 Pac. 1044.

[3] This principle would be fatal to the judgment were it not for the well-recognized rule of practice that, where a cause is tried upon the theory that a certain fact is in issue, and evidence thereon is received without objection, it is too late thereafter to complain that no such issue was presented. Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318, 147 Pac. 90; Howard v. Hobson Co., 38 Cal. App. 445, 176 Pac. 715.

[4] In the absence of the evidence at the trial and in view of said finding of the court, the presumption being in favor of the regularity of the proceedings, we must assume that such was the action of the parties.

[5] The question then occurs whether sufficient facts are found to justify a judgment against appellant for fraud. In relation thereto the first thing that challenges attention is that the other stockholders in their agreement to sell their stock were not influenced by any representations of appellant. He did not deceive them in any way, and he made no effort to persuade or induce them to pool their stock for the purpose of sale at the price of $5 per share. The proposition was presented to them by Martin, who was interested in the transaction primarily for the reason that he hoped to sell to said vendee other interests closely connected with the property of the Lost Hills Mining Company. The court finds specifically that Lindemann did not know of the plans or expectations of Martin, and did not aid or abet any scheme that the latter may have had in view. The situation then is simply this: L. is offered $15 per share for his stock in a certain corporation if other stockholders will sell at $5 to the extent that the purchaser may secure 20,000 shares. The other stockholders, uninfluenced by L., are willing and agree to sell at the lower price. The question is whether they have any claim upon the additional price or bonus thereafter received by L. The answer to this question depends, of course, upon the consideration whether L. sustained to the others any relation of confidence which made it his duty to disclose his prospect of a larger price. Since any active or positive fraud is negatived by the findings of the court, there remains only the possible operation of the principle of fraudulent deceit consisting of "the suppression of a fact, by one who is bound to disclose it." Section 1710, subd. 3, Civ. Code. But we have not been cited to any authority to the effect that, either as stockholder or secretary, Lindemann was under any legal obligation to disclose to the others the fact that he had received such letter from the Mercantile Trust Company, or that he afterward obtained $15 per share for his stock. It may be admitted that some men of a fine sense of honor would have done such a gracious and altruistic act, but we are simply to inquire what the law demands in a situation of this kind.

In Ryder v. Bamberger, 172 Cal. 791, 158 Pac. 753, it was held that even "directors and officers of a corporation have the right to purchase the shares of the stock of other stockholders, where the transaction is free from fraud; and they are not bound to acquaint a stockholder willing to sell his stock with facts which would enhance the price of the stock, as they are only trustees for the stockholders as to the management of the corporation, and not in their private dealings." Manifestly, there is less reason for holding that the secretary, who is a mere ministerial officer of the corporation, holds such relation of trust and confidence to the other stockholders as to require a disclosure of any information that he may have received in his individual capacity as stockholder.

Hallidie v. First Federal Trust Co., 177 Cal. 600, 171 Pac. 431, involved an action "to compel an accounting of dividends and other proceeds realized by the purchaser, on the ground that the sale had been induced by fraudulent misrepresentations made by Enginger to Hallidie, who was acting in the transaction for California Wire Works." It was contended by appellant that, even if there was no active misrepresentation by Enginger, he was chargeable with constructive fraud because of his failure to disclose all the facts within his knowledge. The Supreme Court, however, said:

"But the evidence did not show any such relation between the parties as to impose upon Enginger the stringent obligations of a trustee. While Enginger was a director and general manager of the Wire Cloth Company, it must be remembered that Hallidie himself was not only a director, but the president of the corporation. In negotiating for the stock, the two stood on equal terms, and neither owed the other any special duty of a fiduciary nature. This being the relation between the parties, the fact, if it be a fact, that the stock was, at the time of the purchase, worth very much more than the price paid, does not furnish a ground for setting the transaction aside."

Other cases cited announcing a similar doctrine are Bacon v. Soule, 19 Cal. App. 428, 126 Pac. 384; Hooker v. Midland Steel Co., 74 N. E. 445, 106 Am. St. Rep. 170; Tippecanoe County Commissioners v. Reynolds, 44 Ind. 509, 15 Am. Rep. 245; Walsh v. Goulden, 130 Mich. 531, 90 N. W. 406.

[6] Nor do we think that appellant is liable upon the theory that all signing the escrow agreement were joint adventurers. In 23 Cyc. 453, it is said:

"A joint adventure does not exist where property is pooled by the several owners to be sold at a particular price, and each contributor is to receive the proceeds of the property contributed by him."

The stockholders at all times owned their respective shares of stock severally and individually, and at no time was there a joint interest either in the stock or the proceeds thereof.

The cases cited by respondents in view of their respective facts do not, in our judgment, satisfactorily meet the situation. Detailed consideration of only one of these, Cole v. Bacon, 63 Cal. 571, is invited by respondents as they seem to think it is "very similar to the case at bar"; but appellant aptly calls attention to the fact that therein Bacon was the avowed agent of the plaintiffs, who were stockholders in a certain corporation, and as such agent he undertook to sell the stock of plaintiffs for the highest price obtainable. He did sell said stock for $250,000, of which he secretly retained all except $47,700, and he falsely represented to plaintiffs that this sum was the price actually paid. The action was brought to recover the balance, and a judgment in favor of plaintiffs was sustained by the Supreme Court. That an agent could thus defraud his principal without rendering himself legally liable to an accounting would, of course, not be urged by any one familiar with the law. It may be added that the case here as presented by the complaint is "very similar" to Cole v. Bacon, supra, but the case as presented by the findings is quite dissimilar.

[7, 8] We think, also, that the court erred in striking out the defense of res judicata. It is stated by appellant that at the trial the facts were stipulated to be as alleged in said defense.

In Merritt v. Campbell, 47 Cal. 542, it was held that—

"A judgment of dismissal, rendered upon the oral agreement of the parties in open court, with a stipulation that each party pay his own costs, is a bar to another suit, afterward brought upon the same cause of action."

Such dismissal was declared to be equivalent to retraxit as known at common law, which, being "an open and voluntary renunciation of his suit in court," the plaintiff was not at liberty to renew. Respondents, however, claim that said decision is not controlling, because therein "the parties appeared in court by their attorneys, and orally agreed to a dismissal, each party to pay his own costs." Appellant rejoins:

"Respondents evidently overlook the fact that in the case at bar the parties did stipulate in open court for the dismissal of the action and the payment of their respective costs, the same as was done in Merritt v. Campbell."

The terms of said judgment do, indeed, accord with appellant's statement, and, of course, the recitals in said judgment in the absence of evidence to the contrary are conclusive upon the parties. Crew v. Pratt, 119 Cal. 139, 51 Pac. 38.

[9] As to Rincon, etc., Co. v. Anaheim Union Water Co. (C. C.) 115 Fed. 543, cited by respondents, appellant is justified in his comment that: First, the interpretation by a federal court of a state statute is not binding upon the state courts (People v. Linda Vista Irr. Dist., 128 Cal. 477, 61 Pac. 86); and, second, that the dismissal therein was not made in open court by stipulation of the attorneys of both parties, but only on motion of defendant's counsel, and the court based its ruling upon subdivision 2 of section 581, and not upon section 582 of the Code of Civil Procedure, as was done in the Merritt Case.

[10] Where the parties appear in open court and stipulate for a dismissal the situation is not covered by said section 581, but a judgment entered thereon is a judgment on the merits as contemplated by said section 582.

[11] Some other questions are discussed by counsel, but we deem it unnecessary to notice them specifically. As we view the matter, the findings do not support a judgment for plaintiffs, but require a conclusion in favor of defendant Lindemann. When such is the case, the proper proceeding is to direct judgment for the defendant. Dargie v. Patterson, 176 Cal. 714, 169 Pac. 360; section 53, Code Civ. Proc.

The judgment is reversed, with direction to enter judgment upon the findings for defendant Lindemann for his costs.

We concur: NICOL, Presiding Judge, pro tem.; HART, J.

183 Cal. 292

STURTEVANT v. JORDAN, Secretary of State. (S. F. 9531.)

(Supreme Court of California. July 8, 1920.)

1. Courts ⟹106 — Oral opinion by Supreme Court may be given, to be followed by written opinion.

Where a decision as to ballots in an election to be held soon necessitates prompt decision, the Supreme Court may render an oral opinion, and later file a written opinion to place the court's views on record.

2. Elections ⟹126(5)—Primary election ballot for associate justices of a District Court of Appeal should show office as single office for which two are to be selected.

In the first election of associate justices of a division of the District Court of Appeal under Const. art. 6, § 4, as amended in 1918, the primary election ballot should show the office of associate justice as a single office for which two or more persons are to be selected with all candidates appearing as for that office and not specially for either of the two associate justiceships to be filled at the election.

In Bank.

Application by George A. Sturtevant against Frank C. Jordan, Secretary of State of the State of California, for mandamus. Prayer of the petition for peremptory writ of mandate granted.

Andrew F. Burke, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Deputy Atty. Gen., for respondent.

PER CURIAM. The question involved in this proceeding for a writ of mandate was whether in the matter of the primary election to be held August 31, 1920, for the two associate justices of Division 2 of the District Court of Appeal of the First Appellate District, the ballot should be in such form as to show each associate justiceship as a separate and distinct office, each distinguished from the other by giving the name of the present incumbent by appointment, and to be voted upon separately; or in such form as to show the office of associate justice as a single office for which two persons are to be selected, with all candidates for the office appearing as candidates for "that office," and not "specially" for either of the two positions to be filled at the election.

[1, 2] Owing to the necessity for a prompt decision, an oral decision was rendered from the bench at the close of the argument, sustaining the view last stated, viz.: That the ballot for the purposes of nomination and election should show the office of associate justice of Division 2 of the District Court of Appeal of the First Appellate District as a "single office," for which two persons are to be selected, with all candidates for the office appearing as candidates for that "office," and not "specially" for "either" of the two associate justiceships to be filled at the election. A peremptory writ of mandate in accord with the prayer of the petition was thereupon ordered issued. This opinion is filed in order that the views of the court on the question may be of record.

The conclusion of the court is in accord with the well-settled rule and practice in this

state with regard to the nomination and election of persons to public office where more than one person is to be selected for the same office, such as associate justice of the Supreme Court, judge of the superior court of counties having more than one such judge, etc., except in the matter of selection of some one to fill an unexpired term by reason of vacancy. The claim of respondent is that the situation here is different by reason of the language of a provision of section 4, art. 6, of the Constitution with relation to the first election for associate justices of the new divisions of the District Courts of Appeal of the first and second appellate districts created by amendment of that section in 1918 (see St. 1919, p. xxxii). By that provision it was decreed that upon the adoption of the amendment "the Governor shall appoint six persons to serve as justices of the district courts of appeal—three as justices of division two of the first appellate district, and three as justices of division two of the second appellate district—from and after their qualification and until the next general election and qualification of their successors." It was further provided therein that the justices so elected in each division shall so classify themselves by lot that one shall go out of office at the end of four years, one at the end of eight years, and one at the end of twelve years. Another provision of the section is substantially to the effect that one of these justices in each division shall be the presiding justice thereof "and as such shall be appointed or elected, as the case may be," which explains why only two persons are to be selected as associate justices. Another provision of the section is that—

"The justices of the District Courts of Appeal shall be elected by the qualified electors within their respective districts at the general state election, and the term of office of said justices shall be twelve years from and after the first day of January next succeeding their election."

Taking the section as a whole, it seems to us that fairly construed it means that at the general election of 1920 selection must be made to fill all of these new judgeships precisely as if no appointment by the Governor had been provided for or made, the term of office of the persons selected to commence as provided in the general provision quoted above, on the first day of January next succeeding the election, and to continue, as determined by lot, four, eight, and twelve years therefrom, while the appointees of the Governor are to hold until the commencement of the term of the judges so elected. If this be the proper construction, as we think is true, the general rule to which we have referred is clearly applicable.

It should be noted that there is a plain distinction between the situation presented by this case, and the situation where a vacancy in judicial office occurs and is filled by appointment to hold until the next general election, when the vacancy must be filled by the election of a justice or judge who shall hold the office "for the remainder of the unexpired term." In such a case, for all the purposes of election, every unexpired term is a separate and distinct office, to be separately designated on the ballot.

In view of our conclusion on the question presented, the prayer of the petition for a peremptory writ of mandate was granted.

ANGELLOTTI, C. J., and SHAW, LAWLOR, and LENNON, JJ., being all the Justices who heard the argument, concur.

OLNEY and SLOANE, JJ., deeming themselves disqualified, do not participate.

(183 Cal. 304)

TRABER et al. v. RAILROAD COMMISSION. (S. F. 9280.)

(Supreme Court of California. July 9, 1920.)

1. Public service commissions ⟸32—Scope of review of facts found.

Notwithstanding the declaration of Public Utilities Act, § 67, that the Railroad Commissions determination of matters of fact are not subject to review, its determination on the question whether or not the facts existing are sufficient to bring the case within the scope of its power must be subject of review, so far as they present a question of law bearing on that subject, and the provision that "conclusions" of the commission on the facts are final does not apply to facts necessary to the existence of the jurisdiction of the commission to act; but where the evidence in proof of such facts is substantial in character, and justifies the inference or conclusion that the facts did exist, then such findings are binding and conclusive.

2. Waters and water courses ⟸257 — Contracts of Fresno Canal & Irrigation Company of 1875 subject to regulation.

The Fresno Canal & Irrigation Company, incorporated on February 16, 1871, under St. 1853, p. 87 (Garfielde & Snyder, p. 273), St. 1861, pp. 618–622, §§ 22–39, and St. 1869–70, p. 660, had the power to act as a public service corporation for the supply of water for irrigation, and, having acted as such, its contracts of 1875, entered into for furnishing water, are subject to regulation by the Railroad Commission, as provided in the Public Utilities Act.

3. Waters and water courses ⟸216—Statute concerning organization of corporation not repealed by implication.

Act April 2, 1870 (St. 1869–70, p. 660), relating to the organization of corporations, did not operate as a repeal by implication of Act May 14, 1862 (St. 1862, p. 540), relating to the organization of corporations for the construction of canals and supplying of water.

4. Statutes ⊂⊃161(1)—Repeal by implication not favored.

The repeal of statutes by implication is not favored, and where there are two laws upon the same subject they must be so construed as to maintain both, if it can be done without destroying the evident intent and meaning of the later act.

5. Corporations ⊂⊃382½, New, vol. 16 Key-No. Series—Property taken by condemnation necessarily dedicated to public use; "public utility administering a public service."

Of necessity, property taken under power of eminent domain is dedicated to public use, and to that extent a corporation exercising such power is a "public utility administering a public service," in view of Const. 1849, art. 1, § 8.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Public Utility.]

6. Waters and water courses ⊂⊃254—No presumption of public use arose from diversion and sale of water.

Prior to the adoption of Const. 1879, art. 14, § 1, no presumption of a public use arose from the mere fact that a corporation diverted waters and agreed to sell it to certain persons.

7. Waters and water courses ⊂⊃254—Finding that corporation dedicated water to public use sustained by evidence.

A finding by the Railroad Commission that Fresno Canal & Irrigation Company, organized under St. 1853, p. 87 (Garfielde & Snyder, p. 273), St. 1862, p. 540, St. 1861, pp. 618–622, §§ 22–39, and St. 1869–70, p. 660, dedicated certain water in 1875 to a public use and became a public utility, *held* supported by the evidence.

8. Waters and water courses ⊂⊃254—Contracts to supply water held not inconsistent with dedication to public use.

The fact that contracts were made by water company, declaring that the agreement to supply water should be appurtenant to respective tracts of land, is not inconsistent with the theory of a dedication, and such contracts relating to the service of water diverted to public use are subject to regulation and control by the public authorities, whether acting under laws then existing or under laws subsequently enacted.

9. Waters and water courses ⊂⊃254—Corporation had power to sell water, whether articles so declared or not.

A corporation organized under St. 1853, p. 87 (Garfielde & Snyder, p. 273), St. 1862, p. 540, St. 1861, pp. 618–622, §§ 22–39, and St. 1869–70, p. 660, had the power to sell water for public use, whether its articles so declared or not.

10. Waters and water courses ⊂⊃254—Agreement of water company as to use of its canal held not a discrimination.

Where a water company, in constructing a canal, found it necessary, by reason of the construction of a ditch by other persons who had appropriated water, to enter into an agreement with such other persons to carry their water in its canal free of charge, other users of the water could not claim that an order of the Railroad Commission fixing the rates for water to be used by them authorized an unlawful discrimination; the arrangement between the water company and the owners of the ditch, which interfered with its construction, not making the company the owner of the water diverted from the river and carried to and delivered to such persons, the effect being that the prior appropriators had a common use of the ditch, although it was under the control of the water company.

In Bank.

Proceeding in certiorari by John W. Traber and another to review an order and decision of the Railroad Commission of the State of California. Petition for writ denied.

Short & Sutherland, W. A. Sutherland, and J. O. Traber, all of Fresno, for applicants.

Milton M. Dearing, of Fresno, for certain water users.

Hugh Gordon, of Los Angeles (Douglas Brookman, of San Francisco, of counsel), for respondent.

SHAW, J. This is a proceeding in certiorari, under the Public Utilities Act, by plaintiffs, for themselves and in behalf of 22 other persons interested in like manner, to review an order and decision of the Railroad Commission made on June 6, 1919, fixing rates to be charged by the Fresno Canal & Land Corporation for water supplied from its canal for the irrigation of land. The ground for review is that the Fresno Land & Canal Corporation is not a public utility, at least so far as plaintiffs' rights to water are concerned; that the respective rights of the plaintiffs to the water are private rights appurtenant to their respective tracts of land, and consequently that the commission is without power over them, and may not fix rates different from those fixed by the respective contracts between plaintiffs and the predecessor in interest of said corporation. It is also claimed that the order is void, because it authorizes the canal corporation to make an improper discrimination in the rates charged.

The Fresno Canal & Land Corporation was incorporated on January 5, 1917. It thereupon took over the properties and functions of the Fresno Canal & Irrigation Company, and ever since that time it has been operating the large water system in Fresno county previously operated by the last-named corporation. In the year 1917 it made two applications to the Railroad Commission, under section 32 of the Public Utilities Act (Stats. 1915, p. 132), asking said commission to investigate the condition of the business carried on by said corporation and make an award regulating and fixing the rates to be charged by said corporation for the service

of water by it by means of said water system. On June 6, 1919, the commission made its award and decision in the matter of said applications, declaring that the corporation should thereafter charge for the service of water at the rate of $200 per year for each 160 acres of land served. The plaintiffs, in connection with other persons, numbering 24 in all, had been previously receiving water from the corporation under contracts made in 1875 with its predecessor in interest, providing that they should receive water at the rate of $25 annually for each quarter section served. The object of the present action is to annul said order, so far as these parties are concerned.

[1] Section 67 of the Public Utilities Act authorizes this proceeding in review. It provides that the review shall not be extended further than to determine whether the commission has regularly pursued its authority and whether or not it has violated any constitutional right of the petitioner. It also provides that the findings and conclusions of the commission on questions of fact shall be final and not subject to review. The first duty of the commission with respect to such applications was to inquire into and determine whether or not the facts existed that were necessary to confer upon it jurisdiction to act in the matter. Notwithstanding the declaration of section 67 that the commission's determination of matters of fact are not subject to review, it must be held that its determination upon the question whether or not the facts existing are sufficient to bring the case within the scope of its powers must be subject to review, so far as they present a question of law bearing upon that subject, and that the provision that the "conclusions" of the commission on the facts are final does not apply to facts necessary to the existence of the jurisdiction of the commission to act. Del Mar, etc., Co. v. Eshleman, 167 Cal. 677, 140 Pac. 591, 948. But if the evidence in proof of such facts is substantial in character, and justifies the inference or conclusion that the facts necessary to the jurisdiction of the commission did exist, then, under the general principles of law regarding the proceeding in certiorari, its decision as to the effect of such evidence is binding and conclusive on the reviewing court. Farmers' etc., Bank v. Board, 97 Cal. 325, 32 Pac. 312; In re Grove Street, 61 Cal. 453; Ex parte Sternes, 77 Cal. 162, 19 Pac. 275, 11 Am. St. Rep. 251; De Pedrorena v. Superior Court, 80 Cal. 145, 22 Pac. 71; Cahill v. Superior Court, 145 Cal. 44, 78 Pac. 467; Grannis v. Superior Court, 146 Cal. 255, 79 Pac. 891, 106 Am. St. Rep. 23. Our consideration of the facts presented must therefore be governed by this principle.

The Public Utilities Act and the Constitution (section 23, art. 12) undoubtedly give the commission power to make orders prescribing the rates to be charged by corporations engaged in operating a system of waterworks or canals for the distribution of water dedicated to public use. If said canal corporation was so engaged, and the water it agreed to supply, and was supplying, to the plaintiffs for their land, was a part of the water so dedicated to public use, the power of the commission to make the order is clear. The rights of these parties arise from contracts made with the Fresno Canal & Irrigation Company, and the inquiry relates exclusively to the character and business of that company and its water supply, and the nature and effect of those contracts.

[2] We think the evidence was sufficient to sustain the conclusion of the commission that the company last named was a public utility at the time these contracts were made, and that the water to be supplied by it in pursuance of said contracts was a part of the water it had dedicated to public use. The Fresno Canal & Irrigation Company was incorporated on February 16, 1871. Paragraph III of its original articles stated that it was formed for the purpose of constructing canals out of Kings river with which to supply water for irrigation to lands along and near the line of its canals and to collect rents for the use of the water it supplied. In May, 1871, said paragraph III was amended by eliminating the foregoing provisions and stating in lieu thereof that the corporation was formed to erect dams or other works in the channel of Kings river and its branches at points near and above the town of Centerville and for the construction and enlargement of canals out of Kings river, and to continue said canals along such routes as should be found most feasible across Fresno county in every available direction. Nothing was said in the amendment about supplying water for irrigation or for any other use to any person or about charges or rates for water supplied. The articles also declared that the company was organized under the act of April 14, 1853, "and the several acts amendatory thereof and supplemental thereto."

The act of April 14, 1853, provided for the organization of corporations, but not for corporations for supplying water. Stats. 1853, p. 87 (G. & S. p. 273). The act of May 14, 1862, which was supplemental to the act of 1853, provided that corporations could be formed under the act of 1853 for "the construction of canals, for the transportation of passengers and freights, or for the purpose of irrigation or water power, or for the conveyance of water for mining or manufacturing purposes, or for all of such purposes." Stats. 1862, p. 540. It also provided that such corporations should have power "to establish, collect, and receive rates, water rents, or tolls, which shall be subject to regulation by the board of supervisors," and also the power to exercise the right of eminent domain by acquiring land or other property

necessary for its canals by condemnation in the mode prescribed by the railroad act of 1861. Stats. 1861, p. 618, §§ 22 to 39. The declaration in its articles that said corporation was formed under the act of 1853 and the several acts supplemental thereto includes the act of 1862 aforesaid as one of the acts under which it was organized. This act, in effect, gives the corporations organized under it the power to act as a public service corporation for the supply of water for irrigation. In Price v. Riverside, etc., Co., 56 Cal. 431, it was decided that "every corporation deriving its being from the act above cited (the act of 1862) has impressed upon it a public trust—the duty of furnishing water, if water it has, to all those who come within the class or community for whose alleged benefit it has been created. * * * The power—in its nature a public power—and the public duty are correlative. The duty exists without any express statutory words imposing it wherever the public use appears." It is therefore clear that the company, in so far as it derives its powers from the act of 1862, was a corporation of the class now known and described as a public utility, and one which, with regard to public service it carries on, is subject to regulation by the Railroad Commission as provided in the Public Utilities Act.

Another act supplemental to the act of April 14, 1853, is the act of April 2, 1870. Stats. 1869–70, p. 660. (By an obviously clerical error it refers to the previous act as the act of April 14, 1863.) This act repeals all acts and parts of acts in conflict with its provisions. Section 13. The plaintiffs contend that the Fresno Canal & Irrigation Company must be deemed to have been formed under the later act alone. Section 1 of the act of 1870 is in substantially the same words as section 1 of the act of 1862 above quoted, and the subsequent provisions of the act are similar to those of the act of 1862, except that, instead of referring to the Railroad Act of 1861 for the mode of condemning private property for corporate purposes, the act itself (sections 4 to 11), prescribes the mode, and with the further exception that it contains nothing corresponding to section 3 of the act of 1862, the section providing that the rates established by a company formed under it shall be "subject to regulation by the board of supervisors," and authorizing such corporations to make rules regulating the distribution of its water and the like. The argument is that these omissions operate as a repeal of those parts of the act of 1862 which in Price v. Riverside, supra, were held to make the corporations formed under that act public utilities, and hence that the Fresno Canal & Irrigation Company had authority to act as a corporation for the private purpose of diverting, distributing, and selling water for its own profit, free from public regulation of any kind.

[3, 4] We do not think the act of 1870 operated as a repeal by implication of the act of May 14, 1862. The repeal of statutes by implication is not favored. The rule is "that where there are two laws upon the same subject, they must be so construed as to maintain both, if it can be done without destroying the evident intent and meaning of the latter act." Merrill v. Gorham, 6 Cal. 42; Hilton v. Curry, 124 Cal. 87, 56 Pac. 784. The act of 1870 expressly repeals all parts of other acts which are "in conflict" with it. The provisions of section 3 of the act of 1862 do not in any manner conflict with the act of 1870, but are entirely consistent therewith. Hence there is no express repeal thereof. Nor do the provisions of the latter act show that it was intended as a complete substitute, and so to operate as a repeal of the earlier act, under the rule applied in Mack v. Jastro, 126 Cal. 132, 58 Pac. 372. Both statutes were in force when said company was organized, and it must be considered as a company formed under both statutes, and as having, potentially, at least, the powers conferred by both.

[5, 6] The act of 1870 confers authority to exercise the power of eminent domain. This would be a taking of private property for public use. Const. 1849, art. 1, § 8. Of necessity, the property so taken would be dedicated to public use, and to that extent at least the corporation taking it would be a public utility administering a public service. But it does not appear that the Fresno Canal & Irrigation Company took any of its property in that manner, and it may be conceded that the act of 1870 might very reasonably be construed to authorize the formation of a corporation to appropriate, distribute, and sell water without dedicating it to public use. It is to be noted that these transactions took place prior to the adoption of the Constitution of 1879 declaring that the use of all water appropriated for sale, rental, or distribution is a public use. Article 14, § 1. At that time, therefore, no presumption of a public use arose from the mere fact that the corporation diverted water and agreed to sell it to certain persons. If there were no other evidence of a dedication of the water to such public use, it might be conceded that the proof before the commission was insufficient to show jurisdiction. But there was other evidence, consisting of acts and declarations, which were sufficient in that respect, as we will proceed to show.

[7] After the irrigation company had completed its dam, it was necessary to construct a canal through the higher banks of Kings river in order to take the water to lands susceptible of irrigation. The company was without funds wherewith to do so. It proposed to the plaintiffs and those whom they represent, 24 in number, that if they would excavate the canal through said banks the company would thereupon execute water-

right contracts to each person so assisting, for the delivery of one cubic foot of flowing water per second for each quarter section of land, at an annual rate of $25. The proposal was accepted, and said parties excavated the canal under this agreement. Thereupon the company executed to said 24 persons the contracts now under consideration. They were all in the same form. They each recite that it was agreed that the company might sell 1,000 water rights of one cubic foot each, and that, if the water in its canals fell short of 1,000 cubic feet, the water it had should be distributed proportionally to the respective purchasers of such 1,000 water rights. At the hearing one of the plaintiffs testified that at the time the negotiations for these contracts were under way, Mr. Church, the manager of the company stated that the company had 1,000 cubic feet of water and intended to dispose of all of the 1,000 water rights; that it was not for disposition to any particular person, but that "anybody was to have it as wanted it"; and that "the water was for sale, and if any man had the money he could get it, until the 1,000 were disposed of." It also appeared that either before or after said contracts were made the company was willing to and actually did sell all said water rights to any one who would sign the form of contract prepared by the company. It is apparent that the company made no limitation upon the persons who should buy, except such as were necessary for the convenient delivery of the water from its canals to the land of such purchaser.

The contracts provided that the company was to furnish the water at its main canal or some branch thereof, and was to place a gate therein to allow the water to flow into a side ditch to be built by the purchaser from his land to said gate, which side ditch, after construction, should be under control of the company and become one of its branch ditches, with the right to use and enlarge the same, providing such act did not interfere with the delivery of water to said land. Subject to these and similar restrictions, depending upon the situation of the particular tract, the water was for sale to all who would apply. From all this evidence the commission concluded that the conduct of the company in disposing of its water in this manner amounted to a dedication thereof to public use. We think the evidence was sufficient to establish that fact. Thayer v. Cal. Dev. Co., 164 Cal. 128, 128 Pac. 21. The offer of the company was a general offer to any and all persons who should apply for the water upon its terms for their lands. Whether in all cases such an offer would constitute a dedication to public use or not, it is clear that evidence of such offer and acceptance is sufficient to justify a finding of such dedication. As soon as the contracts were all sold, the persons making the purchase and the lands to which the water was to be applied would comprise the portion of the public entitled to the use, and to whose use the water was dedicated, so far as it was necessary thereto.

[8] The fact that contracts were made declaring that the agreement to supply water should be appurtenant to the respective tracts of land is not inconsistent with the theory of a dedication to public use. Fresno C. & I. Co. v. Park, 129 Cal. 437, 62 Pac. 87. Such contracts relating to the service of water devoted to public use are subject to regulation and control by the public authorities, whether acting under laws then existing or under laws subsequently enacted. Southern P. Co. v. Spring Valley W. Co., 173 Cal. 298, 159 Pac. 865, L. R. A. 1917E, 680.

[9] In this view of the case the point made by the plaintiffs that the amendment to its articles eliminated the pre-existing declaration that the company was organized to furnish water and collect rates for its use becomes immaterial. By the acts under which the company was formed it had the power to sell water for public use whether its articles so declared or not.

[10] The objection that the order of the Railroad Commission authorized an unlawful discrimination between persons similarly situated with regard to the use of the water is not well taken. It appears that, at and before the time the company was constructing its diversion works and preparing for the construction of its canal, certain other persons owning some 1,700 acres of land had constructed a ditch and had taken water from Kings river therein to their lands for the irrigation thereof, and claimed a prior right to do so, both to the water taken and to the use of the ditch through which it was carried. As this ditch would interfere with the construction of the canal laid out by the company, it became advisable to make some arrangement with said persons for a common use. Accordingly it was arranged that the company should construct its canal as laid out, and that thereafter it should take out of the river at its headgate the quantity of water previously diverted by said persons, and should carry the same to a designated place on its canal, and there deliver it to said other persons into a canal to be constructed by them leading to their lands, and that in view of the mutual concessions of the parties the company should make no charge for such carriage of the water. This, in substance, was the arrangement made at that time, and under it the company has ever since carried the water from the river to said canal of said other persons free of charge, as it had agreed to do. The order of the Railroad Commission did not expressly authorize this to be continued, but it did not provide that it should be discontinued, and this constitutes the discrimination complained of. The arrangement made between the company and these persons was entirely lawful, and it

did not make the company the owner of the water it diverted from the river to be carried to and delivered to these persons for their lands. It was a mere arrangement whereby the ditch of the company was for that purpose to be used by the other persons to carry their water to their lands. The effect was that they had a common use of the ditch, although it was under the control of the company.

Upon the filing of the petition herein the court did not order a writ of review to issue and return to be made, but merely made an order that the respondent show cause why such writ should not issue. We are unable to perceive any reason for the issuance thereof.

The petition for a writ of review is denied.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SLOANE, J.; LENNON, J.; WILBUR, J.; LAWLOR, J.

(47 Cal. App. 788)

CHASTEK et al. v. ALBERTSON et al.
(Civ. 3125.)

(District Court of Appeal, Second District, Division 1, California. May 28, 1920.)

1. Appeal and error ⊂⊃931(1)—Evidence considered most favorably toward prevailing party.

In determining whether a judgment is warranted by the evidence, the appellate court must consider the testimony in its most favorable aspect toward the prevailing party.

2. Bailment ⊂⊃14(1)—Ordinary care required of automobile dealer trying out car to be credited on purchase.

Where one, desiring to purchase an automobile, left with the dealer a car to be credited on the purchase price to determine its value, the bailment was for the mutual benefit of both, and ordinary care was required to be exercised by the dealer in protecting the car while retaining it for the purpose of ascertaining its value.

3. Bailment ⊂⊃14(1)—Automobile dealer did not exercise ordinary care to protect car left to determine value for purpose of credit on new car.

Where one, contemplating the purchase of an automobile from a dealer, left with him an old car to have its value ascertained for the purpose of crediting the amount on the purchase price, and the car was stolen, in an action by the purchaser to recover the value of the car *held* that the court was justified in concluding that ordinary care was not used for protection of the automobile, the defendant dealer having left it at the curb unlocked.

4. Bailment ⊂⊃30—Complaint to recover value of automobile negligently lost by bailee sufficient, though allegations were in general appropriate for action for conversion.

A complaint, alleging that plaintiff left an automobile with defendants as bailee, and subsequently demanded the return thereof, and that they failed and refused to return the same, to the damage of the plaintiff in a certain sum, while in general form the allegations are appropriate to an action for conversion, warranted a recovery as against one who assumed the obligation of a depositary, who must upon demand redeliver or become liable for value of the property, in view of Civ. Code, § 1822.

5. Pleading ⊂⊃406 (5) — Special objections waived by not demurring.

Any special objections which might have been urged as to the completeness of the allegations of a complaint were waived where no demurrer was interposed.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Marion W. Chastek and the New Jersey Fire Insurance Company against Fred S. Albertson and John Hoover. Judgment for plaintiffs, and defendants appeal. Affirmed.

Overton, Lyman & Plumb, Wm. B. Himrod, and George W. Prince, Jr., all of Los Angeles, for appellants.

Edward Brody and Charles A. Bank, both of Los Angeles, for respondents.

JAMES, J. Appeal by defendants from a judgment entered in favor of the plaintiffs by which an award was made for the value of an automobile.

In the complaint it was alleged that appellant Albertson was engaged in business under the name of Albertson Motor Company; that plaintiff Chastek was the owner of an automobile. This allegation followed:

"That at the city of Los Angeles, state of California, and on or about the 4th day of May, 1918, the plaintiff Marion W. Chastek, at the special instance and request of the defendants, and each of them, placed the said automobile in the possession of the defendants, and each of them, as bailees, and subsequently thereto on the same day plaintiff Marion W. Chastek demanded the return of the said automobile of the said defendants, and each of them, and the defendants, and each of them, failed, neglected, and refused, and still fail, neglect, and refuse to return the said automobile to plaintiff Marion W. Chastek to the damage of the plaintiffs in the sum of $574.00."

There was the further allegation that prior to the commencement of this action Chastek had assigned to his coplaintiff a one-half interest in the claim; and the prayer was for the recovery of $574. Defendants, after making denial of the material allegations of the complaint, further answered, alleging that at the request of Chastek, defendants had taken possession of the automobile described in the complaint for the purpose of examining and appraising the same and determining the amount that they would allow as a credit in part payment on

a new motorcar which plaintiff Chastek contemplated buying from defendants. The defendants alleged that while the automobile was in their possession for the purposes last set forth, the same was without fault or negligence on their part, stolen and taken from their possession.

[1–3] In determining the first point as to whether the judgment is warranted by the evidence, we will consider the testimony, as we must, in its most favorable aspect toward the plaintiffs. The plaintiff testified that he went to the place of business of the defendants with the idea of purchasing an automobile of which the defendants were the vendors; that he desired to "turn in" the Ford automobile which he owned, and defendants desired to "try out" the Ford automobile before finally determining what allowance would be made as a credit on the purchase of the machine which they were seeking to sell to the plaintiff. Plaintiff testified, in part, as follows:

"When I came to Albertson's place of business I locked the car. When Mr. Hoover took the car to try it out I handed him the key. I don't think I unlocked the car for Mr. Hoover. I handed Mr. Hoover the key. Mr. Rall, the salesman, suggested that Mr. Hoover, the appraiser, try the Ford out, to see if they could allow me more than $450. So Mr. Hoover took the Ford in order to appraise it. I saw Mr. Hoover leaving the place of business with my car, and I saw him again that day after the machine was stolen, when he came back to the Albertson Motor Company."

On the part of the defendants, Hoover, the appraiser, testified that he took Chastek's machine, ran it into the central portion of the city of Los Angeles, and left it at the curb while he entered an office building to interview a man who desired to buy a Ford automobile of similar style and equipment to that of the plaintiff; that he was gone five or six minutes; when he returned the machine had been stolen. He testified further:

"I don't know whether Mr. Chastek gave me the key to the car, either he gave me the key or else he had left the car unlocked, because it was a Rex lock, and you can't take the key out unless you locked the car; so he either left it unlocked while he was there, or else he gave me the key. I don't remember. Mr. Chastek either gave me the key to the car, or I went out and found the key in the lock of the car. I do remember that I did not lock it when I got out."

In arriving at a conclusion as to whether defendants, in view of the fact that the car was stolen, incurred any liability to Chastek, the question arises as to what degree of care was required to be exercised by them in the circumstances. Appellants contend that the bailment was gratuitous; hence that a slight degree of care only was required of them; and that the evidence did not show that they were guilty of gross negligence. The court determined that the bailment was for the mutual benefit of Chastek and defendants, and hence ordinary care was required to be exercised by the latter in protecting Chastek's property. We agree that this conclusion was the correct one to be drawn. The defendants received the automobile of Chastek in the course of the negotiation for a machine which they desired to sell to Chastek, and that they would be benefited by the transaction was only contingent upon an amount being agreed upon as a credit to be allowed Chastek which would be satisfactory to both sides. We think that the court was justified in concluding that ordinary care was not used for the protection of Chastek's automobile while it was in possession of the defendants. The machine was equipped with a lock, as to the operation of which Hoover, one of the defendants and the man who took charge of the machine, appeared to be familiar. Chastek delivered the key of the lock to Hoover, and when he turned the machine over in front of the place of business of the defendants the lock was fastened. Hoover took the automobile into the business section of a large city, left it unattended and unlocked, and it was stolen. With very simple means at hand by which the machine could have been made more secure in the place where he left it, Hoover omitted altogether to make use of this means. It would seem to be clear beyond question that such act of his by no means satisfied the requirement of ordinary care.

[4, 5] Neither do we think there is merit in the contention of appellants that the action as framed by the complaint was not appropriate to permit a recovery by the plaintiffs. While in general form the allegations were appropriate to an action for conversion, facts are alleged which show that a bailment had been created and the refusal of the defendants to redeliver the property upon demand. Under the circumstances of this case, we feel well satisfied that in taking control of the automobile of Chastek, defendants assumed the obligation of a depositary. It was their duty, upon demand, to redeliver the same to plaintiff, in default of which they would become liable for the value of the property. Civ. Code, § 1822. The case assumed no different aspect in regard to the legal relation than that of the ordinary warehouse contract, in which cases suit for the property itself or its value has been assumed to be the proper remedy. Morse v. Imperial Grain & Warehouse Co., 181 Pac. 815; Pope v. Farmers' Union Milling Co., 130 Cal. 139, 62 Pac. 384, 53 L. R. A. 673, 80 Am. St. Rep. 87. The case of Poggi v. Scott, 167 Cal. 372, 139 Pac. 815, 51 L. R. A. (N. S.) 925, cited by appellants, is not, we think, inconsistent with the view

here expressed. No damages were claimed herein beyond the value of the automobile which was lost, and the court expressly found that value to be the sum of $500, for which judgment was awarded. No demurrer was interposed to the complaint; hence any special objections which might have been urged as to the completeness of the allegations thereof have been waived.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

47 Cal. App. 774

HUNT v. GLASSELL. (Civ. 3201.)

(District Court of Appeal, Second District, Division 2, California. May 27, 1920.)

1. Appeal and error ⊂=1170(1)—No reversal for error, unless prejudicial.

On appeal the question is not as to whether there is error in the record, but rather as to whether there is prejudicial error, in view of Const. art. 6, § 4½.

2. Bills and notes ⊂=358—Assignee of, as collateral holder for value.

An assignment of a negotiable instrument before maturity as collateral security for a pre-existing debt constitutes an indorsement for a valuable consideration, sufficient to protect the purchaser thereof under the law merchant against defenses to the note of which he has no notice at the time of the indorsement, under Civ. Code, §§ 3123, 3124.

3. Bills and notes ⊂=351—Maker may set up any defense as against indorsee after maturity.

The maker of a note, sued on by indorsee after maturity, may prove anything to destroy or satisfy the note that he might prove if it were in the hands of the person to whom originally given, anything that denies its validity, or that constitutes a bar to an action upon it, as distinguished from anything which constitutes admission or affirmance of the plaintiff's right of action, but which seeks to defeat recovery by establishing liability on his part.

4. Bills and notes ⊂=351—Notes purchased from trustee in bankruptcy after maturity subject to all defenses.

Even a bankruptcy court possesses no such power that it can by a pretended sale of a purported right to a note which it never possessed, actually or constructively, and which was settled in full, surrendered, canceled, and destroyed several months before payee had been adjudged a bankrupt, deprive the maker thereof of such defenses thereto as he might interpose at the time it was delivered by the payee to a third person as collateral security.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by F. W. Hunt against A. Glassell. Judgment for defendant, and plaintiff appeals. Affirmed.

Murphey & Poplin, of Los Angeles, for appellant.

J. E. Hannon and J. Vincent Hannon, both of Los Angeles, for respondent.

THOMAS, J. This is an action brought to recover judgment against the defendant on a promissory note alleged to have been made, executed, and delivered by the defendant on the 25th day of September, 1907, to the Duquesne Brewing Company, a corporation, for the sum of $10,000, subsequently delivered as collateral security to the Fidelity Investment Company, and by further transfers, hereinafter set forth, eventually becoming the purported property of this plaintiff.

[1] In this, as in all cases, our first query is not, "Is there error in the record?" but rather, "Is there prejudicial error?" or "Is the judgment just?" In quest for the correct answer to the latter inquiry, it will be necessary, we think, to set forth briefly a statement of the case, as disclosed by the record. It first appears that on September 25, 1907, this defendant, as the result of certain representations made to him by an agent of the Duquesne Brewing Company, a corporation—the payee named in the note hereinafter referred to—executed and delivered to said brewing company a certain subscription for 200 shares of stock in said corporation, which subscription reads as follows, to wit:

"I, the undersigned, hereby subscribe for 200 shares of the capital stock of the Duquesne Brewing Company, par value $50, amounting to $10,000, payable as follows, to wit: August 1, 1908. Witness my hand and seal this 25th day of September, 1907. Andrew Glassell. [Seal.]"

And at the same time and place, as a part of the same transaction, and as further evidence of the promise and agreement to pay for such shares, but not as payment therefor, the defendant also executed the note sued on here, which note is in words and figures as follows:

"$10,000.00. September 25, 1907. Ten months after date I promise to pay to the order of Duquesne Brewing Company ten thousand dollars. This note is negotiable and payable, without any relief or benefit whatever from stay, valuations, appraisements, or homestead exemption laws. Due August 1, 1908. Andrew Glassell."

Briefly stated, the representations so made to induce defendant to execute the subscription and the note were as follows: That said brewing company was about to erect, in the city of Los Angeles, a brewery of large capacity, and engage in the business of conducting such brewery in said city; that it owned the land upon which such brewery was to be erected, and that it had money enough

on hand to erect and to put the brewery in operation; that the buildings would be completed and the brewery in operation by August 1, 1908, and that if defendant did subscribe for such 200 shares he would not be required or called upon to pay said subscription, or to accept such stock, prior to the completion of said brewery and the commencement of the operation thereof; that each and every one of said statements was false, and known by said brewery company to be false, for the reason that such company did not own the land referred to, or have sufficient funds on hand with which to complete the brewery, or to put the same in operation.

We are next met with the fact that the shares of stock so subscribed for were never issued or delivered to defendant, or to any one else for him; that before the expiration of the time within which the money was, by the terms of the subscription and note, to be paid and said stock delivered, the said brewing company had wholly abandoned the intention to erect such brewery or to engage in the business of manufacturing or selling the products thereof, and had wholly abandoned the purposes for which said subscription to its capital stock was made; and that it had been, at all times mentioned, unable to erect such brewery, or to carry out the purposes or intention for which said subscription was obtained, or to engage in the business as already set forth.

In addition to said alleged fraud, one of the defenses made by defendant here was that there was no consideration for the subscription referred to, or for the note which is the basis of this action. Some time between "some time in the year 1909 and prior to the 24th day of June, 1909," the said Duquesne Brewing Company, being indebted to the Fidelity Investment Company in the sum of about $2,500, as evidenced by a promissory note payable to and negotiated by one Martel to the latter company, delivered the note sued on here to said investment company as collateral security to secure the payment of such indebtedness. Thereafter, and on the 24th day of June, 1909, such indebtedness being past due and unpaid, the said Fidelity Investment Company brought suit on the $10,000 collateral security note, and while such suit was pending, and prior to the 10th day of May, 1910, the plaintiff in that action sold and transferred the said $2,500 note—the transaction carrying with it the note here involved and so held as collateral security—to one Hugh Glassell; the latter conducting and continuing the suit so commenced in the name of his assignor, the Fidelity Investment Company. On or about May 10, 1910, this defendant, believing that said Hugh Glassell was an innocent holder of said note for value, paid to him something more than $2,500, in full payment and discharge of the said $10,000 note for cancellation, and it was thereupon destroyed. On October 5, 1909, the Duquesne Brewing Company was, in accordance with the federal bankruptcy law, adjudged a bankrupt, a trustee of the estate of the bankrupt was duly appointed, and by the referee, to whom the matter was referred, authorized to sell at public auction the assets of such bankrupt. Thereupon the trustee proceeded as directed to sell the property of the bankrupt estate, which consisted of certain real estate and promissory notes, among which was included the note of defendant upon which this action is based—being designated as "Parcel 3. Andrew Glassell, promissory note for $10,000." On December 19, 1910, 7 months and 9 days after the payment of said sum by this defendant to said Hugh Glassell, and at least 1 year, 5 months and 25 days after the note in controversy was delivered by the Duquesne Brewing Company as collateral security to said Fidelity Investment Company, the note having been so delivered at least 3 months and 11 days before the adjudication of said brewing company to be a bankrupt, as already set forth, the trustee in bankruptcy was authorized to sell all of said property, which, as we have already shown, purported to include the note in question, notwithstanding the fact—which must now be obvious—that this note was not among the assets of said bankrupt estate at the time the corporation was by the court declared a bankrupt, nor has it been at any time since; it being shown that the company had not possessed it at all since June 24, 1909. Pursuant to said purported order, the trustee in bankruptcy made a purported sale of said note to the plaintiff herein, which purported sale the referee in bankruptcy did thereafter, on January 23, 1911, pretend and purport to confirm. Accordingly, on January 26, 1911, whatever right the said Duquesne Brewing Company, a corporation, bankrupt, had in and to said note, was pretended and purported to be sold and delivered to the plaintiff herein.

Under these facts and conditions, plaintiff claims that the judgment so entered should be reversed, and the lower court directed to enter judgment in his favor "as prayed for in his second amended complaint." The trial court found, among other things, as follows:

"It is not true that at the time the defendant made said payment he knew that said note for $10,000 made by him to Duquesne Brewing Company was held by the Fidelity Investment Company as collateral security to secure the payment of the said $2,500 note or notes, or for no other purpose, or knew that the only interest that the Fidelity Investment Company had in said note of $10,000 was to the extent of $2,500, with interest; nor is it true that said note was at the time of said settlement held by the said

Fidelity Investment Company, a corporation, as collateral security or otherwise. * * * The court further finds that the note herein sued on * * * is the same note that was sued on in the original complaint; * * * that said note had been delivered up to be canceled as fully paid and discharged, and had been canceled and destroyed, paid and discharged, prior to * * * December 10, 1910."

There is evidence to support these findings. Were this action between the defendant here and the brewing company, there is no question but that on the showing made the defendant would have been entitled to judgment on both grounds; i. e., "fraud" and "no consideration." Is the plaintiff in this action in any better position than the brewing company would have been? We think not.

[2] As we have already seen, the $10,000 note was due by its terms on August 1, 1908. The Fidelity Investment Company became the holder of the note during the year 1909, and prior to June 24th of that year, which was some time after the note had become due. It was therefore, as a matter of law, received by said investment company, as well as by the latter's successor in interest—Hugh Glassell—subject to any and all defenses which the maker thereof, defendant here, might interpose. Risley v. Gray, 98 Cal. 40, 32 Pac. 884; James v. Yaeger, 86 Cal. 184, 24 Pac. 1005; Braly v. Henry, 71 Cal. 481, 11 Pac. 385, 12 Pac. 623, 60 Am. Rep. 543; Folsom v. Bartlett, 2 Cal. 163. The rule in this state is that an assignment of a negotiable instrument before maturity as collateral security for a pre-existing debt constitutes an indorsement for a valuable consideration sufficient to protect the purchaser thereof under the law merchant against defenses to the note of which he has no notice at the time of the indorsement. Sections 3123 and 3124, Civ. Code; Pezzoni v. Greenwell, 178 Cal. 649, 174 Pac. 60. The record in the case at bar discloses the fact that the note in question was signed by defendant, made payable "to the order of Duquesne Brewing Company," and was negotiable in form. The court found that said brewery company did practice the fraud upon defendant and induced him to subscribe for said stock, and that no stock was ever issued or delivered by said brewery company to defendant, which findings find support in the evidence. The court further found that at the time said Fidelity Investment Company so received the said note it had no notice of any fraud in the procuring of the note in the first instance, or of any defense to its validity, except the fact that it was by its terms several months past due. It also appears that no call or assessment upon the stockholders or against the stock subscribed for was made by the board of directors of said brewing company at any time, for any amount, nor by said bankruptcy court, or the trustee therein, nor were any proceedings had to determine what, if any, amount would be necessary to pay the debts, etc., of the bankrupt corporation, and that there are no unsatisfied creditors.

[3] Under such conditions as these, the general rule is that—

"The maker of a note sued on by an indorsee after maturity may prove anything in defense which goes to destroy or satisfy the note—anything that denies its validity, or that constitutes a bar to an action upon it, as distinguished from anything which constitutes an admission or affirmance of the plaintiff's right of action and his title to the money he seeks to recover, but which seeks to defeat the recovery by establishing liability on his part. Within this class of defenses are fraud, mistake, want or failure of consideration, release, or anything else which goes to show that he ought never be compelled to pay the note to the person to whom it was originally given, or to any person who had held it after maturity, and before it came into the hands of the plaintiff." Note to Y. M. C. A. Gymnasium Co. v. Rockford Nat. Bank (Ill.) 46 L. R. A. 760.

There is, therefore, no merit in appellant's contention that respondent here is liable as trustee of an involuntary trust.

[4] Appellant urges 13 points for reversal of the judgment, none of which, however, do we deem it necessary or essential to discuss, for the reason that it is now obvious that the bankruptcy court had absolutely no jurisdiction or control over the note, and that the bankrupt estate had no interest therein that could be so disposed of. Under these facts, even a bankruptcy court possesses no such power that it can, by a pretended sale of a purported right to a note which it had never possessed, actually or constructively, and which was settled in full, surrendered, canceled, and destroyed several months before the payee named therein had been adjudged a bankrupt deprive the maker thereof of such defenses thereto as he might interpose at the time it was so delivered as such collateral security.

We think, regardless of the claim that there is error in the record, finding no prejudicial error therein, that the judgment is eminently just. Particularly is this so when the entire record is viewed in the light of section 4½ of article 6 of our Constitution; for we cannot say, after an examination of the entire cause, including the evidence, that we are of the opinion that the errors complained of have resulted in a miscarriage of justice.

Judgment affirmed.

We concur: FINLAYSON, P. J.; WELLER, J.

47 Cal. App. 274

DAMAN v. HUNT (REYNOLDS, Intervener). (Civ. 2072.)

(District Court of Appeal, Third District, California. April 30, 1920. On Hearing in Supreme Court, June 28, 1920.)

1. Insolvency ⟸14—Jurisdiction must appear on face of record in insolvency proceedings.

The superior court in proceedings in insolvency exercises a special or limited jurisdiction, and therefore everything required by the Insolvency Act of 1880, to give the court the jurisdiction to hear and determine the same or act in the proceedings must be made affirmatively to appear in the record.

2. Pleading ⟸129(1)—Ultimate facts not denied admitted.

Where vital ultimate facts alleged in a complaint are not denied by the adversary party in his pleadings, they are to be deemed as admitted.

3. Insolvency ⟸89—Successor to assignee needs no specific assignment of property.

In an insolvency proceeding, where the office of assignee has become vacant and the vacancy has become regularly supplied by the appointment of another to discharge the duties of the office, property of the insolvent estate having already been assigned and conveyed to the original assignee and his "successor and successors in office," it was not necessary that there should be a specific assignment and conveyance of the property belonging to the insolvent to the person appointed to the vacancy.

4. Insolvency ⟸21—Consent to dismissal must appear upon face of proceedings.

Consent of all interested parties, in an insolvency proceeding under Insolvency Act 1880, to a dismissal, must be made to appear upon the face of the proceedings to dismiss, to render an order of dismissal immune from collateral attack.

5. Motions ⟸59(2)—Have jurisdiction to vacate void order.

A court making an order without jurisdiction had authority to vacate it.

6. Insolvency ⟸167—Unauthorized dismissal of proceedings complete nullity.

Unauthorized dismissal of an insolvency proceeding, unauthorized because the court was without jurisdiction to dismiss, did not have the effect of nullifying the proceedings, and they were still pending in contemplation of law, and the insolvent did not thereby gain title to the property of the estate.

7. Insolvency ⟸82—Assignee must file bond, otherwise sale void.

The requirement in Insolvency Act, § 15, that assignee in insolvency should file a bond, is an essential requisite for his qualification, and a sale by an assignee who had not filed a bond was absolutely void.

8. Insolvency ⟸82—Order for private sale void in absence of petition.

An order requiring assignee in insolvency proceeding to make a private sale was absolutely void, where there was no petition filed praying for the sale or disposal of the property by private sale, in view of Insolvency Act, § 25.

9. Insolvency ⟸81—Failure of assignee to promptly prosecute proceedings not abandonment of property.

The fact that the administration of the estate of an insolvent remained in abeyance or was dormant because the proceeding in insolvency was not properly prosecuted to final determination did not constitute an abandonment of land forming a part of the assets of the estate; there being no presumption of abandonment from mere lapse of time.

10. Insolvency ⟸81—Abandonment of property by assignee question of fact.

The question of abandonment of property by an assignee of an insolvent is one of fact to be determined by the jury, or the court if the issues of fact are tried by the court.

11. Insolvency ⟸81 — Party claiming abandonment of property by assignee must clearly prove it.

In an action concerning title to land, one claiming that the land was abandoned by assignee of an insolvent had the burden of clearly showing that there was an intention in the assignee to abandon the property.

12. Limitation of actions ⟸19(3)—Five-year statute held to apply to action to quiet title involving land fraudulently obtained.

The five-year statute of limitations (Code Civ. Proc. § 318) *held* to govern the time within which an action to quiet title might be commenced, although the purpose was to recover land fraudulently acquired, section 338 not applying, the relief prayed for being based upon the ground that plaintiff was entitled to possession of the property.

13. Limitation of actions ⟸44(4)—Accrual of cause of action to recover land.

Where assignee of insolvent in insolvency proceeding failed to promptly sell land and subsequently the court dismissed the proceedings and appointed an assignee to transfer the property without the consent of the creditors, the five-year statute of limitation, Code Civ. Proc. § 318, did not commence to run until the making of the order of dismissal, or perhaps from the act of the filing of the petition for a dismissal.

14. Limitation of actions ⟸110—No statute runs against claim after filing of petition in insolvency.

In view of Insolvency Act, § 58, no statute of limitation will run against a claim after the filing of a petition to be adjudged an insolvent, during the pendency of the proceeding.

On Hearing in Supreme Court.

15. Insolvency ⟸21—Proceeding could not be dismissed without creditors' consent.

Dismissal of an insolvency proceeding without the consent of the creditors was absolutely void under Insolvency Act 1880.

16. Insolvency ⟸51—After dismissal, appointment of assignee for limited purpose not authorized.

Court had no authority to appoint an assignee after dismissal of an insolvency proceed-

ing under Insolvency Act 1880, for the limited purpose of making a conveyance of the property to the insolvent.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by A. O. Daman against John Wesley Hunt, Jr., in which H. W. Reynolds intervened. From a judgment for part of the relief prayed for plaintiff appealed. Affirmed in the District Court of Appeal, and hearing denied in Supreme Court.

A. J. Mitchell and Charles H. Brock, both of Los Angeles, for appellant.

J. H. Creighton, of Los Angeles, for respondent.

Charles Thomson, of Los Angeles, for defendant.

HART, J. Plaintiff brought the action to quiet his title to certain lots in the town site of Howard, in the county of Los Angeles. Judgment was in favor of plaintiff for a portion of said lots and in favor of the intervener as to the balance thereof. Plaintiff prosecutes this appeal from that portion of the judgment which was in favor of the intervener, no question arising herein as to the other lots.

The complaint was filed on September 23, 1915, and was in the usual form, alleging that defendant, Hunt, claimed some interest in the real property adverse to plaintiff. On February 16, 1916, H. W. Reynolds, as assignee in the matter of Jeremiah W. German, an insolvent debtor, filed a complaint in intervention.

The findings of the court present fully certain facts of the case. They are as follows: (2) That, on the 31st day of July, 1888, Jeremiah W. German was the owner in fee, and was in possession of the lots in controversy. (3) That on said day said German filed his petition in voluntary insolvency in the superior court of the county of Los Angeles, and that he was duly adjudged an insolvent. (4) That at a meeting of the creditors of said insolvent, Jacob Baruch was chosen assignee in said insolvency matter, and duly qualified as such assignee. (5) That in the schedule attached to the petition of said insolvent was the real property involved herein. (6) That verified claims were filed against said insolvent estate to the amount of $4,907.09, which were duly allowed by the court, and are now unpaid, except that there was paid thereon the sum of 7.1046 cents on each dollar thereof received from the sale of the personal property belonging to the insolvent. (7) That, on the 8th of September, 1888, the county clerk deeded said real property to the assignee, Jacob Baruch, and to his successor or successors in office. (8) That said assignee, Jacob Baruch, died about January 1, 1909. (9) That, about the 28th of February, 1912, the court, "without any notice to creditors or to any one else interested in said insolvency proceedings, made the following order in said proceedings, to wit: 'This cause coming on to be heard upon the application of Jeremiah W. German, the insolvent debtor, * * * for an order dismissing this action for want of prosecution, and it appearing * * * that no proceedings have been had therein for a period of more than 20 years, * * * it is ordered that the said action be, and the same is hereby dismissed for want of prosecution.'" (10) That on or about the 7th day of June, 1912, the court, "without any notice to creditors, or to anyone else interested in said insolvency proceedings, made the following order: 'It appearing to the court' that said order dismissing the action 'was inadvertently made in this, that said order does not provide for the disposition of the undisposed property heretofore conveyed to the assignee' of the estate of said insolvent, 'it is therefore ordered that the said order of dismissal be, and the same is hereby, canceled and set aside and the court hereby assumes jurisdiction of said cause for the purpose only of taking such further action therein as may be necessary and proper in the furtherance of justice; and it further appearing to the court that there is certain real estate heretofore conveyed to Jacob Baruch as assignee in this cause, * * * and that no disposition has been made of said real estate by the said assignee; * * * that by reason of the death of the said Jacob Baruch * * * a vacancy exists, and that there is no person qualified to act herein; * * * that no successor to said Jacob Baruch as assignee has been appointed, and that by reason of the want of prosecution of said action the said assignor * * * is entitled to a dismissal thereof and to a reconveyance of any undisposed of property herein; that said German has conveyed to one A. O. Daman, by deed dated March 5, 1912, * * * an interest in and to the said undisposed of real estate—it is therefore ordered that James H. Blanchard be, and he is hereby, appointed as assignee in this cause, without bond, for the purpose only, and he is hereby directed to convey to A. O. Damon, as grantee of Jeremiah W. German, the undisposed of real estate heretofore conveyed to Jacob Baruch,'" etc. (11) That, on or about the 28th of February, 1917, said court vacated the portion of the last-above quoted order which appointed said Blanchard special assignee, and appointed H. W. Reynolds as assignee with bond of $1,000. (12) That the said German gave a quitclaim deed, dated March 5, 1912, to A. O. Daman, to the property in question. (13) That, on or about the 7th day of June, 1912, the said Blanchard, acting as special assignee, gave a deed to said property to said Daman, purporting to convey the title from

the estate of said insolvent, "but the said James H. Blanchard had not qualified as said assignee * * * and never did qualify as such assignee, and no order had been obtained for the making of said transfer, save and except the order" set out in finding 10, "and no notice of sale had been given" or obtained, "and no sale had been made of said property, and no consideration for said deed passed to the said assignee, * * * and the estate of said insolvent and "the creditors therein did not * * * at any time receive any consideration for the said transfer of said property," and no notice to creditors was ever given of the intention to make said transfer. (14) That the creditors first obtained knowledge of the making of the orders set out in findings 9 and 10 about the 1st day of November, 1915. (15) That, about the 10th day of June, 1912, A. O. Daman gave to Frank P. Stedman a grant deed to said property, the consideration recited in said deed being $1,000.00. (16) That, about the 7th day of September, 1915, Stedman gave to Daman a grant deed to said property, the consideration recited in said deed being $10. (17) That in the account of the assignee, Jacob Baruch, filed July 9, 1889, said Baruch reported to the court that the real estate in question was undisposed of, for the reason "that the said assignee was unable to find purchasers therefor, and that upon the 22d day of July, 1889, this court audited and settled the account of said assignee."

The points made by the appellant for a reversal are thus specifically stated in the brief of the respondent:

"(1) That the demurrer to respondent's amended complaint should have been sustained; (2) that there is no evidence to show that Jacob Baruch was ever appointed assignee or ever qualified as such in the insolvency proceedings of Jeremiah W. German, or that the property here involved was ever assigned to him, or that respondent was ever appointed assignee in such insolvency matter or ever qualified as such, or that the property in question was ever assigned to him; (3) that the findings of fact and conclusions of law do not support the judgment; (4) that the intervener could not make a collateral attack on the orders made in the insolvency proceedings for the reason that the superior court when sitting as an insolvency court is a court of general jurisdiction; (5) that the order of dismissal made in the insolvency proceedings was a valid order, and disposed of all of the interest which the assignee or creditors might or could have had in the property here involved, and put the property back in Jeremiah German just the same as if no insolvency proceedings had been had; (6) that the order setting aside and vacating the order of dismissal did not set aside and vacate it, and that if any of the order setting aside and vacating the order of dismissal is void, it is void in toto; (7) that the property here involved was abandoned by the assignee in the insolvency proceedings; (8) that the intervener is barred from bringing this action by the statute of limitation; (9) that by reason of the great lapse of time since the insolvency proceedings were instituted, all the claims, debts, liabilities, or demands against Jeremiah German on July 31, 1888, being the time when said insolvency proceedings were commenced, must be deemed to have been discharged; (10) that appellant was an innocent purchaser of said property; (11) that James H. Blanchard was the legally appointed and qualified assignee in the insolvency matter."

It is deemed proper first to examine and present herein such of the provisions of the Insolvency Act of 1880 (Stats. 1880, p. 82), under which the insolvency proceedings involved herein were instituted, as have direct pertinency to the inquiry submitted by this appeal.

The first, second, third, and fourth sections of said act pointed out the manner in which an insolvent debtor may as a voluntary insolvent petition the superior court to be discharged from his debts and liabilities, and provided that annexed to his petition there should be a schedule of his debts and liabilities, which should contain a full and true statement thereof, and an inventory containing a description of all his estate, both real and personal. The fifteenth section provided for the election by the creditors of an assignee to take charge of and administer the insolvent's estate. Said section also provided that the assignee so elected should, within five days after his election, file with the clerk of the court a bond, in an amount fixed by the court, with two or more sufficient sureties, approved by the court, and conditioned for the faithful performance of the duties devolving upon him. The court could, however, upon a proper showing, extend the time for filing such bond beyond the five days' limit specified in said section for said purpose.

Section 25 of the act provided as follows:

"The assignee shall, as speedily as possible, convert the estate, real and personal, into money. He shall keep a regular account of all moneys received by him as assignee, to which every creditor or other person interested therein may, at all reasonable times, have access. No private sale of any property of the estate of an insolvent debtor shall be valid, unless made under the order of the court upon a petition in writing, which shall set forth the facts showing the sale to be necessary. Upon filing the petition, notice of at least ten days shall be given by publication and mailing, in the same manner as is provided in section seven of this act. If it appears that a private sale is for the best interests of the estate, the court shall order it to be made."

See, also, subdivision 4, § 21, of said act.

Section 58 of the act provided:

"Pending proceedings by or against any person, copartnership, or corporation, no statute of limitation of this state shall run against a claim, which in its nature is provable against the estate of the debtor."

Section 66 of said act provided:

"The court may, upon the application of the debtor, if it be a voluntary petition, or of the petitioning creditors, if a creditor's petition, dismiss the petition and discontinue the proceedings at any time before the appointment of assignee. After the appointment of assignee, no dismissal shall be made without the consent of all parties interested in or affected thereby."

[1] It is settled that the superior court, in proceedings in insolvency, exercises a special or limited jurisdiction. It follows, therefore, that everything required by the insolvency statute to give said court the jurisdiction to hear and determine the same or to act in the proceedings must be made affirmatively to appear in the record. If any jurisdictional fact appears, upon the face of the record, to be wanting, then the court was wholly without jurisdiction to act or to make any valid order or adjudication in the proceeding.

In the case of McDonald v. Katz, 31 Cal. 167, the court said, referring to insolvency proceedings:

"The proceedings are special, and no intendments can be made in favor of the jurisdiction. Everything bearing upon that question must appear affirmatively"—citing McAllister v. Strode, 7 Cal. 430; Judson v. Atwill, 9 Cal. 478; Meyer v. Kohlman, 8 Cal. 47; Swain v. Chase, 12 Cal. 283.

See, also, Keystone Driller Co. v. Superior Court, etc., 138 Cal. 738, 742, 72 Pac. 398.

By the rules stated in the foregoing cases the points as to the jurisdiction of the court to make the several orders referred to must be considered and determined.

1. The demurrer to the amended complaint in intervention was general, and was properly overruled. That pleading states the facts as they are substantially hereinabove reproduced. It is not necessary to examine in detail herein the averments of said complaint, and we shall not attempt to do so, since the facts as they are above stated show that, as embraced in the complaint, a cause of action is stated.

[2] 2. As to the point that there was no evidence showing that Jacob Baruch was duly appointed and the qualified assignee in the insolvency proceedings, a ready and conclusive reply is found in the fact that the appellant failed to deny the allegation in the complaint of Baruch's appointment, etc., and so in legal effect admitted that fact. The complaint in intervention alleges the appointment and qualification of Baruch as assignee, and also that the clerk of the superior court, on the 8th day of September, 1888, deeded and assigned to said Baruch, as assignee, etc., and to his successor and successors in office all of the property, real and personal, belonging to the insolvent, Jeremiah W. German, except such property as was by law exempt, said deed and assignment having been duly recorded. There was no denial of these averments, and, as above stated, the facts so averred, therefore, stand as having been admitted. Nor was there any denial in the answer of the averments of the complaint in intervention that the court set aside and vacated the order appointing James H. Blanchard as assignee, and declared the office of assignee vacant, and thereupon appointed H. W. Reynolds (intervener and respondent) as such assignee, and that said Reynolds "ever since has been, and now is, the duly appointed, qualified, and acting assignee in the said insolvency matter," etc.

[3] It requires the citation of no authorities to confirm the obvious proposition that where certain vital ultimate facts alleged in a complaint are not denied by the adversary party in his pleading, such facts are to be deemed admitted, and that in such case it is not necessary to introduce evidence extrinsic to the pleadings themselves to support such facts. But in this connection, it may be noted that counsel for appellant contend that there is neither allegation nor proof that the property was assigned to the intervener. This contention cannot be maintained. The undenied allegation of the complaint in intervention is, as we have seen, that the clerk of the court, upon the filing of the petition in insolvency and the adjudication following therefrom that German was an insolvent debtor, deeded and assigned to said Baruch, the original assignee, "and to his successor and successors in office, all of the property, real and personal, then belonging to the said Jeremiah W. German," etc. It follows, of course, that the office of assignee having become vacant and a successor to Baruch having been regularly appointed and qualified, such successor thereupon immediately became vested with the right to the possession of all the property belonging to the insolvent estate by virtue of the assignment and conveyance to Baruch. We have found no provision in the insolvency law to the effect that, where the office of assignee has become vacant and the vacancy has been regularly supplied by the appointment of another to discharge the duties of the office, and where the property of the insolvent estate had already been assigned and conveyed to the original assignee, and his "successor and successors in office," it is necessary or requisite that there should be a specific assignment and conveyance of the property belonging to the insolvent's estate to such successor or successors. We, therefore, conclude that it was not necessary to plead and prove that the clerk directly assigned and conveyed the property to Reynolds, Baruch's successor.

[4] 3. The order dismissing the insolvency proceedings showed upon its face that the court was without jurisdiction to make said order, and that the same was absolutely void.

The petition for the order of dismissal and the order constitute the entire record of the proceeding wherein the order dismissing the proceedings was made, and it appears therefrom that the petition was filed on the 28th day of February, 1912, and that the order of dismissal was made on the same day. As will be observed, section 66 of the Insolvency Act, above quoted herein, provided that after the appointment of an assignee in insolvency, no dismissal of the petition in insolvency and discontinuance of the insolvency proceedings should be made and ordered without the consent of all parties interested in or affected thereby. It was not made to appear upon the face of the petition to dismiss or in the order of dismissal or otherwise that the consent of the parties interested in or affected by the insolvency proceedings had been obtained for a dismissal and discontinuance of the proceedings in insolvency. The consent of the parties interested in the proceedings involved a jurisdictional fact. The court was absolutely powerless to make an order of dismissal and discontinuance of the proceedings in the absence of a showing of that fact, and its act in making the order under such circumstances was coram non judice. Moreover, since the superior court was in insolvency proceedings vested only with a special or limited jurisdiction, no presumptions or intendments can be indulged in favor of the validity of the order. It was necessary that the consent of all interested parties should be made to appear upon the face of the proceeding to dismiss to render the order immune from collateral attack. As above intimated, there was no showing nor any attempt to show by evidence de hors the record of the proceeding to dismiss that the consent of the interested parties to a dismissal and a discontinuance of the insolvency proceedings actually was had, assuming that it would have been proper thus to have made such a showing.

[5, 6] 4. It was, of course, proper for the court to set aside and nullify its order dismissing the insolvency proceedings. As above shown, the court was wholly without authority or jurisdiction to make the order of dismissal and discontinuance, and there was therefore left to it no other alternative but that of vacating said order, and thus getting it out of the way and so preventing complications which would necessarily arise in the insolvency proceedings by reason of said order. The deed of conveyance of the property by German to the appellant was, of course, absolutely void. It conveyed nothing. The unauthorized dismissal of the insolvency proceedings—unauthorized because the court was without jurisdiction to dismiss the proceedings—did not have the effect of nullifying the proceedings. They still were pending in contemplation of law, and, of course, the insolvent was not legally reinvested with title to the property which had belonged to the estate and which had been conveyed for the purposes of administration of the estate to the assignee and his successor and successors in office. And the fact that appellant, having conveyed the property to one Stedman after German, in the interval between the dismissal and the restoration of the insolvency proceedings, had made a purported conveyance of the property to the appellant, received a conveyance back of the property from said Stedman could not have the effect of vesting any greater title in the appellant than he was able to convey to Stedman. In other words, having obtained no title from German, the appellant could convey none to Stedman, and therefore the latter had no title he could convey when he made the purported reconveyance to the appellant.

[7-9] It was also proper for the court, upon vacating the order of dismissal and thus reviving the proceedings, to appoint an assignee to take charge of and administer upon the remaining undisposed assets of the insolvent's estate, since there was a vacancy in that office by reason of the death of the original assignee. The appointment of James H. Blanchard as assignee to succeed Baruch, assignee, was regular. But Blanchard failed to file a bond as assignee, and he was therefore without authority to exercise the duties of his office or to perform a valid act as assignee until he filed such bond. It follows that the conveyance by him of the land in controversy to the appellant involved a void act. It was wholly without legal force or effect. Counsel for the appellant vigorously contend, however, that the mere appointment of Blanchard vested him with all the powers of an assignee or a trustee, and that he could act or perform the duties of the office without giving or filing a bond conditioned for the faithful discharge of his duties as such assignee. We are unable to concur in that contention. As above shown, the Insolvency Act (section 15) provided that the assignee, within a certain specified time, or within any further time which the court might allow for meeting that requirement, should file a bond conditioned for the faithful performance of the duties devolving upon him. It is true that section 15 of said act does not expressly declare that the filing of the bond should be a prerequisite to his right to exercise his authority as assignee, but it certainly meant that such was to be the case. If the assignee could go on and legally administer the insolvent estate without filing the bond required, what could have been the object of the Legislature in requiring a bond at all? The assignee derived his title to the insolvent's estate from the assignment, which divested the insolvent of his property and vested it in the assignee from the time of the insolvency. Both the insolvent and the creditors are interested in the estate, and are entitled to have its assets administered according to the best interests of all concerned. The insolvent

is interested in having his liabilities as far extinguished by the assets of his estate as possible and the creditors are interested in having their claims as nearly satisfied in full as the condition of the estate will permit. Hence, it was a wise provision that one having cast upon him so important a trust should be required to file a sufficient bond conditioned for the faithful performance of the trust, and we entertain no doubt that the requirement that an assignee in insolvency should file a bond for that purpose was intended by the Legislature as an essential requisite for his qualification to exercise or perform the duties of that office. At any rate, it has been so held in a number of cases, among which may be mentioned the case of Winchester v. Union Bank of Maryland, 2 Gill & J. (Md.) 79, 19 Am. Dec. 255. Furthermore, the order appointing Blanchard limited his authority as assignee to the performance of the act of making a conveyance of the property in dispute to the appellant. That portion of the order was absolutely void, since it does not appear therefrom or from anything in the proceeding culminating in his appointment that a petition was filed praying for the sale or disposal of the property by private sale. Section 25 of the Insolvency Act provided that "no private sale of any property of the estate of an insolvent debtor shall be valid, unless made under the order of the court upon a petition in writing, which shall set forth the facts showing the sale to be necessary." And the same section provided that upon the filing of a petition for such a sale notice of at least 10 days should be given by publication, etc. The order appointing Blanchard as assignee and the order authorizing him to convey the property to the appellant was, as we have seen, practically one order, and both were made on the same day. Thus it is manifest that there is not only not any showing that a petition was presented to the court asking for a private sale, but that it was absolutely impossible for any notice whatever, much less the required notice of 10 days, to have been given of such sale, assuming, of course, that the conveyance to the appellant involved a sale by the assignee. And this brings us to the question, raised by the appellant, that the right to subject the land in controversy to the payment of the debts of the insolvent was lost by reason of the fact that said land had been abandoned by the assignee. But there is no merit to the point. The complaint of the intervener alleges that said property was taken possession of by the original assignee, Jacob Baruch, the same having been assigned and conveyed to him by the clerk of the superior court. This allegation is not denied by the answer to the complaint in intervention, and therefore stands as admitted. The fact that the administration of the estate of the insolvent remained in abeyance or was dormant because the proceedings in insolvency were not promptly prosecuted to a final determination did not constitute an abandonment of the property as part of the assets of the insolvent estate to be subjected to the extinguishment of the liabilities of the insolvent. The rule of law as to abandonment is that there is no presumption of abandonment from mere lapse of time. Partridge v. McKinney, 10 Cal. 181. See, also, Utt v. Frey, 106 Cal. 352, 397, 398, 39 Pac. 807, as to what will and will not constitute the abandonment of property. In the present case, there could be no abandonment except by the assignee in whom the title to the property for the purposes of the insolvency proceedings had been vested. There is no evidence tending to show that Baruch abandoned, or intended to abandon, the property, save and except the fact that he failed to sell it during his incumbency as assignee and appropriate the proceeds of the sale to the payment of the debts of the insolvent. This omission may be assumed to have involved a dereliction of official duty on the part of Baruch rather than an abandonment, since it does not appear that the property was not of sufficient value to have justified the expense of selling it for the benefit of the insolvent's estate.

[10, 11] Appellant cites a number of cases which it is claimed support the view that the property herein involved was abandoned, and therefore the right to appropriate it to the payment of the debts of the insolvent lost; but we have examined the cases and do not perceive that they are in point here. The property belonged to the insolvent's estate, and it was available for disposition by the assignee in insolvency. No claim was ever made that it was abandoned or that there was an intention to abandon it as a part of the insolvent's estate until the void order was made, at the instigation of the insolvent, dismissing and discontinuing the insolvency proceedings, when the insolvent himself undertook to retake possession of it and convey it to the plaintiff. The question of abandonment is one of fact to be determined by the jury or the court, if the issues of fact are tried by the court, and the burden was upon the plaintiff clearly to show that there was an intention in the assignee to abandon the property. Latham v. City of Los Angeles, 87 Cal. 514, 518, 25 Pac. 673. The finding of the court in this case that there was no abandonment is conclusive upon this court.

[12] 5. The contention that the action, in so far as it is made by the complaint in intervention, is barred by the statute of limitations is without force. The complaint of the intervener is one for the quieting of title to the property in dispute as against the plaintiff and the defendant and in favor of the intervener, or, in effect, is for the recovery of real property, and the claim that the intervener's claim is barred proceeds upon the theory that the action, as to the time within which it should have been commenced, is governed by section 338 of the Code of Civil Pro-

cedure. But it is manifest that that section does not apply to the intervener's case, but that section 318 of said Code governs as to the time within which such an action may be commenced. Section 338 provides for the commencement of actions where the relief prayed for is based upon the ground of fraud, and that is not the ground of the relief asked for by the intervener. Section 318 provides that an action for the recovery of real property, or for the possession thereof, cannot be maintained "unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question, within five years next before the commencement of the action." The Supreme Court, in construing section 318, in Murphy v. Crowley, 140 Cal. 141, 146, 147, 73 Pac. 820, 821, 822, says:

"It seems to be established, therefore, by these cases that, although the main ground of the action is fraud or mistake, whereby the defendant has obtained the legal title to the land in controversy, and the chief contention between the parties is with respect to the fraud or mistake alleged, yet, if the plaintiff alleges facts which show, as matter of law, that he is entitled to possession of the property, and a part of the relief asked is that he be let into possession, or that his title to the land be quieted, the action is in reality for the recovery of real property, and is not barred except by the five-year limitation contained in section 318. The same rule has been followed in the states of Iowa, Kansas, Missouri, and Texas. Williams v. Allison, 33 Iowa, 278; Reihl v. Likowski, 33 Kan. 515; Dunn v. Miller, 96 Mo. 338; Shepard v. Cummings, 44 Tex. 502. There is a case to the contrary in New York. Hoyt v. Putnam, 39 Hun, 406.

"Unless the decisions of this court above cited are to be overruled, it must be conceded that, although the wrong complained of, and undoubtedly the principal contest in the case, arises from the undue influence exerted by the defendant Crowley on her deceased husband in his lifetime, the action in question is nevertheless an action to recover real property and for the possession thereof, and is not barred by the provisions of section 318."

See, also, Page v. Garver, 146 Cal. 577, 80 Pac. 860.

[13] In the present case the first act which could start the statute of limitations to running, or could in any way impart to the intervener or the creditors of the estate of which the intervener became the assignee, information that the appellant claimed an interest in the property was the filing for record of the deed from German to the appellant, which act of recordation occurred on the 11th day of March, 1912, or, as counsel for the respondent suggest, perhaps the act of the filing of the petition for a dismissal of the proceedings in insolvency and the making of the order of dismissal might have been the first acts indicating a claim of interest in the property by parties other than the assignee, and the order of dismissal was made on the 28th day of February, 1912. The intervener's amended complaint, upon which the action was tried, was filed on the 11th day of March, 1916, within the five-year limitation prescribed by section 318 of the Code of Civil Procedure. It is therefore manifest, as stated, that the intervener's action is not barred.

[14] 6. The point that "because of the lapse of time since the filing of the petition by the said Jeremiah W. German to be adjudged an insolvent debtor, the presumption exists that all claims, debts, liabilities, and demands that were valid claims against said petitioner on July 31, 1888, have been paid and discharged" is conclusively answered by section 58 of the Insolvency Act, above quoted herein, that no statute of limitation of this state shall run against a claim which, in its nature, is provable against the estate of the debtor.

7. It is claimed that the findings of fact and conclusions of law do not support the judgment. It is not necessary to reproduce herein the findings of fact and the conclusions of law to show that this contention has no foundation. It is sufficient to say that we have carefully examined the findings and the conclusions of law, and that we have concluded from said examination that the judgment derives ample support from them.

There are numerous other points made by the appellant in impeachment of the judgment, but we have discovered no merit in them. We are satisfied that the judgment is legally impregnable, and it is accordingly affirmed.

We concur: ELLISON, Presiding Judge pro tem.; BURNETT, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [15, 16] In denying the petition for a hearing in this court after decision by the District Court of Appeal of the Third Appellate District we are not to be understood as approving that portion of the opinion substantially holding that the ordinary presumptions and intendments applicable to judgments of courts of record are not applicable to judgments and orders of the superior court in insolvency proceedings. We think that here the order of the superior court dismissing the insolvency proceeding, and the subsequent order appointing Blanchard as assignee for the limited purpose of making a conveyance of the property to the insolvent, were manifestly void upon their face, the order of dismissal because it sufficiently appears on the face of the record that it was made without the consent of the creditors, and the other order because no such appointment of an assignee is authorized by law. In view of this conclusion, we intimate no opinion upon the question of the effect of the failure of Blanchard to give a bond. In all other respects we are satisfied with the opinion of the District Court of Appeal.

The application for a hearing in this court is denied.

All concur.

183 Cal. 314

In re PRATHER'S ESTATE. (S. F. 9162.)

(Supreme Court of California. July 19, 1920. Rehearing Denied Aug. 16, 1920.)

1. Evidence ⟸461(1)—Intent of parties when writing letters furnishing basis of contract, inadmissible.

Where contract as to attorney's fees was embraced in correspondence, evidence as to what the parties had in mind at the time they wrote letters is inadmissible to vary terms of the writings.

2. Contracts ⟸169—Intention of parties to written contract must be ascertained from the writing and surrounding circumstances.

The intention of the parties to a written contract contained in correspondence must be determined from the language of letters read in light of surrounding circumstances.

3. Attorney and client ⟸144—Attorney held not entitled under contract to additional compensation for services.

Where an attorney employed by the executor of an estate in litigation pending to recover property which the deceased had transferred shortly before his death advised that recovery could be had in creditor's suit, and it was begun and prosecuted to a successful determination, the attorney's agreement that a stipulated fee should cover all necessary litigation in the superior court of the county included litigation not then pending and as well a creditors' suit, which was necessary to recover the property.

4. Executors and administrators ⟸256(6)—Allowance of probate court for attorney's fee will not be disturbed unless erroneous.

An allowance by the probate court for services of an attorney in appellate court will not be disturbed on appeal, unless the claim appears to be without justification.

5. Executors and administrators ⟸216(2)—An allowance of $4,550 for attorney's fees rendered in appellate court held warranted.

Where on appeal an attorney secured reversal of an adverse judgment in a suit by an executor to recovery property transferred by decedent shortly before his death, and secured an affirmative judgment for the executor, who bought in the property for about $40,000, an award of $4,550 for services was not excessive.

Department 1.

Appeal from Superior Court, Alameda County; W. M. Conley, Judge.

In the matter of estate of Thomas Prather, deceased. Appeal by the executor from order fixing attorney's fees. Affirmed in part, and in part reversed, with directions.

J. P. O'Brien, of San Francisco, for appellant.

Redman & Alexander, of San Francisco, for respondent.

OLNEY, J. This is an appeal by the executor of the will of Thomas Prather, deceased, from an order in probate fixing certain sums as the compensation to which the respondents, a firm of attorneys, are entitled for legal services rendered the executor, and directing their payment. The facts are:

The decedent, Thomas Prather, shortly before his death transferred to his brother, Samuel Prather, a large amount of his property. The appellant, upon his appointment as executor and before the employment of the respondents, brought a number of suits to recover the property so transferred. Three of these suits were brought in the superior court of San Francisco and others elsewhere. One of the San Francisco suits was to recover an open book account of some $112,000 due the decedent from the Merced Stone Company. The theory of this action was that the transfer was a gift, and had not been completed so as to pass title before the decedent's death. The other suits were on the theory that the transfers were invalid because of the incompetency of the decedent and the undue influence upon him of his brother.

After these suits had been brought, but before any of them had been tried, the respondents were employed. The terms of their employment were arranged by correspondence between them and what may be described as the attorney for the estate; that is, the attorney having general charge of the legal affairs of the estate. After one of the respondents, Mr. Corbet, had been interviewed by the attorney for the estate, Mr. Snook, and the papers in the pending actions had been placed in Mr. Corbet's hands, he wrote Mr. Snook on December 31, 1913, as follows [the italics being ours]:

"Confirming our understanding as to the fee to be paid to our firm for services in connection with *the pending litigation* in the city and county of San Francisco in which Edson F. Adams, as executor, is the plaintiff, the amount thereof is $5,000. This to be paid by Mr. Adams."

To this Mr. Snook replied, under date of January 8, 1914 (the italics again being ours):

"In reference to your letter of the 31st ult. regarding your understanding of our agreement for services, I do not think your letter is quite specific enough in the matter of your services in the Prather estate. I told Mr. Adams that your service charge included *all the necessary litigation* in the superior court of the city and county of San Francisco, and also that you would respond when your services would be needed to assist outside of San Francisco in the cases now pending.

"I would also suggest that your charge should be made against the Prather estate, the same to be guaranteed by Mr. Adams."

The next day Mr. Corbet replied (the italics being ours):

"My understanding with Mr. Adams, through you, about my charge for services—$5,000, includes *the necessary litigation* in the superior

court of the city and county of San Francisco; and, further, I will assist you when needed outside of San Francisco in all of the cases now pending.

"This is to be a charge against the Prather estate, payment of same to be guaranteed by Mr. Edson F. Adams."

Following this exchange of letters, Mr. Corbet examined into the matters committed to him, and advised that he believed a recovery could be had in the action against the Merced Stone Company, but that none could be had in the other actions, based as they were on the theory of incompetence and undue influence; that, however, he believed the transfers attacked could be set aside as in fraud of the decedent's creditor's and advised the bringing of such an action. This was done, and the action so brought is referred to in the present litigation as the creditors' suit, meaning not that it was brought by the decedent's creditors, but by the executor on behalf of the creditors. Pursuant to the advice of Mr. Corbet, the action against the Merced Stone Company and the creditors' suit were brought to trial, and resulted, after appeal, in a judgment in each case in favor of the executor. Mr. Corbet had charge of and conducted both actions, both in the superior court and on appeal. The actions pending in the San Francisco court at the time of Mr. Corbet's employment other than the one against the Merced Stone Company were not prosecuted, and were finally dismissed without trial. The soundness of his advice that a recovery could not be had in them, but that the result desired, the recovery of the property transferred, could be had in the creditors' suit, was demonstrated, not only by the success of the latter, but by the fact that one of the actions in another county on the theory of incompetency and undue influence was tried and lost.

The two judgments in favor of the executor obtained by Mr. Corbet resulted in the recovery for the estate of a very considerable amount of property. There is a sharp dispute as to just how much its value was, but it is evident it had substantial value. The mere statement of the character of the litigation is enough to indicate to any lawyer of experience that it was difficult and required time, attention and ability for its successful prosecution, and that the services of Mr. Corbet were of decided value.

Under the foregoing circumstances the respondents asked that, in addition to the $5,000 called for by their exchange of letters with Mr. Snook, they be allowed compensation for their services on appeal in the action against the Merced Stone Company, and for their services both in the superior court and on appeal in the creditors' suit. The probate court allowed them $4,550 because of the first item, and $3,600 because of the second, making in the latter case no apportionment as between services rendered in the superior court and those rendered on appeal. The appeal of the executor is, as to the first item, on the ground that the amount allowed is excessive, and as to the second item, on the ground that nothing should have been included for services in the creditors' suit in the superior court because such services came under the contract for $5,000.

[1,2] Taking up the second point first, it turns, of course, on the proper construction of the letters between Mr. Corbet and Mr. Snook, which evidence the terms upon which the respondents were employed. Much testimony was introduced as to what the parties had in mind when they wrote these letters. We do not understand upon what theory such testimony was offered or received or may be considered by us. It certainly cannot be received or considered for the purpose of varying the terms of the writings. As to construing those writings, it is certainly also the primary rule of construction that the meaning of the parties is to be determined by the language of the writings read in the light of the surrounding circumstances. It is also the rule that with the exception of a single class of cases, of which the present is not one, testimony either by the parties themselves as to what they intended, or as to declarations of intention made by them at the time, is wholly incompetent.

[3] Reading the letters in the light of the situation as it existed when they were written, we find ourselves unable to avoid the conclusion that they cover the services rendered by the respondents in the creditors' suit in the superior court. The first letter written by Mr. Corbet specifies that the services for which he is to receive $5,000 are services in the superior court of San Francisco in the "pending litigation." This plainly would limit the services covered by the arrangement to services in the actions then pending, if this letter were the final arrangement between the parties. But it was not. Mr. Snook replied to it that it was not specific enough, and that he had informed the executor that the respondent's charge (of $5,000) included "all the necessary litigation in the superior court." To this Mr. Corbet replied that his understanding with the executor made through Mr. Snook was that his charge of $5,000 included "the necessary litigation in the superior court," and this letter is the final expression of the terms of the respondent's employment. It is plain that the expression in the first letter "pending litigation" was changed ex industria to "all necessary litigation." The inference from this is unavoidable that the charge of $5,000 was intended to cover litigation not then pending if such litigation were necessary.

There remains the question as to whether or not the creditors' suit subsequently brought comes within the expression "all necessary litigation." It is claimed that this suit was not contemplated at the time Mr.

Corbet's letter was written. This is undoubtedly true in the sense that an action of that particular character was not then contemplated. But it is also true that the possibility of other actions than those pending was contemplated, as otherwise there would have been no occasion for the deliberate change from an arrangement for "pending litigation" to one for "all necessary litigation."

What, then, was meant by the phrase "all necessary litigation?" Necessary for what? Clearly, it must have been all litigation necessary to accomplish the object for which the pending actions had been brought. It was the accomplishment of this object for which the respondents were employed, and was the thing which the parties had in mind and about which they were talking. That object was the setting aside of the transfers by the decedent to his brother. This also was the object of the creditors' suit. The situation, therefore, is that the respondents by the arrangement for their employment agreed that they would charge only $5,000 for their services in the superior court in all litigation necessary to set aside the decedent's transfers of property to his brother, and the creditors' suit, subsequently brought, comes directly in the category of such litigation.

It follows that the order of the lower court was in error in allowing the respondents compensation for services in the superior court in addition to the $5,000 provided for in the arrangement for their original employment. Before dismissing this branch of the case, however, it may be advisable to note one argument made on respondents' behalf by their counsel. It is argued that the creditors' suit could have been brought in any one of a number of counties, while the $5,000 charge of the respondents was limited to services in the superior court of San Francisco, and that it is not to be supposed that it was intended that the services in the creditors' suit were within the $5,000 charge, when they could have been taken without it by the simple expedient of bringing the action elsewhere than in San Francisco. The answer to this is: First, that no lawyer worthy of his profession would change the venue of a contemplated action for such a reason, and we are certain that this is true of the respondents; and, second, that the matter of the venue was one finally within the control of the client and not of the lawyer.

[4, 5] As to the other branch of the case, the claim of the executor that the allowance of $4,550 for services on appeal in the action against the Merced Stone Company was excessive, little need be said. The question of what was the proper amount was one to be determined by the probate court, and with its decision we cannot interfere, unless it appear plainly that it was without justification. It does not so appear, but rather the contrary. The action was a difficult and complicated one, and the services on appeal were quite exceptional. The trial court gave judgment against the executor. This was affirmed on appeal by the District Court of Appeal. The respondents then petitioned for a hearing before this court and obtained it. This court reversed the judgment against the executor, and ordered the action back for a new trial. The respondents thereupon petitioned that the order of reversal be modified by directing judgment for the executor upon the findings, instead of requiring a new trial. This petition was granted, so that the final result of the respondents' services on appeal was that a judgment against the executor was transformed into one for him. The chief argument of the executor's present counsel is that the compensation allowed is excessive because of the comparatively small actual value of the claim against the Merced Stone Company which was recovered from the decedent's brother. But while the value of the recovery made is an element to be considered in determining the proper amount to be allowed as compensation, it is not controlling, and, furthermore, the actual value of the recovery does not appear with any certainty. It does appear that the executor, upon acquiring the claim against the Stone Company, proceeded to enforce it, and, upon execution sale, bought in the assets of that company for about $40,000. If this was the real value of the recovery obtained by the respondents for the executor, the compensation allowed them was certainly no more than reasonable, in view of the rather exceptional services rendered.

Order affirmed as to the compensation allowed the respondents for services on appeal in the action by the executor against the Merced Stone Company, and reversed as to the compensation allowed respondents for services in the so-called creditors' suit, with directions that the lower court redetermine the amount to be allowed for the latter services, eliminating all services rendered in that action in the superior court.

We concur: SHAW, J.; LAWLOR, J.

183 Cal. 295

OAKLAND BANK OF SAVINGS v. CALIFORNIA PRESSED BRICK CO. et al.

(S. F. 8685.)

(Supreme Court of California. July 9, 1920. Rehearing Denied Aug. 5, 1920.)

1. Chattel mortgages ⊂=138(1)—Sales ⊂=473(1)—Buyer and seller may agree that title to personalty shall remain in the seller until payment, which title will be superior to that of subsequent mortgagee or purchaser.

The owner of personalty has the right to sell the same and deliver possession to the buyer, on condition that title shall remain in him until payment, and the title so withheld will until payment be superior to that of a subsequent mortgage or purchase of the property from the buyer, even if such subsequent mortgage, etc., was made without notice so long as the property retains its character as personalty.

2. Fixtures ⊂=21—Notwithstanding personalty is converted into realty because affixed to the land, it will as between the buyer and seller be treated as personalty.

Notwithstanding the fact that personalty may be converted into realty by being affixed to the land, yet where the question arises solely between the seller, who retains the title, and the buyer, who affixes it to the land, the property as between the two will, under Civ. Code, § 1013, be treated as personalty.

3. Fixtures ⊂=21—Personalty affixed to the land becomes realty, and may be held by subsequent mortgagee against seller who reserved title.

Where boilers and other heavy machinery were affixed to land, so as to become land, within Civ. Code, §§ 658–660, such property, though the seller retained title, will pass to a subsequent mortgagee without notice, notwithstanding section 1013, for under the circumstances the machinery became part of the land and passed under the mortgage.

In Bank.

Appeal from Superior Court, Alameda County; William H. Donahue, Judge.

Action by the Oakland Bank of Savings against the California Pressed Brick Company to foreclose a trust deed, in which Curtner and McWhinney alleged they were owners of certain personal property placed by defendant on the incumbered property. From a judgment foreclosing the trust deed as to the other property, but directing that certain funds should be paid over to Curtner and McWhinney, plaintiff appeals. Reversed and cause remanded.

McKee & Tasheira, and Peck, Bunker & Cole, all of Oakland, for appellant.

Thomas C. Huxley, of Oakland, for respondents.

SHAW, J. The California Pressed Brick Company executed a deed of trust conveying to Bankers' Trust Company certain property, real and personal, comprising the plant in use by the brick company for the making of pressed brick and similar articles, as security for payment of a series of bonds issued by the brick company, amounting to $100,000. Afterwards, the Oakland Bank of Savings was duly substituted as trustee. Bonds to the amount of $93,400 have been issued and are unpaid. The object of this action is to foreclose the lien of said trust deed upon said property and thus enforce payment of the bonds.

The defendants Curtner and McWhinney made answer, alleging that they are the owners of certain boilers, machinery, and personal property conveyed by said deed of trust and embraced in said plant and that their title thereto is superior to that of the trustee. They claim as successors in interest of C. N. Raymond Company, a corporation, which was the seller in an agreement for the conditional sale of the property to the brick company, providing that the title should remain in the seller until the price was fully paid, notwithstanding the delivery of possession to the buyer. The conditional sale was made, the property delivered, and the boilers and the heavy machinery affixed to the land in the manner specified in section 660 of the Civil Code, prior to the execution of the trust deed. The portion of the property not so affixed is not in controversy; it being conceded that the reservation of title in the seller is good with respect to that part of the property, as against the subsequent deed of the buyer to the trustee. Prior to the judgment the property was, in pursuance of a stipulation between the parties, converted into money, which was deposited to await the event of the action.

The court below was confronted with the question which party, under these circumstances, had the superior title. It decided that Curtner and McWhinney, as successors to the title of C. W. Raymond Company under the conditional sale, had title superior to that conveyed by the trust deed from the brick company, and gave judgment foreclosing the trust deed as to the other property, but directing that the money so deposited should be paid over to Curtner and McWhinney free from all claims of the plaintiff. The plaintiff appeals from the part of the judgment in favor of said defendants.

[1] The owner of personal property has the right to make an agreement to sell the same and deliver possession thereof to the buyer, upon the condition that the title thereto shall nevertheless remain in the seller until the price agreed on has been fully paid, and the title so withheld by the owner will until full payment, be superior to that of a subsequent mortgage or purchase of such personal property from the buyer, even if such subsequent

mortgage or purchase was made without knowledge or notice of the reservation of title and paid full value for the property. Putnam v. Lamphier, 36 Cal. 157; Kohler v. Hayes, 41 Cal. 457; Palmer v. Howard, 72 Cal. 295, 13 Pac. 858, 1 Am. St. Rep. 60; Lowe v. Woods, 100 Cal. 409, 34 Pac. 959, 38 Am. St. Rep. 301; Vermont M. Co. v. Brow, 109 Cal. 241, 41 Pac. 1031, 50 Am. St. Rep. 37; Rodgers v. Bachman, 109 Cal. 555, 42 Pac. 448; Van Allen v. Francis, 123 Cal. 477, 56 Pac. 339; Perkins v. Mettler, 126 Cal. 105, 58 Pac. 384; Lundy F. Co. v. White, 128 Cal. 170, 60 Pac. 759, 79 Am. St. Rep. 41; Liver v. Mills, 155 Cal. 462, 101 Pac. 299.

[2, 3] The above rule prevails so long as the property retains its character as personalty, and the cases cited state the rule applicable in such case. The case at bar raises the question what the rule is or should be when the personal property which is the subject of the conditional sale has become affixed to the land of the buyer, so as to become a part of the realty, after its delivery to him, and the buyer has thereafter made a mortgage or trust deed to one who has no knowledge or notice that such title remains in the seller on condition, and money has been loaned on the faith of such security, also without knowledge of the secret title.

Few cases have arisen in this state which touch upon this precise question. The Civil Code declares the law as to what constitutes real property as follows:

"Real or immovable property consists of: 1. Land; 2. That which is affixed to land; 3. That which is incidental or appurtenant to land; 4. That which is immovable by law." Section 658.

"Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance." Section 659.

"A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws." Section 660.

The boilers in controversy were set in the building on the land on a concrete foundation made to receive them, and then bricked in by a wall, so as to retain the heat. The heavy machinery was set on concrete blocks built in the ground for that purpose, with large bolts or rods brought up through the concrete, by means of which the machines were fastened down. The machinery, engine, and boilers were connected together by pipes, rods, shafts, and belts, so that the engine would operate the machinery, and they were all attached for the purpose of using them permanently in the plant in the making of brick. There can be no doubt that they were affixed to the land, so as to become real property, under the definition given in section 660. Lavenson v. Standard Soap Co., 80 Cal. 250, 22 Pac. 184, 13 Am. St. Rep. 147; McNally v. Connolly, 70 Cal. 3, 11 Pac. 320.

Notwithstanding the fact that personal property may be converted into real property by being affixed to land in this manner, there is a well-established rule in this state and elsewhere that where the question arises solely between the seller, who retains the title, and the buyer, who affixes it to the land, the relations or the contract between the parties may be such that the property will be deemed personalty, and will be treated as such in law, so that the title will continue in the seller, after it is so affixed, as well as before. The Civil Code recognizes this rule in section 1013, which declares that:

"When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed, except as provided in section ten hundred and nineteen, belongs to the owner of the land, unless he chooses to require the former to remove it."

But this does not cover the case of a bona fide purchaser or mortgagee of the land without notice of the agreement.

Our decisions are not harmonious on the subject. In Hendy v. Dinkerhoff, 57 Cal. 5, 40 Am. Rep. 107, Hendy had leased a steam engine and boiler to one Lampson for two months, for use on a mining claim, the latter to pay $566.50 for the use for that period, and then to have the right to buy them from Hendy for $1, but until then he should have no right to them, except as lessee. They were permanently affixed to the quartz mill on the claim, so as to become part of the realty. The mining claim and mill belonged to Dinkerhoff, who had agreed to sell it to Lampson, who took possession thereof and affixed the engine and boiler, but afterward failed to complete the purchase, whereupon Dinkerhoff took possession and claimed ownership of the engine and boiler as part of the realty. The court held that as between Hendy and Lampson "the engine and boiler remained personal property, notwithstanding the fact that it was by him attached to the mill," and then proceeded to say:

"Can they be so regarded in the hands of the defendants? How this would be if the latter occupied the position of bona fide purchasers, without notice, of the real estate to which the chattels were attached, need not be determined, for they are not in that position."

In March v. McKoy, 56 Cal. 85, March, being the owner of a thresher engine and boiler mounted on wheels so that they could be readily moved from place to place, leased the same to one Woods for six months at a rental of $100 per month, with an agreement that if $600 was paid at the end of six months he would sell the property to Woods. Woods took off the wheels, bolted the axles

to large timbers bedded in the soil, and connected the same with machinery in a sawmill owned by him and thereafter the engine was used to drive the machinery. Woods failed to pay the rent, but made repairs on the engine at a cost of $30. A mechanic's lien was filed upon the entire property for these repairs. The same was foreclosed and the property sold, March not being made a party to the suit. It was described in the foreclosure proceedings as a planing mill contiguous to McKoy & Hubbard's sawmill. The decree did not provide for any sale of the land on which the engine stood. The court said that assuming that, the Code gave a lien upon personal property for repairs by mechanics who did not take possession of it, it was clear that March could not be deprived of his title unless he was a party to the foreclosure proceedings, and gave its decision accordingly. The opinion shows that the case was decided upon the theory that all the parties to the foreclosure proceedings had treated the property as personalty and that it was to be considered in that aspect. The case does not appear to be applicable to the question we have before us.

In Jordan v. Myres, 126 Cal. 565, 58 Pac. 1061, the question arose in an action to foreclose mechanics' liens against Myres and Joshua Hendy Machine Works; the latter being the appellant. Myres was the owner of mining property. He agreed to sell the same to one Berry under an agreement that if he failed to complete the purchase he could remove any engine or hoisting machinery which he may have placed on the mine above ground. Shortly afterwards the Machine Works leased to Berry and his associates an engine and other machinery for a stipulated rental, on payment of which they were to have the right to purchase the same. The lessees placed the same on the mine, where it was permanently affixed to the land, and was thereafter used in working the mine. The work for which the mechanics' liens were filed was done after the machinery was so affixed. The court said:

"It is settled law that this personal property cannot be treated as part of the realty, so far as the owner of the mine and the defendants were concerned. * * * The question is: Must it be so treated as to respondent? Section 1183 of the Code of Civil Procedure provides as follows: 'And any person who performs labor in any mining claim or claims has a lien upon the same, and the works owned and used by the owners for reducing ores from such mining claim or claims, for the work or labor done or materials furnished by each respectively,' etc. This section contemplates that the lien shall attach to the property of the owner, and not to the property of some other person."

To the objection that the machinery had been affixed to the realty as a part of it, and that the lien would attach to it as the property of the owner of the mine, unless notice was given to the lienholders by the appellant of its title, the court referred to and quoted from Hill v. Sewald, 53 Pa. 271, 91 Am. Dec. 209, and Stell v. Paschal, 41 Tex. 640, holding that the intention of the parties to affix personal property to land is controlling as to the character of the property after it is so affixed. In the Texas case the machinery was merely put into the mortgaged property for exhibition and not for permanent use. The court then said that the general rule as to sales on execution and foreclosure was that the purchaser acquired only such title and interest as the judgment debtor had and "we cannot see in what way the sale upon foreclosure of a mechanic's lien can be said to carry any greater interest than the owner of property had at the time the lien attached, whatever may be the rule as to a bona fide purchaser or mortgagee of land without notice," and that "respondent secured no lien upon this personal property by virtue of the statute, for he could only have a lien upon the property of the owner of the mine." It proceeded to say that any other view would greatly retard development, especially of mining property, where it often became necessary for the miner to hire machinery, which for the time being, in order to utilize it, must be affixed to the realty. It will be observed that the court took care to say that the rule might be different with respect to a bona fide purchaser or mortgagee of land without notice. It seems to have been assumed by the court that the plaintiff in the mechanic's lien suit did not occupy the same position as a purchaser or mortgagee without notice. In its relation of the facts, however, the court stated that it would deal with the case as though the plaintiffs had no notice of the appellant's claim of title. Apparently the court was of the view that the statute allowing such liens restricted the rights of the lienholders to a greater extent than those of a subsequent mortgagee or purchaser without notice. The case is not an express authority on the question before us, although it is somewhat difficult to distinguish it on principle.

In Tibbitts v. Moore, 23 Cal. 208, Moore executed a mortgage on real property to the appellant, and thereafter purchased certain machinery from Lambard, giving to him a chattel mortgage for the price thereof, and then attached the machinery to the mortgaged realty in such manner that it became a part thereof. Each mortgage was duly executed and recorded. The court held that the lien of the realty mortgage did not take effect upon the personalty until it became attached to the realty, and consequently that as to that property the chattel mortgage was superior to the prior mortgage on the realty.

These comprise all the cases in this state which have any material relation to the question. None of them, except Jordan v. Myres

and Tibbitts v. Moore, touches upon the exact question. In the former the court expressly excepted cases of bona fide purchasers or mortgagees of the land without notice, while the latter involved only the question of the lien of a mortgage on land to which personal property already subject to a chattel mortgage was afterward affixed. In the case at bar the machinery in question was affixed to the realty, so as to become a part thereof, before the deed of trust, under which plaintiff claims, was made, and there was nothing to indicate to a purchaser or mortgagee that the property so affixed was not a part of the realty, or that the title thereto was not in the owner of the soil. The question, so far as this state is concerned, is an open one.

The rules of the Civil Code, above quoted, are essentially the same as those of the common law on the subject. They prevail generally throughout the United States. The exact question has often arisen in other states, and the overwhelming weight of authority is to the effect that the title of the seller of personal property of this character, which title is to be held by him until the price thereof is paid, and which is afterwards affixed to land of the vendee, so as to become part of the realty, is subject to the lien of a subsequent mortgagee in good faith without notice of the reserved title. This is fully shown in the elaborate note of Mr. Freeman to Fuller-Warren Co. v. Harter, 110 Wis. 80, 85 N. W. 698, 53 L. R. A. 603, in 84 Am. St. Rep. at pages 892 and 893, and also in the notes to Muir v. Jones, 23 Or. 332, 31 Pac. 646, in 19 L. R. A. 444, and Lawton, etc., Co. v. Ross-Kellar, etc., Co., 33 Okl. 59, 124 Pac. 43, in 49 L. R. A. (N. S.) at page 396, to which we refer for a list of the cases.

We think the proposition is in accordance with justice and reason. The seller of the personal property voluntarily placed it in the possession and control of his vendee, with knowledge that, if it was put to the use for which it was designed, it would be affixed to land. Its character was such that it could not ordinarily be used at all by the vendee, unless it was so affixed to the real estate comprising its plant. The seller, because of these facts, is presumed to have agreed that the personal property should be, or might be, converted into real property. By this transformation is was brought under the operation of the laws for recording contracts affecting realty and for the protection of innocent purchasers thereof, regardless of the conditions of the agreement of sale. The contract between the Raymond Company and the brick company shows by its terms that this was the intention and hence Curtner and McWhinney are chargeable with knowledge thereof. A person about to loan money on the security of a mortgage or trust deed on such real property, and having no information of the secret agreement as to the title, would be justified in believing that all the machinery would be hypothecated by such mortgage or deed and would have the right to rely on such belief and to make the loan accordingly. He is the innocent party in the transaction, and he should be protected, rather than he who caused the deceitful appearances.

Our conclusion is that the court below erred in directing that the proceeds of the machinery in question which was affixed to the realty should be paid over to Curtner and McWhinney. They were entitled to the proceeds of those of the articles sold by the Raymond Company to the brick company that were not so affixed, if any such articles were included in the sale made under the stipulation for the sale of the property claimed by Curtner and McWhinney. It may be necessary for the court below to take evidence to ascertain how much of the $5,000 deposited is attributable to such articles; consequently we cannot direct a judgment.

The portion of the judgment appealed from and set forth in the notice of appeal is reversed, and the cause is remanded for further proceedings in accordance with this opinion.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

183 Cal. 326

LAMPORT v. SOUTHERN PAC. CO.
(L. A. 6026.)

(Supreme Court of California. July 21, 1920.)

1. Master and servant ⟸286(33)—Negligence as to switchman held question for jury.

In an action for death of a switchman struck by the rear of a train while signaling to the engineer of another train, where there was evidence that deceased was directly on a line between the engineer of the train by which he was struck and a switchman signaling to such engineer so as to be clearly in the field of their vision, whether their failure to warn him of his danger was negligence *held* a question for the jury.

2. Appeal and error ⟸1078(1)—Points not argued not considered.

Points not argued either in brief or oral argument will not be considered on appeal.

Department 1.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Edith S. Lamport, administratrix of the estate of Lester C. Lamport, deceased, against the Southern Pacific Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Henry T. Gage and W. I. Gilbert, both of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondent.

SHAW, J. The defendant appeals from the judgment.

The complaint stated a cause of action to recover damages for the death of the plaintiff's intestate, Lester C. Lamport, which death, it is alleged, was caused by the negligence of the defendant. Lamport was in the employ of the defendant as a switchman in the Oakland yards at the time of his death.

The only point argued by the defendant in support of its appeal is that the evidence is insufficient to support the allegations of the complaint with regard to the negligence of the defendant. The complaint alleges that while Lamport was engaged in his work as switchman standing near one of the switch tracks of the defendant, the defendant ran one of its cars against and over him, causing his death; that said death was caused solely by the negligence of defendant in giving no warning or notice of the approach of said car, and in negligently failing to have any light upon the car that struck the decedent.

[1] There was evidence of the following facts: At the time of the accident two trains were being operated in the switchyard of the defendant. One of them was the train with which Lamport was connected. It was upon a track on which there was a platform scale for weighing cars. It was being operated to place the rear car on the platform in the track, so as to have the car weighed. It was necessary to stop the car that was to be weighed at the exact spot where its whole weight would be on the rails laid upon the scale platform. This was a process termed "spotting the car." The accident happened at about midnight. At each end of the scale a light was erected to enable the switchman to ascertain when this car was exactly at the right place to be cut out and weighed. The train with which Lamport was engaged was several car lengths away moving toward the scales upon a cross-over track leading from another track to the track in which the scales were affixed. This made it a curved track and required that Lamport should stand some distance to one side from the scale track in order that the engineer, who was upon the engine of that train at the farther end thereof could see his signals and be informed of the exact point at which to stop. It was also necessary for him to observe the lights opposite the end of the scale, so as to see precisely when to give the signal. At a point some 15 feet from the scales on the side on which Lamport had to stand to give the signals to his engineer there was another straight track upon which another engineer and switchmen were engaged in moving another train in the same direction as the train with which Lamport was engaged. This other train consisted of several cars, the rear car being an oil tank car without any light at the rear end thereof. This train was moving backwards toward Lamport. The switchman of that train was at some distance beyond Lamport at a point where he intended to stop his train and was standing there to give signals to his own engineer. Lamport was standing on a direct line between the two and between the two rails of that track. In order to give and receive these signals, it was necessary for the switchman and engineer upon the other train each to look toward the other and toward Lamport. While Lamport was so standing engaged in signaling to "spot" the car, the engineer of the other train moved that train down towards Lamport, and the rear car thereof ran over and killed him. Lamport while so engaged had in his hand a lighted lantern with which to give signals to his own engineer for the "spotting" of the car. It is plain that when the engineer and switchman of the other train were watching for each other's signals, as they were doing at that moment, Lamport would be clearly in the field of their vision and directly on a line between them.

No argument is required to demonstrate the proposition that, under these circumstances, they should have observed him and warned him of the danger, or that it was at least a question for the jury to determine whether or not their failure to do so was negligence. It is obvious from the mere statement of the facts that the evidence tended to show negligence, if it did not demonstrate it absolutely.

[2] Other points are mentioned in the brief on appeal, but no other point was argued either in the brief or oral argument. It is therefore unnecessary to consider any other questions in the case.

The judgment is affirmed.

We concur: LAWLER, J.; OLNEY, J.

183 Cal. 321

SUTTER BUTTE CANAL CO. v. SUPERIOR COURT in and for BUTTE COUNTY et al.

(Sac. 3105.)

(Supreme Court of California. July 20, 1920. Rehearing Denied Aug. 19, 1920.)

Prohibition ⟸5(3)—Not issued to restrain judicial action where question of lower court's jurisdiction had not been presented.

Superior court, which has overruled demurrers in actions to enjoin irrigation company from supplying water in new territory and has dismissed the Railroad Commission's complaint in intervention, will not be restrained from proceeding in such actions on the ground that the Railroad Commission had directed the company to supply such new land with water, under St. 1913, p. 84, where the complaint made no reference to the commission's order, so that ruling on demurrers was no more than a ruling that the complaint stated a cause of action within the general jurisdiction of the court, and where the dismissal of such complaint in intervention may have been ordered on the ground that the commission was not a party beneficially interested, since in such case the question of whether the court had jurisdiction in the face of the commission's order had not been presented.

Angellotti, C. J., dissenting.

In Bank.

Application for writ of prohibition by the Sutter Butte Canal Company against the Superior Court of the State of California in and for the County of Butte and Hon. H. D. Gregory, the Judge thereof. Writ denied.

Bell, Brookman, Simmons & Creech, of San Francisco, W. H. Carlin, of Marysville, and Isaac Frohman, of San Francisco, for petitioner.

George F. Jones, of Oroville, and Armfield & Eddy, of Woodland, for respondents.

OLNEY, J. This is an application for a writ of prohibition. The petitioner is a public utility corporation engaged in the business of selling and distributing water largely, if not entirely, for irrigation. By its articles of incorporation it was authorized to engage in this business in the counties of Butte and Sutter. Prior to the present year there were some 58,000 acres of land, mostly, if not all, in Butte county, to which water was furnished by it. In the fall of last year the Railroad Commission authorized the company to obligate itself to supply some 14,400 acres more of land, all in Sutter county. Pursuant to such authority, the petitioner did so obligate itself by contract with the owners of these lands, and has extended its work so as to supply them at a cost which the commission finds to have been between $200,000 and $250,000. No objection to this was made at the time by the old consumers of the water company, but it may be that they were unaware of the application for authority, although notice of the application was published in the newspapers circulating in Butte county, and the commission finds that the construction of the additional works by the company and its intention to serve thereby additional land was a matter of common knowledge in the county.

The last winter was an exceedingly dry one, and by spring it became evident that there would be a general water shortage. Representatives of the old consumers thereupon filed a complaint with the Railroad Commission, setting forth that they were old consumers of the company, that the company was intending to take on some 14,400 acres of additional land, that there was a shortage of water and the company would not be able to supply both the lands of the old consumers and the new lands, and asking that the company be ordered not to supply the contemplated additional lands. The owners of the latter lands intervened in the proceeding, so that all parties in interest were represented. After a hearing, the commission denied the complaint and directed the water company to deliver water for the new lands without discrimination between it and the lands previously supplied. See Stats. 1913, p. 84; Deering's General Laws, Act 4348a.

Pending the decision of the commission, three actions were commenced in the superior court of Butte county against the water company, one by a consumer of five years' standing under a contract, one by a consumer of a year's standing without a contract, and one by a landowner who was not a consumer but whose lands lay within the area served by the company's system as it had theretofore existed without the extension for the supplying of the 14,400 acres of new land. The complaints alleged a shortage of water, that the water company was intending to supply 14,400 acres of additional land, that there was not enough water for this land and the company's old consumers, and prayed for an injunction restraining the company from supplying the new land. No mention whatever was made in the complaints of any of the proceedings before the Railroad Commission. Demurrers were interposed to these complaints, and the Railroad Commission itself filed a complaint in intervention, setting up the authority previously given by it to the water company to supply the additional land and the pendency of the proceedings before it. After the rendition by the commission of its decision, the superior court of Butte county dismissed the commission's complaint in intervention and overruled the demurrers of the water company and directed it to answer. The water company thereupon applied to this court for a writ of prohibition to prevent the Butte county court from proceeding further with the actions before it. An alternative

writ was granted, and a hearing has been had upon it.

The ground on which the writ is sought is that the superior court has no authority to enjoin the petitioner from supplying the additional lands in the face of the order of the Railroad Commission directing it to supply those lands. The question as to this authority has been the only point presented to us, and since it is one of importance, and its decision, if in favor of the petitioner, would finally determine the controversy between the parties, we would much prefer to decide it and grant or deny the writ asked for accordingly. But we think it fairly plain that the question is not presented by the proceedings before the superior court in their present stage, and we do not feel at liberty deliberately to overlook this fact and to proceed to decide a question not in reality presented by the record. The only action taken by the superior court has been to overrule the demurrers to the complaints and to dismiss the commission's complaint in intervention. Its action in neither of these respects involved a ruling that it had authority to enjoin the water company from doing what the commission directed it to do, or necessarily indicated that the court would proceed without regard to the order of the commission when the existence of such order and the water company's reliance upon it were properly presented to the court.

So far as the overruling of the demurrers is concerned, the essential point is that the complaints make, as we have said, no reference to the proceedings before the commission or to the latter's order in the matter. They merely allege the relation of consumer to the company, or, in one case, the right and desire to initiate the relation, the intention of the company to take on other lands, and the lack of water to supply both the company's old consumers and the new lands. The complaints and the demurrers to them present merely the question whether, under these circumstances, no order of the Railroad Commission being involved, an old consumer may enjoin a water company from taking on further requirements upon its supply. This question is purely one within the general equity jurisdiction of the superior court, and as such the court had authority to pass upon it and to overrule the demurrers to the complaints if it concluded that the old consumers were entitled to an injunction upon the facts alleged. With the correctness of this conclusion we are not concerned. If the facts were merely as stated in the complaints, and the court's conclusion that upon such facts causes of action existed in favor of the plaintiffs was incorrect, its decision could be reviewed on appeal, but not by prohibition. In brief, the action of the superior court in overruling the demurrers to the complaints was no more than a ruling that the complaints stated a cause of action within the general equity jurisdiction of the court. The question of whether or not the court had no authority to grant relief because of the fact that the Railroad Commission had made an order in the premises was not presented. With the complaints reading as they did, this question could be presented only by an answer to them, setting up the order of the commission. It may well be, and, in fact, we presume, that the superior court overruled the demurrers upon this theory, particularly in view of the decisions of this court in Pacific, etc., Co. v. Eshleman, 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822, and Sexton v. Atchison, etc., Co., 173 Cal. 760, 161 Pac. 748; between which and the more recent decisions in Yolo, etc., Co. v. Superior Court (App.) 185 Pac. 195, and Red Bluff v. Southern Pacific (App.) 187 Pac. 152, we see no conflict.

As to the action of the court in dismissing the commission's complaint in intervention, the court may well have done this upon the ground that the case was not one for intervention by the commission, that the commission was not a party beneficially interested, and that if the defense that it had made an order in the matter was to be presented it should be presented either by the water company or by the owners of the additional land to be served. Such theory, at first blush, would seem to be sound, but, whether it be or not, the fact that the superior court may well have acted upon it establishes at once that the court's action in dismissing the commission's complaint is not a ruling that it has jurisdiction despite the order of the commission, or any indication that the court intended to proceed despite that order, if the fact of its existence were properly shown.

There is, therefore, as we have said, as yet no ruling by the superior court that it has jurisdiction to issue an injunction in the face of the order of the Railroad Commission, and the question as to such jurisdiction has not been presented.

It follows that the writ sought must be denied, but without prejudice to another application if occasion should hereafter require; and it is so ordered.

We concur: SHAW, J.; SLOANE, J.; LAWLOR, J.; WILBUR, J.; LENNON, J.

ANGELLOTTI, C. J. I dissent, being of the opinion that it is apparent from the face of the complaints in the superior court actions that, in view of sections 5 and 6 of the act of April 25, 1913 (Stats. 1913, p. 84; Deering's General Laws, Act 4348a), the subject-matter of such actions is within the exclusive jurisdiction of the Railroad Commission, subject only, in so far as the courts of this state are concerned, to review by this court, as provided by the Public Utilities Act.

183 Cal. 354

KNIGHT et al. v. MARKS et al. (S. F. 8653.)

(Supreme Court of California. July 26, 1920. Rehearing Denied, Aug. 23, 1920.)

1. Damages ⟸79(5) — Liquidated damages may not be stipulated for mere failure to pay an installment of rent.

Provision in lease fixing liquidated damages for breach, so far as applying to mere failure to pay an installment of rent, is void; Civ. Code, § 3302, fixing the damages for breach of obligation to pay money only at the amount due by the terms of the obligation, with interest, and sections 1670, 1671, declaring void provision of a contract determining in advance the amount of damages for breach of obligation, except when from the nature of the case it would be impracticable or extremely difficult to fix the actual damage.

2. Landlord and tenant ⟸184(2) — Assignee of lessee's interest in fund deposited by lessee as security for performance of covenants has contingent interest.

Assignee of the lessee's interest in a fund deposited by the lessee as security has a contingent interest in the fund, so long as lessee does not fail to perform.

3. Landlord and tenant ⟸184(2) — Deposit not released by change of lease, where unknown to lessor a third person was, as to such deposit, surety for lessee.

Where lessor did not know that as to a fund deposited as security for performance of lessee's covenants a third person stood in the relation of surety, the fund was not released by alteration of the lease.

4. Appeal and error ⟸158(2) — Right to prosecute appeal not lost by enforcement of judgment by execution.

Appellant does not lose his right to prosecute appeal by the fact that after it is taken the judgment was satisfied through enforcement by execution; the appellate court, under Code Civ. Proc. § 957, having power, in case of reversal, to make restitution.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Thomas G. Knight and another, executors of Serena H. Knight, deceased, against Benjamin L. Marks and others. From an adverse judgment, defendant Joseph C. Bianchi appeals. Reversed.

Geo. C. Sargent, of San Francisco, for appellant.

Peter A. Breen, Percy E. Towne, Goodfellow, Eells, Moore & Orrick, and Elliott M. Epsteen, all of San Francisco, for respondents.

SHAW, J. This is an action for money claimed to be due to the plaintiffs' testatrix upon a lease executed by her to Benjamin L. Marks, on October 22, 1908. The cause was tried by a jury and upon the verdict judgment was rendered in favor of plaintiffs against Marks for the sum of $2,000 and against defendant Bianchi and the German Savings & Loan Society for the sum of $11,222.87. From this judgment the defendant Joseph C. Bianchi appeals.

The lease embraced property upon which the lessor agreed to erect a building in accordance with plans and specifications annexed thereto, which plans, however, do not appear in the record. It was for the term of 10 years, beginning 30 days after the completion of the building. The total rental was $120,000, payable in monthly installments of $1,000 each on the 1st day of each month, and Marks was to pay $200 as attorneys' fees in any action by the lessor against the lessee for a breach of any covenant of the lease. It provided that the lessee should furnish $8,000 as security for the performance of the covenants on his part, which sum should be deposited in the German Savings & Loan Society in the names and for the joint account of the lessor and lessee, there to remain with such interest as should accumulate thereon, provided that, in the event of failure to pay rent or other breach of covenant by Marks, the "lessor may withdraw from the said account the entire sum, together with the accumulated interest, as agreed liquidated damages for the breach," and that upon the termination of the lease by expiration of time or otherwise any balance of the money and interest so on deposit and not applied to the claims of the lessor should be returned to the lessee.

The complaint alleged that the purpose of the parties in leasing the premises was that the lessee should conduct a livery stable therein and that the building was constructed so as to be suitable for that use; that the lessor would not have erected a building for that purpose except in consideration of the covenants and conditions of the lessee and except for the money deposited as security for performance; that because of the fact that it was designed for that use it would be difficult to procure another tenant and impractical and extremely difficult to fix the damages that would be suffered by the lessor in case of the ouster of the lessee for the nonpayment of rent or other breach of the conditions of the lease; and that it was for this reason that the provision regarding liquidated damages was inserted in the lease and the sum of $8,000 deposited as above stated. It further alleged that Joseph C. Bianchi claimed some interest in the fund on deposit.

Bianchi in his answer alleged that the money deposited by Marks with the defendant German Savings & Loan Society in pursuance of the lease was furnished to Marks by C. D. Bianchi for the purpose of making

said deposit therewith; that the lessor was informed that the money was the property of Bianchi and was pledged by him as security for the obligation of Marks under the lease; that in May, 1912, without the consent of said C. D. Bianchi, the lessor and lessee by agreement in writing altered the terms of the lease by providing that the building could be accepted by the lessor and lessee in an uncompleted state and located upon ground other than that described in said lease and that the time for its completion should be extended and that it might be used as a garage instead of as a stable. It is also alleged that in November, 1912, said C. D. Bianchi assigned all of his right, title, and interest in the said fund on deposit to the defendant Joseph C. Bianchi. He asked judgment to the effect that he was the owner of the said fund on deposit.

[1] The parties to a contract may agree therein upon an amount to be allowed as damages for a breach thereon only "when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." Civ. Code, §§ 1670, 1671. The only breach of the covenants of the lease here in question that is alleged is the failure to pay the stipulated rent. In the verdict, the jury found specially against Marks for $2,700. It was admitted that this sum included all rent due up to and including the rent due July 1, 1917. The trial was had on July 18, 1917, and judgment was entered on July 19, 1917. The building was completed and occupied by the lessee on or about August 1, 1909, and consequently the 10-year term began on September 1, 1909, and ended on September 1, 1919. This action was merely for the rent due and the stipulated damages, and no notice to quit or forfeiture of the lease was alleged, nor any restitution of the possession to the lessor demanded. Nor is it alleged that the lessee has vacated, abandoned, or surrendered the possession, or that he is insolvent. Where the lease has not expired and a forfeiture and restitution is not sought, the measure of damage for a breach of the covenant to pay the rent fixed by the lease is the amount of the rent unpaid and no more. It could not be difficult or impracticable to fix the damages in such a case. It was a breach of an obligation to pay money only, and the damages were "the amount due by the terms of the obligation, with interest thereon." Civ. Code, § 3302. The parties cannot overcome this objection in such a case by any provision in the contract itself, for such a provision is expressly declared to be void. Civ. Code, § 1670; Green v. Frahm, 176 Cal. 262, 168 Pac. 114; Jack v. Sinsheimer, 125 Cal. 564, 58 Pac. 130. It follows that the plaintiff was not entitled to anything as liquidated damages for the breach of contract alleged, and that the verdict and judgment are, to that extent, without support in the law and evidence.

[2] It must be admitted that, at the time of the judgment at all events, it was possible that Marks might fully perform all the covenants of the lease. If he did so the money on deposit would have then fully served its purpose as security and it would then belong to Marks, absolutely, free from any claims of the lessor. The evidence showed that at the time the money was deposited C. D. Bianchi, as a loan to Marks for the purposes of said lease, gave him a check for $8,000 to be used in making said deposit; that the check was indorsed by Marks and transferred to the bank; and that the deposit was by that means effected. Upon the deposit being made, Marks, in writing, assigned all his interest therein to C. D. Bianchi, "subject to the lien thereon of said Serena H. Knight," under the lease, as security for the repayment of said sum to Bianchi by Marks, and Marks therein expressly promised to repay the same. C. D. Bianchi having, as the evidence shows, assigned to the appellant, Joseph D. Bianchi, all his rights under the writing between him and said Marks to the fund so deposited, it follows that the appellant had, when the judgment was rendered, a contingent right to the fund, which would become a full right if Marks should perform his covenants in the lease. The judgment was erroneous, in that it denied Bianchi all relief. It should have declared his contingent interest therein.

[3] The appellant claims the absolute and immediate right to the fund, on the ground that, by the terms of an alleged agreement between Mrs. Knight, Marks, and C. D. Bianchi at the time the deposit was made, it was understood between them that said Bianchi should deposit the money as security for the performance by Marks of his obligations under the lease, and consequently that said Bianchi and the fund he so deposited stand in the relation of a surety for Marks to Mrs. Knight for such performance. It is claimed further that in May, 1912, after the lease had run nearly three years, Mrs. Knight and Marks made an agreement in writing constituting a material alteration of the terms of the lease, so far as the obligations of Marks thereunder were concerned, which alteration, it is argued, operated to release the fund and transfer the same to Bianchi as the absolute owner thereof, under his assignment from Marks. It does not appear that Mrs. Knight had any knowledge of the terms of the agreement between C. D. Bianchi and Marks whereby the money was loaned to Marks for the purpose of making the deposit, and was immediately assigned by Marks to Bianchi as security for the repayment to Bianchi of the money so loaned by him to Marks. By the terms of the agreement and of the loan, the title to it

passed absolutely to Marks. Mrs. Knight was not informed that the right of Marks thereto, such as it was, had been pledged to Bianchi for the repayment of the loan to him by Marks. The evidence does not show that she knew that Bianchi was, or claimed to be, a surety for Marks with respect to this money. Consequently the alteration of the lease, even if there were such alteration, did not operate to release her claim to the money so deposited. It may be added that the agreement, which it is claimed changed the terms of the lease, merely gave the consent of the lessor to the lessee to make some alterations in the premises which he desired to make and thereafter to use the premises as a garage instead of a stable. Prior to that time he had been using it as a stable. There was no covenant in the original lease which restricted the lessee's right to use the premises for anything other than a stable. We do not perceive how the consent of the lessor to the proposed alterations operated in any respect to change the obligations of Marks for which the money was deposited as security.

[4] The respondents move to dismiss the appeal on the ground that after it was taken the judgment was fully satisfied. The proofs in support of the motion show that the satisfaction was the result of the enforcement of the judgment by execution. The appellant does not lose the right to prosecute his appeal by such enforcement. Code Civ. Proc. § 957.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; LAWLOR, J.; OLNEY, J.; SLOANE, J.; WILBUR, J.; LENNON, J.

183 Cal. 335

SCHNEIDER v. SCHNEIDER. (L. A. 6027.)

(Supreme Court of California. July 26, 1920.)

1. Marriage ⊂=54—Void marriage confers no rights in respect to property of other.

A void marriage confers no rights upon either of the parties in respect to the property of the other, such as would be conferred by a valid marriage.

2. Marriage ⊂=63—Wife of void marriage entitled to division of property jointly earned.

While, strictly speaking, there can be no community property in the absence of a valid marriage, courts will, in dividing gains of a married man and woman living together under a void marriage, innocently entered into, applied by analogy the rule which would obtain when a valid marriage is dissolved.

3. Marriage ⊂=65—Judgment dividing property or void marriage without settling legal status held valid.

In an action by a wife for divorce, where it was discovered that the plaintiff was not entitled to a divorce because she had a husband by a prior marriage, from whom she believed she had been divorced, and it was agreed that there should be a trial for the purpose of hearing evidence on the issue of the property rights of the parties, and such issue was tried on the day set, the court was warranted in adjudicating on the question of their property rights, and a judgment, dividing the jointly earned property, will not be reversed, although no decree of annulment was entered.

Department 2.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Sarah Schneider against Jacob Schneider. From a judgment for plaintiff, and an order denying a motion to set aside the judgment, the defendant appeals. Affirmed.

Gerecht & Chambers and Harry Ellis Dean, all of Los Angeles, for appellant.

A. P. Thomson, of Los Angeles, for respondent.

The following opinion was prepared by Mr. Justice KERRIGAN of the District Court of Appeal, First Appellate District, while acting as justice pro tem, of this court in place of Mr. Justice MELVIN. It is adopted as the opinion of this court.

This was an action for divorce brought by the wife, and the appeal is taken by the defendant from that part of the judgment awarding to the plaintiff a portion of the joint property. The defendant also appeals from an order denying his motion to set aside the judgment, and brings said appeals to this court upon the judgment roll alone. No argument is made in the briefs in support of the appeal from said order.

As to the appeal from the judgment, it appears from the findings of the trial court that the plaintiff at the time of her marriage to the defendant was the wife of another man, although at that time she was laboring under the belief that as the result of a certain proceeding had in the year 1905 her prior marriage had been dissolved. Her union to the defendant took place in 1908, and was entered into in good faith, and the parties thereafter lived together as husband and wife for about eight years, accumulating by their joint efforts certain property, a part of which by the judgment in this case, was awarded to the plaintiff.

The plaintiff as a ground for divorce alleged cruelty on the part of the defendant, and, in addition to praying for the dissolution of the matrimonial bonds, sought a division of the "community property." Upon the finding as to the continued existence of said prior marriage of the plaintiff the court denied a divorce, but declared the property described in

the complaint to be joint property of the parties in the nature of and analogous to community property, and by its decree divided it equally between them giving to the defendant, however, in such division, credit for certain payments which he had been required to make to the plaintiff during the pendency of the action, in recognition of the fact that the parties were not legally husband and wife.

[1] Under the authorities it is clear that a void marriage confers no rights upon either of the parties to it in respect to the property of the other such as would be conferred by a valid marriage; but in the case before us the question for determination is, Conceding that the marriage was void, what right, if any, has the plaintiff in the property acquired by the joint efforts of herself and the defendant during their cohabitation entered upon innocently upon the faith of their admittedly void marriage?

On this question there is a conflict in the decisions. In the states where the common-law right of dower exists it is generally held that a woman, in order to be entitled to dower, must base her claim upon a legal marriage. In those states if a man has a wife living, and enters into a second marriage, no matter how innocent of wrongdoing the other party to it may be, nor how gross the deception by which she enters into the marriage, she is not entitled to dower, not being his lawful wife. Kennelly v. Cowle, 6 Ohio Dec. 170.

In the case of De France v. Johnson (C. C.) 26 Fed. 891, a man had a wife living at the time he married the plaintiff, a mere girl, with whom he lived for a great many years and until his death. By her he had 13 children. After his death she sought to recover dower, but the court decided against her, holding that a woman who innocently marries and cohabits with a man who has a wife living from whom he has never been divorced, cannot acquire an interest in his land by reason of such illegal marriage.

This doctrine does not prevail in all the states, nor in fact in any where the community property regime has been adopted. In Louisiana and possibly New Mexico a marriage such as the one here is known as a "putative" marriage, and the property rights of the woman are recognized and protected by statute. In four of the seven states where the community rule as to property of the character here considered prevails it has been held that where a woman is an innocent party to a void marriage she is entitled to the same interest in property acquired by the parties as if the marriage were valid. In the state of Texas the question has often been before the courts, and in a number of recent cases has been given attentive consideration. The Spanish law as to marital rights prevailed in Texas until 1840, and the doctrine of putative marriage was a part of that law, as shown by the decisions of its courts, and even since the adoption of the common law the property rights of persons who contract void marriages, but in good faith, have been upheld. McKay on Community Pro. 194.

In the case of Morgan v. Morgan, 1 Tex. Civ. App. 315, 21 S. W. 154, which was decided after the adoption of the common law in that state, the court said:

"The status of property acquired by a man and woman living together as husband and wife without having been lawfully married has been the subject of doubt and litigation almost from the time Texas became an independent republic,"

—and after reviewing the early cases the court continued:

"It will thus be seen that the strong tendency of our judges in the past has been to hold that property acquired in this state, under our community laws, by a man and woman living together as husband and wife, should belong to them in equal shares, whether they were legally married or not. And why should this not be so, especially when they have attempted to enter into a marriage contract, and believed that they were lawfully husband and wife? In such cases, by attempting to enter into the marriage contract, they agreed, as far as they had the power to agree, that they would live together as husband and wife, and that all property that they might thereafter acquire should be community property, and belong to them in equal portions. Such is the meaning of the contract they attempted to make under our law. How, then, can it be said that the property acquired in pursuance of such a contract shall belong to one of the parties more than to the other? What right has the husband to all of the property to the exclusion of the wife, or what right has the wife to all of the property to the exclusion of the husband? Suppose a wife so situated should by her own exertions acquire property towards which the husband did not contribute anything, would it be contended that this property became his property? How, then, can it be that where the property is acquired by the joint labors of both, each in the eye of the law contributing one-half thereto, it shall belong only to the husband? It will not do to refer to the decisions in common-law states to sustain the proposition that the woman under such circumstances has no right to any part of the property so acquired. In those states, by entering into the marriage contract she understood that all the property they might acquire while living together should belong to the husband, but in this state she understood that their rights in the property they might acmulate should be equal."

See, also, Lawson v. Lawson, 30 Tex. Civ. App. 43, 69 S. W. 246; Routh v. Routh, 57 Tex. 589.

In the case of Barkley v. Dumke et al., 99 Tex. 150, 87 S. W. 1147, a girl had innocent-

ly contracted marriage with a man having a living wife; and the court held that it was the settled doctrine in that state that by virtue of such a marriage the putative wife became entitled to the same rights in property acquired by the parties as would be the case if the marriage were free from defect, pointing out that the statute law of Texas upon the subject of the mutual property rights of married persons is so inconsistent with the common law as to show an intention on the part of the law-making power not to subject such rights to the rule of the latter. This case has since been frequently followed in that state.

[2] In California, as in Texas, the common law is the general rule of decision, but in both states the law regulating the mutual property rights of married persons is radically different from that law; and, while we do not wish to be understood as saying that the rule of the common law as to husband and wife apply to no case under our system, yet we agree with the Texas courts that the common-law rule as to the consequences of a void marriage upon the mutual property rights of the parties to it is inapplicable where the community property regime prevails. This conclusion is dictated by simple justice, for where persons domiciled in such a jurisdiction, believing themselves to be lawfully married to each other, acquire property as the result of their joint efforts, they have impliedly adopted, as is said in the Texas case cited, the rule of an equal division of their acquisitions, and the expectation of such a division should not be defeated in the case of innocent persons.

In Werner v. Werner, 59 Kan. 399, 53 Pac. 127, 41 L. R. A. 349, 68 Am. St. Rep. 372, a case very similar to the present one, a woman having a husband living contracted marriage, and lived with this supposititious husband for many years in the belief that her former marriage was invalid. Her action for divorce was held to be an equitable proceeding in which the court had full jurisdiction to give adequate relief, and accordingly it annulled the marriage and made an equitable division of the property.

In the province of Quebec, a civil law jurisdiction, it was held, in Gregory v. Dyer, 15 L. C. Jur. 223, that a woman who in good faith had married a man who had a wife living, and lived with him until his death, was entitled to a community interest in the property acquired by them after their marriage. See, also, Cathcart v. Union Bldg. Soc., 15 L. C. Rep. 467; Morin v. Corporation des Pilotes, 8 Quebec, 222; 1 Cyc. 1633.

In the case of Buckley v. Buckley, 50 Wash. 213, 96 Pac. 1079, 126 Am. St. Rep. 900, it is held that, where a woman enters into a marriage contract with a man without knowledge that he has a wife living, the court has power to annul the marriage, whether the action be for divorce or annulment, and in such action to dispose of property acquired by the joint efforts of the parties, and can, as in a true divorce proceeding, award to the innocent injured woman such proportion of the property as under all the circumstances would be just and equitable.

The authorities on the subject are reviewed and the rule in this state announced by Mr. Justice Sloss in the well-considered case of Coats v. Coats, 160 Cal. 671, 118 Pac. 441, 36 L. R. A. (N. S.) 88. That was an action, after a decree of annulment, for a division of the property which had been accumulated by the parties after the marriage. It was held that a woman who in good faith had entered into a marriage, which was subsequently annulled at the instance of the other party upon the ground of her physical incapacity to enter into the marriage state, was entitled to participate in the property which had been accumulated by the efforts of both parties during the existence of the abortive marriage. "To say," declares the court, "that the woman in such case, even though she may be penniless and unable to earn a living, is to receive nothing, while the man with whom she lived and labored in the belief that she was his wife shall take and hold whatever he and she have acquired, would be contrary to the most elementary conceptions of fairness and justice." In that case the appellant argued that, the marriage being voidable, the effect of the decree of annulment was to render the marriage void from the beginning, and that all property rights of either dependent upon the marriage were terminated and annulled. "But," said the court, "these decisions * * * deal with the rights of one of the parties in property owned by the other. * * * Here, however, the question is a different one. The controversy is not over the property owned by the defendant prior to marriage, or acquired by him alone thereafter, but has to do with the acquisitions of the two parties after marriage and before annulment. * * * In the absence of fraud or other ground affecting the right to claim relief, there can be no good reason for saying that either party should, by reason of the annulment, be vested with title to all the property acquired during the existence of the supposed marriage." And the court proceeds to hold that while, strictly speaking, there can be no community property in the absence of a valid marriage, courts will, in dividing gains made by the joint efforts of a man and woman living together under a voidable marriage which is subsequently annulled, apply by analogy the rule which would obtain when a valid marriage is dissolved. It is true in that case that the marriage was only voidable, while here it was void; but this difference furnishes no logical or sound reason why a different rule should be applied in the

division of the jointly acquired property. Indeed, in the case from which we have quoted, the marriage having been annulled, the court assumed it to have been void ab initio.

[3] We do not overlook the fact that the present action was for divorce, and that no decree of divorce or annulment of the marriage was entered. But it is also to be noted that when the parties discovered that the plaintiff was not entitled to a divorce they agreed upon a day to which the trial should be postponed for the purpose of hearing evidence on the issue of their property rights, and accordingly such issue was tried on the day set. It therefore appears to us that, in view of the issues framed by the pleadings, and the course of trial adopted upon the development of the facts bearing upon the marriage of the parties, the court was warranted in adjudicating upon the question of their property rights. The circumstance that the court failed to settle their legal status, as it might well have done, is no ground for reversing that part of its judgment dealing with such property rights, and to which the appeal is directed.

The judgment and order are affirmed.

WILBUR, LENNON, and SLOANE, JJ., concur.

183 Cal. 342

SAN PEDRO, L. A. & S. L. R. CO. v. ATCHISON, T. & S. F. RY. CO. (L. A. 6099.)

(Supreme Court of California. July 26, 1920.)

1. Railroads ⟸138—Trackage agreement for division of taxes construed.

A covenant in a trackage agreement between two connecting railroads for joint use of leased connecting lines operated by one of them, requiring the other to pay one-half of all taxes accruing upon the joint line during the term of the agreement, must be construed without regard to the subsequent change in the law to the gross earnings method of taxation provided for by Const. art. 13, § 14, and Laws 1911, c. 335, § 9, where the agreement contains no provision for such contingency.

2. Contracts ⟸303(1) — Unforeseen contingency cannot affect.

An unforeseen contingency or event, not considered by the parties at the time they entered into a contract, can in no manner affect the same.

3. Evidence ⟸48 — Common knowledge that taxes do not remain constant.

It is a matter of common knowledge that our tax laws and the amount of the tax to be paid seldom, if ever, remains constant.

4. Appeal and error ⟸1050(2) — Admission of immaterial evidence harmless.

Admission of immaterial evidence was harmless, where it in no manner tended to aid the court in the interpretation of a contract, which was the issue involved.

Department 2.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by the San Pedro, Los Angeles & Salt Lake Railroad Company against the Atchison, Topeka & Santa Fé Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

A. S. Halsted, of Los Angeles, Dana T. Smith, of Salt Lake City, Utah, and E. E. Bennett and Fred E. Pettit, Jr., both of Los Angeles, for appellant.

E. W. Camp, U. T. Clotfelter, M. W. Reed, and Robert Dunlap, all of Los Angeles (Gardiner Lathrop, of Chicago, Ill., and Charles H. Woods, of Carlinville, Ill., of counsel), for respondent.

The following opinion was prepared by Mr. Justice KERRIGAN of the District Court of Appeal for the First Appellate District while acting as justice pro tempore in this court in place of Mr. Justice MELVIN. It is adopted as the opinion of this court.

By this action plaintiff seeks to recover the sum of $71,534.08 paid on account of state taxes to defendant under a certain agreement relating to the same. It is admitted that the amount was paid under duress and protest. For the sake of brevity counsel have referred to the plaintiff as the Salt Lake Company and to the defendant as the Santa Fé Company. We will so refer to them.

The plaintiff and defendant are railroad companies, and this action involves the construction of a certain trackage agreement entered into between them. It appears from the record that the Santa Fé Company holds and operates in this state two connecting lines of railroad under lease from the Southern Pacific Company. One of these lines extends from Barstow to Daggett, and the other from Colton to Barstow. The Salt Lake Company owns, controls, and operates a line of railway extending from San Pedro to Colton. By the terms of the contract under consideration the parties hereto agreed to jointly use the leased lines of the Santa Fé Company upon certain conditions. The lines are designated in the agreement as the "Joint Line." The contract is lengthy, but the issue in the case relates to the covenant to pay taxes. This issue arises from a difference between the parties as to the proper construction and effect to be given to that covenant. The right or license to use the Joint Line was for an indefinite period, terminable upon three years' notice, the grant being conditioned, among other things, upon the payment to the Santa Fé Company, for such use, of a sum of $48,782.38 per annum and a certain per cent. of costs chargeable to capital account, to-

gether with sums equal to one-half of all taxes and assessments accruing upon or in respect of all or any part of the railroads, franchises, and other property composing the Joint Line, during the term of the agreement, since terminated.

The contract further provided that the taxes and assessments accruing upon the Joint Line should be deemed to be such proportion of the total taxes paid by the Santa Fé Company as the Joint Line mileage bore to the total mileage on which said taxes were paid.

The so-called Joint Line is situated within the state of California, and the lines of the Santa Fé Company, of which the Joint Line forms a part, extend into different counties.

The contract here involved is dated April 26, 1905. From that date until the year 1910 taxes were assessed and levied directly against railroad property in the state, the assessment being an ad valorem one only. The amount paid as taxes by the Salt Lake Company for the period aggregated $70,687.36. There is no dispute concerning payments made during this time. Upon the adoption in 1910 of a constitutional amendment prescribing what is generally termed the "gross earnings" method of taxation of railroads, this system of taxation was changed. Section 14, art. 13. By it and the enactment of laws in conformity therewith (Laws 1911, § 9, c. 335) the railroads were required to pay, as taxes to the state in lieu of all other taxes, sums equal to a certain percentage of the gross earnings from the operation of their railroads. By reason of this change a dispute arose between the parties as to the proper interpretation of their contract relating to the payment of taxes. Under the constitutional amendment and the laws passed in pursuance thereof both the Santa Fé Company and the Salt Lake Company were required to pay a tax "equal to the percentages hereinafter fixed upon the gross receipts from the operation of such companies within the state." The amendment also provided that the gross receipts shall be deemed to be all receipts on business beginning "and ending within this state, and a proportion, based upon the proportion which the mileage within the state shall bear to the entire mileage over which the business is done, of receipts on all business passing through, into or out of this state."

After the adoption of this constitutional amendment the Santa Fé Company claimed that the Salt Lake Company should pay one-half of the amount of the Santa Fé Company's gross earnings tax allotable to the Joint Line on a mileage basis. The Salt Lake Company, on the other hand, insisted that the amount of its gross earnings tax allotable to the Joint Line by the same method of taxation should be taken into consideration in order to determine the amount due from it to the Santa Fé Company under the agreement, it being claimed that the total sum to be paid by the Salt Lake Company under the terms of the contract was one-half of the aggregate of the taxes so paid by both companies allotable to the Joint Line.

The trial court adopted the construction of the Santa Fé Company and rendered judgment in its favor, and plaintiff appeals.

We are of the opinion that the construction adopted by the trial court is the proper one to be given to the agreement.

It is admitted that the tax paid by both companies under the new method of taxation is a tax upon property within the meaning of the contract. The question here presented, therefore, requires a construction of the tax clause in the agreement. That portion of the covenant involved is as follows:

"That in consideration of the foregoing grant, the San Pedro Company agrees: That from and after the date of the commencement of said term, and until such term shall expire as provided in section 3 of article 1, it will pay to the Atchison Company, at its office in the city of Los Angeles, California, the following sums, namely:

"(b) From time to time, sums equal to one-half of all taxes and assessments, which during said term shall accrue upon or in respect of all or any part of the railroads, franchises and other property composing the Joint Line.

"The taxes and assessments accruing upon or in respect of that portion of the Joint Line which is leased by the Atchison Company from the Southern Pacific Company, shall be deemed to be sums bearing the same ratio to the whole sums payable by the Atchison Company, under said indenture of lease and contract dated July 15, 1898, in respect of taxes and assessments upon the whole line leased to the Atchison Company under said indenture of lease and contract, as the mileage of said portion thereof embraced in the Joint Line bears to the mileage of said leased line.

"Inasmuch as the portion of the Joint Line leased by the Atchison Company from the Southern California Railway Company, will not be taxed or assessed separately, but will be taxed or assessed with or as a part of other railway lines of the Southern California Railway Company or of the Atchison Company, it is understood and agreed that the taxes and assessments upon that portion of the Joint Line shall be deemed and taken to be such share of the taxes and assessments upon all such lines including such portion of the Joint Line so taxed together as an entirety, as shall bear to the whole of such taxes and assessments thereon the same ratio as that which the mileage of said portion of the Joint Line shall bear to the mileage of all such lines so taxed together or as an entirety.

"Any taxes or assessments for any year of which only a part is included in said term shall be apportioned and the San Pedro Company shall pay a sum equal to one-half of a share thereof proportionate to such part of the year as is included in the term.

"Each sum payable under this subdivision (b) in respect of taxes and assessments shall be payable by the San Pedro Company, within

thirty days after the Atchison Company shall have paid such taxes and assessments, and shall have caused a written statement thereof to be furnished to the San Pedro Company."

Neither counsel has furnished us authority, and we have found none, where a contract of like character has received judicial interpretation. To us, however, it appears that none is required, for the terms of the covenant involved seem clear and free from doubt. From the language employed, considering the surrounding circumstances at the time the contract was entered into, it is plainly manifest that it was the intention of the parties hereto that the Salt Lake Company was to pay one-half of the taxes imposed on the Joint Line, which the Santa Fé Company was required to pay during the life of the agreement.

[1, 2] The contract provides that the Salt Lake Company shall pay one-half the taxes allocated to the Joint Line "after the Atchison Company shall have paid such taxes." Again, it is provided that the taxes shall be payable by the Salt Lake Company "thirty days after the Atchison Company shall have paid such taxes and assessments, and shall have caused a written statement to be furnished to the San Pedro Company." The plain inference from these provisions is that the Santa Fé Company was to be reimbursed for one-half of the taxes paid by it upon the property constituting the Joint Line. Nothing is contained in the contract with reference to what the Salt Lake Company might be obliged to pay by reason of a change in the taxing method. Under the method of taxation in force at that time the taxes levied against the Joint Line were wholly paid by the Santa Fé Company. No other system of taxation, such as here involved, under which both parties might become liable for a tax by reason of the use of the Joint Line, seems to have been contemplated by the parties, for their contract contains no clause with reference to such a contingency. An unforeseen contingency or event, not considered by the parties at the time they entered into their agreement, can in no manner affect the same.

[3] It is a matter of common knowledge that our tax laws and the amount of the tax to be paid seldom, if ever, remains constant. Different character and forms of taxes and assessments are frequently being created. The parties hereto are deemed to have had knowledge of this fact, and it was their duty, if such was their intention, to make provision relating to such change. We cannot do this for them. To do so would be to impose upon them a contract which neither party might have assented to in the first instance.

The fact that the change in the law might create additional burdens upon either of the parties is of no consequence. The agreement provides that the Salt Lake Company shall pay to the Santa Fé Company one-half of all taxes which shall accrue during the term thereof. It is admitted that the amount paid by defendant was paid as taxes, and there is no question that they accrued during the term of the contract.

[4] Appellant complains of the admission of certain evidence offered by defendant for the purpose of showing that the change in the method of taxation did not bring about an equitable result. From this evidence it appeared that for the years 1907 to 1910 the taxes paid by the Salt Lake Company aggregated $70,687.36, and that from 1911 to 1914, inclusive, the amount paid was $93,513.69. To justify its admissions respondent argues that the evidence refutes the claim of gross injustice, for the reason that under plaintiff's construction of the agreement it would only pay $21,979.60 for the disputed period, notwithstanding that the taxes were materially higher than during the preceding four years. The evidence should have been rejected. Courts are not concerned with the question of how changed conditions might or might not benefit either party, where their contract is silent with reference thereto. The admission of the evidence, however, was harmless, for it in no manner tended to aid the court in the interpretation of the agreement, for it did not affect the same.

For the reasons given, the judgment is affirmed.

We concur: WILBUR, J.; LENNON, J.; SLOANE, J.

183 Cal. 329

ANTHONY et al. v. JANSSEN. (L. A. 5038.)

(Supreme Court of California. July 24, 1920.)

1. Evidence ⇐183(15)—Sufficient foundation held not laid for secondary evidence of lost deed's contents.

Sufficient foundation is not laid for introduction of secondary evidence of the contents of a deed as lost, where, so far as appears, if searched for, it could have been found.

2. Mines and minerals ⇐117—Sheriff's deed under decree against holder of option on mining claim not evidence of recitals against owner.

A sheriff's deed, purporting to be made pursuant to a decree, only against one having merely an option to purchase a mining claim, ordering foreclosure, of a lien for debt contracted by him in development, is not evidence against the one giving the option.

3. Mines and minerals ⇐117—Sheriff's deed under judgment against one person only held to convey no other interest.

Under Code Civ. Proc. § 700, sheriff's deed, pursuant to judgment, in action to foreclose lien for debt contracted by P. in developing mining claim for which it had option, conveyed only the interest of P., the judgment

running only against P., and directing sale of the property and execution of a deed for the interest of P.

4. Corporations ⊂=619 — Directors, as trustees, on forfeiture of charter, must act as a body.

The powers of directors as trustees, which they become under St. 1905, p. 493, as amended by St. 1907, p. 746, on a corporation forfeiting its charter for nonpayment of its license tax, must, under Civ. Code, §§ 860, 2268, in absence of provision to the contrary, be exercised by their united action, so that a deed by one of them, as an act in execution of the trust, transfers no title, unless done in consummation of some disposition of the property made by all the trustees acting unitedly.

5. Corporations ⊂=619 — Deed of individual stockholder after forfeiture of charter subject to powers of trustees.

Deed of individual interest of stockholder of a corporation which had forfeited its charter for nonpayment of its license tax, is subject to the rights and powers of the trustees of the corporation in settling the corporate affairs, and so is no basis for judgment quieting title to mining claim of the corporation in the grantee against the trustees.

6. Judicial sales ⊂=3—Direction in decree, for deed immediately after sale, void as contrary to Code.

Direction in the decree that deed be made immediately after execution sale, being contrary to Code Civ. Proc. §§ 700a, 703, and beyond the court's power, is void.

7. Execution ⊂=241—Deed executed on making sale given effect as certificate of sale.

A deed, executed by a sheriff on making execution sale of real estate, subject to redemption, when under Code Civ. Proc. § 700a, he should execute only a certificate of sale, may be given effect as a certificate of sale; it containing all the statutory requirements thereof, except the statement that the property was subject to redemption, which is declared by the law itself.

8. Execution ⊂=303—Deed after time to redeem necessary to complete transfer of interest.

A deed under Code Civ. Proc. § 703, after failure to redeem within a year from execution sale of interest in real estate, is necessary to complete transfer to the purchaser of the rights of the judgment debtor.

In Bank.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by Mabel E. Anthony and others against I. P. Janssen. From an adverse judgment, plaintiffs appeal. Reversed.

Eugene Ferry Smith, of San Diego, for appellants.

C. E. Joslin, of Los Angeles, for respondent.

The following opinion was prepared by Mr. Justice Kerrigan of the District Court of Appeal, First Appellate District, while acting as justice pro tempore of this court in place of Mr. Justice Melvin. It is adopted as the opinion of the court.

This is an appeal from the judgment in an action brought by the plaintiffs, as trustees of the Palagonite Industrial Mining Company, a defunct corporation, and of the stockholders thereof, to quiet title to four separate mining claims in San Diego county. The complaint is in the form usual in such cases. In the answer of the defendant it is not only denied that the plaintiffs are the owners of the premises or have any interest therein, but facts are therein set forth constituting the basis of the defendant's alleged title, for the quieting of which he also prays the court's decree.

The court by its decision determined, first, that the plaintiffs have no interest in these mining claims and are not entitled to any relief in the action; second, that defendant is the owner of the portion claimed by him of the said mining claims. Judgment was entered accordingly, and the plaintiffs appealed therefrom. Plaintiffs also duly presented in the lower court a motion to vacate the judgment and for a new trial. On that motion it was ordered:

"That the said judgment and decree be vacated and set aside and a new trial be, and the same is hereby, granted as to all matters contained therein, quieting defendant's title to the described premises and as to all affirmative relief to the defendant other than his judgment for costs."

At present, therefore, and assuming that the said order did not vacate the entire judgment, it is only necessary to consider that part of the judgment from which the appeal is insisted upon at this time, viz. the determination "that the plaintiff take nothing by this action." This adjudication resulted from a finding that the allegations of the complaint are untrue; in other words a finding that it is not true that the plaintiffs own or have any interest in the described property.

At the trial it was stipulated that on the 2d day of June, 1910, title to the said mining claims was vested in the plaintiffs as trustees of the Palagonite Industrial Mining Company and of its stockholders. On this stipulation plaintiffs rested, whereupon the defendant in support of the allegations of his answer introduced in evidence a contract entered into between the plaintiffs and Ralph E. Pearce on the 2d day of June, 1910, whereby the plaintiffs agreed to convey the premises to Pearce for $50,000 upon certain specified conditions, and under which Pearce went into possession of said claims. Thereafter, on or about July 15, 1910, Pearce assigned this contract to the Premier Investment Company, a

corporation, at the same time delivering to said corporation possession of the premises. On August 1, 1910, Margaret Standeford, one of said plaintiffs, conveyed to Pearce all her interest in the mining claims as one of the trustees of said defunct corporation, and Pearce two weeks later conveyed that interest to the Premier Investment Company. Oral evidence was also introduced tending to show a similar conveyance from Mabel E. Anthony and Ada D. Anthony, the remaining trustees. While the Premier Investment Company was in possession of the mining claims, debts were incurred by it for work and labor done thereon, for which liens were filed. James R. Haddock became the owner of these liens, and in August, 1911, commenced an action to foreclose the same against these plaintiffs and the Premier Investment Company. All of the defendants in said suit failed to appear, and their default was entered. The judgment, however, ran against the Premier Investment Company alone. By it the sheriff was directed to make a sale of the property, and to execute a deed thereof to the purchaser "for the interest of said defendant Premier Investment Company." In the month of May, 1917, the sheriff of San Diego county sold and conveyed the property described in the judgment to the plaintiff therein, James R. Haddock, who thereafter conveyed it to I. P. Janssen, the defendant and respondent herein.

[1] It is not claimed by the respondent that the option agreement divested plaintiffs of their title, but that he deraigned title from the plaintiffs by means of the above-mentioned conveyances to the Premier Investment Company, coupled with the sheriff's deed made in the foreclosure suit, and which purported to convey to the grantee therein named whatever interest in the property was owned by said corporation. As before stated, the defendant introduced evidence for the purpose of establishing that plaintiffs, as trustees of the Palagonite Industrial Mining Company, had conveyed the real property involved in this action to the Premier Investment Company. Such evidence included a deed from Margaret S. Standeford, but the only evidence produced tending to show a similar conveyance by the other two trustees was in the form of testimony, offered and received on the theory, as counsel for the defendant stated, that there had been executed by said plaintiffs as trustees a deed conveying the property to Pearce, which deed had been lost and had not been recorded. There were two witnesses on the subject. The testimony of Charles L. Brown, at one time president of the Premier Investment Company, amounted to nothing more than that "the assignment from Mabel E. Anthony and Ada D. Anthony to Pearce" had been brought to him by Pearce and had been examined by him; that afterwards this document and others having been deposited in the files of that company, the papers had been missing, had been searched for and returned to the files. This testimony was stricken out by the court, except the statement that the papers were missing, were sought for and returned. J E. Neal, a bookkeeper of the Premier Investment Company for about a year following September 1, 1910, after examining the deed from Standeford to Pearce and of Pearce to the Premier Investment Company, testified that he saw a paper "similar to the first of these instruments," but whether the wording was just the same he could not say. Further he testified:

"I know nothing of any search being made for the papers and was not aware of it. It is among the files of the company now."

It is manifest that no sufficient foundation was laid to entitle the defendant to introduce secondary evidence of the contents of the deed said to have been made by plaintiffs Anthony. So far as appears, if searched for, it would have been found and could have been produced at the trial. Moreover, there is no evidence of its delivery by the grantors. It is also clear that the testimony does not show what property, if any, was conveyed thereby.

[2-5] The only other evidence relied on by the defendant to show that the title of the trustees had passed to him consisted of the decree of the superior court of San Diego county and the sheriff's deed executed to James R. Haddock, above referred to, purporting to be made under the authority of that decree, which evidence was received over the objection of plaintiffs. The Premier Investment Company was in possession of the property under the optional contract of purchase, according to the terms of which the corporation was authorized to do certain development work. It was while operating the property under this contract that the company incurred certain debts for such work for which the mining claims were legally subject to liens as against the plaintiffs as well as against that company. We have already referred to the filing of these liens, their foreclosure by decree of the superior court, and the sheriff's deed to the predecessor in interest of the defendant pursuant thereto. In that proceeding the plaintiff therein proceeded on the theory that the trustees for the Palagonite Industrial Mining Company had only some incidental or subordinate claim to the premises, and that the Premier Investment Company was the only real and substantial owner thereof, and accordingly prayed and was granted a decree ordering the foreclosure of the liens only against the interest of the Premier Investment Company in the property. The sheriff's deed, purporting to be made pursuant to the terms of this decree, while broad in its terms, is evidence only against the Premier Investment Company,

and not against these plaintiffs. Donahue v. McNulty, 24 Cal. 411, 85 Am. Dec. 78. The sheriff's deed could convey no more than directed by the decree, and therefore conveyed to the purchaser only the right, title, and interest of the judgment debtor, the Premier Investment Company. Code Civ. Proc. § 700; Foorman v. Wallace, 75 Cal. 552, 17 Pac. 680. Under it the defendant could obtain only the rights of that company under the option contract of plaintiffs with Pearce, and the title conveyed by the deed from Margaret Standeford to Pearce. The option contract gave Pearce only the right to purchase the property on the specified terms, by complying with the conditions therein stated, and the right of possession of the property in the meantime, subject to forfeiture for failure to perform those conditions. It does not appear that that company ever exercised the option or obtained any title under it. Hence the sheriff's deed did not transfer the title of the plaintiffs. The deed of Margaret Standeford, so far as the evidence shows, was of no effect upon the rights and powers of the trustees. The Palagonite Company forfeited its charter on November 30, 1908, because of its failure to pay its license tax as provided in the act of 1905 and amendments thereto. Stats. 1905, p. 493, as amended by Stats. 1907, pp. 664, 746. The plaintiffs were then its directors, and under the amendment of 1907 (page 746) they thereupon became trustees of the corporation and its stockholders, with full power to settle its affairs and take such legal proceedings as should be necessary for that purpose. They have the same power under section 400 of the Civil Code. Their powers as trustees include authority to sell and convey the corporate property whenever in their judgment it is necessary for the settlement of the corporate affairs. Rossi v. Caire, 174 Cal. 81, 161 Pac. 1161. There is no provision of the law authorizing them to act separately in the matter. Their powers as trustees must therefore be exercised by the united action of all of them in order to be valid. Civ. Code, §§ 860, 2268. The Standeford deed was executed by herself alone, and it purports to be her deed, both as trustee of said Palagonite Company and in her own right. As an act in execution of the trust, it was not binding on the trust property, and transferred no title, unless it was done in consummation of some disposition of the property made by all the trustees acting unitedly, which does not appear. As a conveyance of her own right, since there is evidence that she was a stockholder in some amount, it would operate to convey whatever title or interest she then had as a stockholder. That title or right, whatever it be, would be subject to the rights and powers of the trustees in settling the corporate affairs, and hence the deed would afford no basis for a judgment against the trustees in this action by them in their trust capacity.

[6-8] With respect to the sheriff's deed, it is sufficient to say, in anticipation of a new trial, that the sheriff was without lawful power at that time to execute a conveyance of the property, or to do anything in consummation of the sale, except to execute to the purchaser a certificate of sale as provided in the Code. Code Civ. Proc. § 700a. The property was real estate and the sale was made subject to redemption. Code Civ. Proc. §§ 700a, 701, 702. The sheriff's power to convey did not accrue until there had been a failure to redeem within the time fixed. Code Civ. Proc. § 703. The direction in the decree that the deed should be made immediately after the sale was contrary to the Code, and beyond the power of the court. It was therefore void. The deed, however, may be given effect as a certificate of sale. It contains all the statutory requirements of a certificate of sale, except the statement that the property is subject to redemption, and as that is declared by the law itself its omission in the certificate does not affect the validity of the sale, nor deprive the document of effect as a certificate showing the sale upon the decree. A deed based thereon, made after the failure to redeem within the year, is, however, necessary to complete the transfer of the right of the Premier Investment Company to the purchaser or his successors in interest.

Under all these circumstances it is clear that the evidence fails to show, as found by the court, that the plaintiffs have no interest in the property. The judgment that they take nothing by their action, and that the defendant recover costs, is therefore erroneous.

The judgment is reversed.

ANGELLOTTI, C. J., and OLNEY, SHAW, LAWLOR, and LENNON, JJ., concur.

183 Cal. 359

ROY v. POS et al. (S. F. 8642.)

(Supreme Court of California. July 26, 1920.)

1. **Specific performance ⊂⊃73—Contract for personal services, dependent on personal will, not enforceable.**

Under Civ. Code, §§ 3386, 3390, subd. 1, contracts for personal services, where the full performance rests upon the personal will of the contracting party, will not be specifically enforced against him.

2. **Specific performance ⊂⊃6 — Contract for services not enforced, where plaintiff has not performed.**

Under Civ. Code, §§ 3386, 3390, subd. 1, contracts for personal services will not be specifically enforced, where the plaintiff is the party who has contracted to render the services, and there has been no full performance on his part, since in such case mutuality in the equitable remedy is lacking.

3. **Specific performance ⊂⊃94—Contract to devise land in consideration of support held not substantially performed.**

Contract to devise land in consideration of support to be furnished by plaintiff during owner's lifetime will not be specifically enforced, where plaintiff furnished such support during only six months following the agreement, though owner continued to live for a year and a half thereafter; plaintiff not having substantially performed her part of the contract.

4. **Wills ⊂⊃58(1)—Agreement to devise not affected by duration of promisor's life.**

Validity of an agreement to devise in consideration of support for life is not affected by the length of life of the promisor after the making of the agreement, provided the agreement was fair in its inception.

5. **Wills ⊂⊃66—Factor determining substantial performance of contract to devise.**

Where one has contracted to devise land in consideration of support for life, the proportion of the remaining lifetime during which the services are rendered is a material factor in determining whether or not there has been a substantial performance of the agreement for support.

6. **Specific performance ⊂⊃94—Contract to devise in consideration for support not enforced under evidence.**

Contract to devise land, made in consideration for care and support to be furnished owner by plaintiff during owner's lifetime, will not be specifically enforced, where plaintiff did not furnish such care and support more than one-third of remainder of owner's lifetime, though plaintiff was able and willing, but was prevented from so doing by owner, notwithstanding Civ. Code, §§ 1511, 1512, in absence of showing that plaintiff in reliance upon agreement had expended a considerable amount of labor or money upon the property agreed to be devised to her, since during owner's lifetime plaintiff could not have been compelled to perform, and owner could not have been compelled to accept plaintiff's performance, and since plaintiff in such case has an adequate remedy at law in action for damages for the breach.

7. **Wills ⊂⊃68—Measure of damages for breach of contract to devise stated.**

Where a party to a property owner's contract to devise in consideration of support for life does not sue in quantum meruit on the owner's breach but waits until owner's death and sues for damages, the measure of damages is not the value of the services rendered, but the value of the property agreed to be devised.

8. **Wills ⊂⊃68—Mortgage deducted from value of property in ascertaining damages for breach of contract to devise.**

If the consideration for a mortgage is the support of owner by mortgagee, and such support is not so inadequate a consideration as to amount to fraud on a party benefited by the owner's prior contract to devise in consideration of support for life, the mortgage is a valid charge against the owner's estate, and should be deducted from the value of the property in ascertaining damages for the owner's breach of the contract.

9. **Specific performance ⊂⊃127(3)—Mortgage, executed in violation of agreement to devise, will not be set aside.**

In an action to specifically enforce contract to devise property, plaintiff is not entitled to a decree setting aside mortgage on the property executed by owner in breach of such contract, where no cause of action for setting aside the mortgage is separately stated; a cause of action for setting aside such mortgage being separate and distinct from the action for specific performance.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by Cecile B. Roy against Rosa L. Pos and others. Judgment for defendants, and plaintiff appeals. Affirmed.

P. A. Bergerot and A. P. Dessouslavy, both of San Francisco, for appellant.

W. W. Sanderson, of San Francisco, for respondents.

LENNON, J. The plaintiff in this action sought to enforce a written agreement to devise property. The appeal is from a judgment in favor of defendants, entered upon the failure of the plaintiff to amend her complaint within the time granted for that purpose by an order sustaining the demurrers of the defendants.

The facts alleged by the complaint are substantially these: In October, 1914, Constance Roy was a widow about 81 years of age, having no living brother, sister, or parent, and without child or other issue; the only person in the United States in any way related to her was the plaintiff, who was the widow of a deceased stepson. Said Constance Roy had lived in the state of California for over

40 years. On and prior to the date above mentioned she lived with strangers, having no home or residence of her own. She was the owner of real property of the approximate value of $8,000 and of personal property amounting to about $1,700, and consisting largely of moneys in bank. Being desirous of making her home with plaintiff, who with her mother lived in San Francisco and supported herself by her own efforts, Constance Roy "solicited and importuned" plaintiff to enter into a written agreement, made and dated October 24, 1914, whereby plaintiff, as the party of the second part covenanted "to maintain, support, care for the party of the first part [Constance Roy], and to furnish to and provide for her suitable board, lodging, clothing, medical attention and all other necessaries of life, in a manner in keeping with the first party's present means and situation in life, from the date of this agreement, for and during the natural lifetime of the party of the first part [Constance Roy]." In consideration of this covenant, Constance Roy, as the party of the first part, agreed as follows:

"To make and execute her last will and testament in due, proper and legal form, whereby the party of the first part shall give, devise and bequeath unto the party of the second part, the whole of the estate now owned by her or belonging to her, real or personal, wheresoever situate, without conditions or restrictions of any kind whatsoever, and to appoint in said will the party of the second part, as her executrix without bonds. The party of the first part hereby further agrees not to revoke said will or any of its provisions or to change or modify the same, in any respect without the written consent of the party of the second part first had and obtained."

The agreement further provided that plaintiff was thereupon and thereafter entitled to the use and possession of all of Constance Roy's property and the income thereof, but was to "assume, pay and discharge for the account of the party of the first part [Constance Roy], all charges, taxes, assessments, insurance premiums and all costs and expenses of keeping any and all of the property of the party of the first part in good and tenantable condition and repair. * * *" Constance Roy, however, by further provisions of the agreement, reserved the right to "rescind this contract and revoke said will or any of its or their provisions * * * upon a substantial violation" thereof by the plaintiff, who, upon such rescission, so the agreement provided, should be entitled to the reasonable value of the services, etc., rendered Constance Roy. The agreement further provided that it was "conclusively admitted and established as a fact by the party of the first part that the damages which shall result to the party of the second part upon a violation of the terms of this agreement, or by a revocation of said will, or any part thereof by the party of the first part, without cause or without the written consent of the party of the second part, shall not be capable of pecuniary compensation and that in consequence, the party of the second part shall, in said event, be entitled to relief in equity upon the death of the party of the first part, and the estate of the party of the first part shall thereupon be impressed with a trust in favor of the party of the second part to the extent of securing to her, all and singular, all benefits contemplated by this agreement." The agreement was recorded October 26, 1914, and thereupon Constance Roy went to live with plaintiff and executed her will and a power of attorney to plaintff pursuant to the terms of the agreement.

About April 22, 1915, Constance Roy, against the will and without the consent of the plaintiff, left plaintiff's home and refused to live with or be cared for by plaintiff, although plaintiff at all times since the execution of the agreement and until the death of Constance Roy was ready, able, and willing to perform all the terms of the agreement, and offered so to do. About April 22, 1915, Constance Roy gave to defendant, Rosa L. Pos, without consideration, the sum of about $1,000, which was part of the money owned by Constance Roy at the date of her agreement with plaintiff. On April 29, 1915, Constance Roy revoked the power of attorney to plaintiff, and since said date plaintiff has been unable to collect any of the rentals of said real property, which have been received by defendant Rosa L. Pos, who gave no consideration therefor. Defendants at all times subsequent to March 1, 1915, had notice and actual knowledge of the provisions of plaintiff's agreement. On June 25, 1915, Constance Roy executed to defendant Rosa L. Pos a mortgage on her real property, which purported to secure the payment of the sum of $3,000, but this mortgage was executed with intent to defraud plaintiff, and the only consideration therefor if any, was the care and support of Constance Roy by defendant Rosa L. Pos. On March 26, 1916, 10 days before her death, Constance Roy made another will leaving her entire estate to defendant Rosa L. Pos, and appointing the latter's husband, defendant Bernard Pos, executor. This will was admitted to probate and administration is pending.

The complaint prays for a decree to the effect that all of the property owned by said Constance Roy on October 24, 1914, or at the date of her death is held by defendants in trust for plaintiff, and that plaintiff is the owner thereof, subject only to administration; that defendants be directed to convey all of said property to plaintiff, together with the rents from May 15, 1915; that the mortgage to defendant Rosa L. Pos be decreed

fraudulent and void as to plaintiff; and that defendant Bernard Pos, as the executor of the last will of Constance Roy, deceased, be enjoined and restrained from delivering to Rosa L. Pos any portion of the property belonging to said estate or the rents, issues, and profits thereof, and be directed to deliver said property to plaintiff.

It is earnestly urged by counsel for plaintiff that the cases which have heretofore arisen in this state for the specific performance of agreements to devise interests in land furnish no tests for the solution of the problem here presented. In this behalf it is argued that the agreements sued upon in the former cases were parol and therefore prima facie within the statute of frauds (Browne on Statute of Frauds, § 263), and that the court in those cases directed the discussion merely to the nature of the part performance necessary to relieve the contract from the operation of the statute, and that, in this connection, the tests of irremediable change of position and the rendition of services incapable of pecuniary estimation were the controlling and determining factors of the decision in each instance. Because of this it is insisted that the cases referred to have no application to the case at bar, where the agreement is not within the statute of frauds. While there is probably no case in this state for the specific performance of a contract to make a will which is directly in point with the pleaded facts of the instant case, nevertheless the principle which must control in the decision of the case now before the court is one which has long been established in this state in actions for the specific performance of contracts for the conveyance of real property.

[1-3] "It is a familiar rule that contracts for personal services, where the full performance rests upon the personal will of the contracting party, will not be specifically enforced against him. It is also generally true that they will not be enforced where the plaintiff is the one who has contracted to render the services and there has been no full performance on his part, since mutuality in the equitable remedy is then lacking." Pomeroy's Equity Jurisprudence, vol. 5, § 2181. That this is the law in California is evidenced by section 3386 and section 3390, subdivision 1, of the Civil Code. It is apparent from the complaint that the plaintiff in this case has not in fact fully performed the services agreed upon.

[4, 5] Neither do the services alleged to have been actually rendered by plaintiff amount to substantial performance on her part, for it appears from the complaint that Constance Roy lived about a year and a half after the agreement was made, and plaintiff's services covered only the first six months of this period. While the length of life of the promisor after the making of an agreement such as the one in suit here is immaterial, providing the agreement was fair in its inception (Howe v. Watson, 179 Mass. 30, 60 N. E. 415), nevertheless it is a self-evident proposition that the proportion of the remaining lifetime during which the services were rendered is a material factor in determining whether or not there has been a substantial performance of the agreement.

[6] Counsel for plaintiff, however, advance the theory that, since plaintiff was able and willing and offered to perform, but was prevented from fully performing by the decedent herself, want of performance is excused, and plaintiff's acts were tantamount to full performance. Sections 1511, 1512, Civ. Code. In support of this contention counsel cite the case of Alexander v. Lewes, 104 Wash. 32, 175 Pac. 572. In that action, although the personal services had not been fully performed by plaintiff, a written agreement similar to the one in the instant case was specifically enforced upon the theory that—

"One who is willing to act upon the contract, but who is prevented by the voluntary repudiation of the other party, is in the same legal position as one who has substantially complied before repudiation, goes without saying."

Whatever may be the law in other jurisdictions, the rule in California was definitely defined in the early case of Cooper v. Pena, 21 Cal. 404, and since then consistently adhered to in this state. In the case of Moore v. Tuohy, 142 Cal. 342, 75 Pac. 896, a suit for the specific performance of an agreement to convey land in return for personal services, this court said:

"It seems to be the theory on the part of the plaintiff that, because the defendant failed in his action to rescind the contract in question, and as he refuses to permit the plaintiff to proceed thereunder, and practically has repudiated the contract, therefore plaintiff has a right to have said contract specifically performed. This, however, does not follow. One party to a contract may refuse to carry it out, and thereby cause damage to the other party; still the nature of the contract and the conditions may be such that the contract cannot be specifically enforced. * * * The defendant, within less than a month, having repudiated the contract, and refused to carry it out on his part, as alleged, may have caused the plaintiff damages, as was stated in the original complaint herein filed, and for which he may have a right of action. But an action for specific performance cannot be maintained unless the plaintiff has performed, or can be compelled to perform, on his part." Wakeham v. Barker, 82 Cal. 46, 49, 22 Pac. 1131; Pacific, etc., Ry. Co. v. Campbell-Johnston, 153 Cal. 106, 94 Pac. 623; Civ. Code, § 3392.

While the agreements in the cases cited were for conveyances inter vivos, the rule therein adopted is not, for that reason, inapplicable to the case at bar. Plaintiff could not, during the lifetime of Constance Roy, have been compelled to perform, nor could

Constance Roy have been compelled to accept plaintiff's performance. Had plaintiff actually performed the services called for by the contract up to the time of the death of Constance Roy, she would probably now be in a position to ask specific performance.

If, on the other hand, plaintiff had so altered her position before the breach of the agreement that to deny specific performance would operate as a fraud upon her, equity would probably regard her part performance as a substantial performance, and grant the relief prayed for. While the excessive weight and inordinately large appetite of Constance Roy may have rendered her care "costly, burdensome, and wearisome," still it does not appear that plaintiff altered her position even to the extent of changing her residence or giving up her position in life in order to care for Constance Roy; nor does it appear that plaintiff, in reliance upon the agreement, expended any considerable amount of labor or money of her own upon the property agreed to be devised to her. The allegations of the complaint do not disclose any injustice to plaintiff such as amounts to a fraud within the purview of equity, and nothing was undertaken or done by plaintiff pursuant to the provisions of the agreement in suit for which she cannot be adequately compensated in an action for damages.

[7] We turn now to a consideration of the claim of plaintiff that a judgment in an action at law for damages would be unavailing for the reason that "the real estate—virtually the sole fund for the payment of such judgment—would be subject to extinction by a foreclosure of the mortgage." This necessitates a consideration of the amount of damages to which plaintiff would be entitled in an action at law for damages. Where a creditor under a written contract of the nature of that now in suit does not sue in quantum meruit, but waits until a final breach of the contract and sues for damages, the measure of damages is the value of the property agreed to be devised or bequeathed, and not the value of the services rendered. Morrison v. Land, 169 Cal. 580, 590, 147 Pac. 259; Noyes v. Noyes, 224 Mass. 125, 112 N. E. 850; Dilger v. McQuade's Estate, 158 Wis. 328, 148 N. W. 1085; Day v. Washburn, 76 N. H. 203, 81 Atl. 474; 40 Cyc. 1073. Section 1512 of the Civil Code provides:

"If the performance of an obligation be prevented by the creditor, the debtor is entitled to all the benefits which he would have obtained if it had been performed by both parties."

We are proceeding upon the assumption that plaintiff is able to prove the allegations of her complaint, and that performance on her part was prevented solely by the act of decedent. From what has been said it is clear that, in an action at law for damages, the measure of damages to which plaintiff would be entitled would include the value of the property agreed to be bequeathed, subject to administration. From this amount, in the instant case, in addition to the debts and expenses of administration, there must also be deducted the reasonable cost of caring for and maintaining the deceased and the reasonable expenditures upon her property from the time of the breach of the agreement, unless, of course, these expenses have been paid from the property of deceased or have been charged as debts against the estate, as well as the amount which plaintiff earned, or could have earned, by devoting her services to others than the decedent.

[8] If, therefore, the mortgage to defendant Rosa L. Pos is a valid charge against the estate, it must be deducted from the value of the estate in ascertaining the amount of damages to which plaintiff is entitled and plaintiff cannot be heard to complain. On the other hand, while decedent retained the ownership of the property during her lifetime, her right to the control of the property was subject to the qualification that any disposition of the property to persons with knowledge of plaintiff's agreement and for the sole purpose of defeating the benefits to be derived by plaintiff from the agreement would be "a fraud in law, or a constructive fraud upon the agreement." Rogers v. Schlotterback, 167 Cal. 35, 48, 138 Pac. 728, 733; Van Duyne v. Vreeland, 12 N. J. Eq. 142.

[9] If such is the case here, plaintiff does not thereby become entitled to specific performance of her agreement, but she may have the right to have the mortgage set aside. The complaint alleges that the mortgage was executed to defendant Rosa L. Pos, defendants having at the time full knowledge and notice of plaintiff's agreement, and neither Constance Roy nor her estate has ever received the $3,000 or any money or property whatever in respect of said mortgage; that the only consideration for said mortgage, if any existed at all, was the care and support of said Constance Roy by defendant Rosa L. Pos; that the mortgage was executed in pursuance of the plan and agreement between the parties of evading and defeating the operation of plaintiff's agreement with said Constance Roy, and with the intention to defraud plaintiff, and in the attempt to withdraw and remove the real property from the effect and operation of plaintiff's agreement. If the support of Constance Roy was the consideration for the mortgage, and such support was not so totally inadequate a consideration as to amount to fraud, the mortgage is a valid charge against the estate. Even were the allegations of the complaint upon this phase of the case sufficient in themselves to state a cause of action for

setting aside the mortgage, still the fact remains that such a cause of action would necessarily be separate and distinct from the action for specific performance, and it was not separately stated in this case. Plaintiff having failed to amend in this particular, the complaint cannot, as it stands, be said to state a cause of action for the setting aside of the mortgage, nor can it be held that the complaint was primarily intended to or did do anything more than attempt to state a cause of action for specific performance. Inasmuch as plaintiff has been held not to be entitled to specific performance, she cannot be held to be entitled, under the pleadings presented upon this appeal, to a decree setting aside the mortgage. Sharp v. Miller, 54 Cal. 329.

The demurrers were properly sustained, and the judgment is therefore affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SHAW, J.; LAWLOR, J.; WILBUR, J.

47 Cal. App. 300

MILLS v. SAN DIEGO CONSERVATORY OF MUSIC et al. (Civ. 3194; L. A. 5662.)

(District Court of Appeal, Second District, Division 2, California. May 1, 1920. Opinion of Supreme Court, In Bank, Denying Hearing, June 28, 1920.)

1. Trade-marks and trade-names ⊂=92—Complaint for unfair competition stated cause of action.

A complaint in an action to enjoin the use of a name, alleging that the name was adopted with the intent and for the purpose of defrauding plaintiff and appropriating for defendants' use and benefit the good will of plaintiff's business, etc., *held* sufficient as against a general demurrer.

2. Trade-marks and trade-names ⊂=79—Courts will enjoin use of name.

Courts of equity, where one has been first in the field doing business under a given name, will protect that person to the extent of compelling competitors to use reasonable precautions to prevent deceit and fraud upon the public and upon the business first in the field.

3. Trade-marks and trade-names ⊂=69—Fraudulent intent in using the same name inferable from facts.

In an action to enjoin the use of a trade-name, fraudulent intent and deceit by the defendants practiced upon the plaintiff *held* fairly inferable from the facts.

4. Damages ⊂=5—"General damages" defined.

"General damages" are such as the law implies and presumes to have accrued from the wrong complained of and are such as naturally and necessarily result from the wrong.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, General Damages.]

5. Damages ⊂=142—Special damages must be pleaded.

Where special damages are not claimed, a party can recover only such damages as are not only the natural and proximate result, but also the necessary result of the act complained of.

6. Trade-marks and trade-names ⊂=92—Damages shown special and not general, requiring pleading.

In an action to enjoin use of a trade-name of a school of music, where no special damages were alleged, evidence that a certain music company refused to carry out a contemplated scheme it had agreed upon to buy a certain number of scholarships in plaintiff's conservatory of music was inadmissible to show damages; such damage being special, requiring that it be alleged.

7. Appeal and error ⊂=1039(13) — Proof of special damages not pleaded reversible error.

The admission of evidence over objection as to special damages not specially pleaded will result in a reversal, where it cannot be ascertained whether such damages were allowed.

On Hearing in Supreme Court.

8. Trade-marks and trade-names ⊂=92—Proof of special damages not alleged erroneously admitted.

In an action to enjoin use of a trade-name and for damages, where the alleged damage was confined to a loss of patronage in that the use of plaintiff's name by defendants had actually misled the public to patronize defendants in the belief that they were patronizing the plaintiff, and that the reputation of plaintiff's business had been greatly injured and damaged, it was error to permit introduction of evidence that a certain music company had refused to carry out a contemplated scheme which had been agreed upon to buy a certain number of scholarships in plaintiff's conservatory of music; such evidence relating to an entirely different matter than the special damage alleged.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Chesley Mills, doing business under the name and style of the San Diego Conservatory of Music, against the San Diego Conservatory of Music, a corporation, and others. Judgment for plaintiff, and defendants appeal. Modified and affirmed in the District Court of Appeal, and hearing denied in the Supreme Court.

Henry C. Ryan and F. F. Grant, both of San Diego, for appellants.

Sweet, Stearns & Forward and Stephen Connell, all of San Diego, for respondents.

THOMAS, J. This is an action for an injunction against the defendants, praying that the latter be enjoined from using the name "San Diego Conservatory of Music," and from conducting business under that name "or using the same in any manner whatsoever,"

asking for damages and for general relief. The relief is sought on the ground of unfair dealing on the part of the defendants.

The complaint, in apt and proper allegations, set forth the acts complained of and because of which plaintiff seeks relief. A general demurrer was interposed to the complaint, and was by the court overruled. Defendants, by their answer, deny practically all the material allegations of the complaint, admitting, however, that defendants other than the corporation organized the defendant corporation, adopting said name therefor "for the purpose of engaging in the same character and line of business claimed to be carried on by plaintiff herein," the location of their business as alleged by plaintiff, and the publishing of certain advertisements; averring that only for the injunctional order of the court they would have continued to carry on such business. The court found for the plaintiff on all the issues, and judgment was entered accordingly. There was a motion for new trial, which was denied. The appeal is from the judgment.

We have read the entire record. From the record it appears that the plaintiff, Prof. Chesley Mills, during the year 1915 established a school devoted to the art of music in all its branches, including instruction in the playing of the piano, organ, violin, flute, cornet, mandolin, ukulele, and other orchestral instruments together with voice culture, platform art, and dramatic training in general, and for the operation and management of a conservatory of music for such instruction and teaching, and the holding of public and private musicals and entertainments incident thereto, as well as the employment of teachers necessary to conduct and carry on such business; that at the time said business was so established the plaintiff adopted the name of "San Diego Conservatory of Music," under which name, since the establishment of said business as aforesaid, he has carried on and conducted the same at 1630 Fifth street, in the city of San Diego; and that under said name plaintiff built up a large business, widely and favorably known, as well as a valuable reputation, etc.; that in September, 1917, the defendants, other than the corporation, organized the defendant corporation, under the laws of this state, under the identical name adopted by plaintiff at the time and place aforesaid, and established the office of said corporation and studio at No. 1434 Fifth street, in San Diego, "within 800 feet of plaintiff's said place of business, on the same side of the street," from which place and under which name defendants caused certain advertisements to be published; and that such business was so transacted by defendants from that time until restrained from so doing by the court. It is further alleged in the complaint that all this was done "with the intent and for the purpose of defrauding plaintiff and appropriating for their own use and benefit the good will of plaintiff's business and deluding and deceiving plaintiff's customers and the public in general into the belief that the business of plaintiff conducted at the aforesaid place was being conducted by defendants, * * * and that the same has actually misled many of them to patronize defendants in the belief that they, the said persons, are patronizing the plaintiff," all to plaintiff's damage, etc.

Appellants enumerate eight assignments of error, which may be reduced to two: Errors of law occurring during the trial, and insufficiency of the evidence to support certain findings.

[1] As to the first point urged, it is claimed that the court erred in overruling defendants' demurrer to plaintiff's complaint. With this we cannot agree. We think the complaint amply sufficient as against the general demurrer.

The next point urged is that the evidence does not support findings Nos. 4, 5, and 6. These findings, in full, are as follows:

"(4) That said defendants, B. Roscoe Schryock, Florence M. Young, Mary Barnum Kessler, Edna D. Anderson, J. Wm. Brown, and Mrs. L. R. Kirby, Sr., caused the name of San Diego Conservatory of Music to be adopted as the name of said defendants' corporation with the intent and with the express purpose of defrauding plaintiff and appropriating for their own use and benefit the good will of plaintiff's business and deluding and deceiving plaintiff's customers and the public in general into the belief that the business of plaintiff conducted at 1630 Fifth street in said city as aforesaid was conducted by said defendants, and that each and all of the said notices or advertisements placed by defendants in said newspapers as aforesaid were caused to be placed therein for the same purpose and with the same intent, and that if said defendants are permitted to carry on said business at said No. 1434 Fifth street or elsewhere under said corporate name of San Diego Conservatory of Music that the prospective applicants for instruction and customers of plaintiff and the public in general will at all times be deceived, misled and defrauded into believing that the place where defendants are so conducting business is plaintiff's place of business, all of which is and will be to the injury and damage of plaintiff and to the public in general.

"(5) That unless restrained from so doing by this court, the defendants will continue and proceed to carry on the said business under the said name of San Diego Conservatory of Music for and with the express purpose of deceiving plaintiff's customers and the public in general into the belief that plaintiff's business conducted at its place aforesaid is defendants' business; and that the name adopted by said defendants, to wit, San Diego Conservatory of Music, was at all times calculated and intended to receive the prospective applicants for instruction at plaintiff's said school or business and the patrons and customers thereof together with the public in general; that by reason of

each and all of the acts of said defendants herein so done or caused to be done by them and each of them, plaintiff has been injured and damaged in the sum of $100.

"(6) That the adoption of said name of defendant corporation, San Diego Conservatory of Music, was made with the intention or purpose of defrauding plaintiff and deceiving or misleading the public and to injure plaintiff, and that each and all of the acts of said defendants have created much confusion in plaintiff's said business. Plaintiff has fully complied with all the provisions of sections 2466–2468 of the Civil Code of the State of California relating to the use of fictitious names. That plaintiff having had the prior and exclusive right to said name of San Diego Conservatory of Music, the said defendants herein and neither of them have any right to use said name of 'San Diego Conservatory of Music' for the reason that the use of said name by defendants is of damage to plaintiff and his business and is calculated to mislead and deceive as hereinbefore set forth."

[2, 3] There is no merit whatever in the "point" that the evidence does not support these findings. Indeed, by the evidence of Mr. Schryock, director and head of the violin and piano department of the defendant corporation, it was shown that he knew, at the time of the incorporation of the defendant company, that plaintiff was conducting a business under that name, and instead of being open and aboveboard in his testimony, as one would be if acting wholly devoid of any ulterior motive, we see all through his testimony evidence of evasiveness and elusiveness, which, we think, amply justified the trial court in its observation that in its opinion this was a case of "rank fraud" on the part of the defendants. As we have already seen, plaintiff was first in the field doing business as above set forth. We think "that in the interest of fair commercial dealing courts of equity, where one has been first in the field doing business under a given name, will protect that person to the extent of making competitors to use reasonable precautions to prevent deceit and fraud upon the public and upon the business first in the field." Spieker v. Lash, 102 Cal. 38, 36 Pac. 362; Dunston v. Los Angeles Van, etc., Co., 165 Cal. 89, 131 Pac. 115; Temple v. Gordon, 31 Cal. App. 127, 159 Pac. 983. We think, too, that the fraudulent intent, as well as the deceit and fraud which defendants practiced upon the plaintiff here, are fairly inferable from the situation of the parties and the defendants' acts.

[4, 5] It is also urged by defendants, in support of this same assignment, that if any damage was done to plaintiff by reason of the fraudulent acts of the defendants, "that it was a special damage and not a general damage," and by reason of that fact that the complaint did not set forth the elements of the special damage incurred by the plaintiff. Hence, it is argued, no damages can be recovered against the defendants herein. There is merit in this contention. "General damages are such as the law implies and presumes to have accrued from the wrong complained of. They are such as naturally and necessarily result from the wrong, although this does not mean that they must inevitably and always result from a given wrong. * * * The subject of general and special damages as contradistinguished is principally a question of pleading, the general rule being that, where special damages are not claimed, a party can recover only such damages as are not only the natural and proximate result, but also the necessary result of the act complained of." 17 C. J. 712, § 20.

[6] The defendants were obliged to conduct themselves and to carry on their business in such a way as to be not unfairly or unjustly detrimental to plaintiff. Because of their admitted actions in this matter they breached that obligation in this, that because of defendants' adoption in use of the same name as that under which plaintiff had been and was at the time of said breach conducting his business, the Gray-Maw Music Company, a corporation, refused to carry out a contemplated scheme which had been agreed upon to buy a certain number of scholarships in plaintiff's conservatory of music. It is undoubtedly true that such injury might be said to follow naturally as a result of the defendants' said actions. We do not think, however, that it can be successfully maintained that they were such damages as necessarily would follow or result therefrom.

[7] It follows, we think, that because of the absence of a pleading setting forth the special damages referred to, the court erred in overruling defendants' objection to the reception of evidence in support of the item of $100 damages found by the court to have been actually suffered by plaintiff as aforesaid. The purpose of the rule requiring that such damages must be specially pleaded is to advise the defendant of the case he is expected to meet, and thus to prevent surprise at the trial. And where the admission of evidence as to special damages not specially pleaded will result in a reversal where it cannot be ascertained whether any such damages were allowed, it is prejudicial error to receive such evidence, in the absence of such a pleading, over defendants' objection. 8 R. C. L. § 157; Treadwell v. Whittier, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175; Terrace W. Co. v. San Antonio, etc., Co., 1 Cal. App. 511, 82 Pac. 562; Morris v. Allen, 17 Cal. App. 684, 121 Pac. 690. It follows therefore that there is no legal evidence to support the finding as to this item of $100.

The judgment, in so far as it awards damages to the plaintiff, is reversed. In all other respects it is affirmed.

I concur: FINLAYSON, P. J.

SLOANE, J. I concur in the decision, but not in all the conclusions of the majority opinion.

Unless the trial court was justified in finding that the defendants were guilty of fraudulent attempt to pirate the business and patronage of the plaintiff, from the mere fact that they attempted to appropriate to their own use the trade-name under which plaintiff was doing business, I fail to see wherein the findings are supported by the evidence.

That there was a deliberate plan and purpose of the defendant Schryock to deprive the plaintiff of the use and benefit of the name "San Diego Conservatory of Music," and, in so far as possible, by incorporating his own business under the same name, obtain the exclusive use of such name, I think there is no doubt. But I fail to find any evidence in the record that he intended or attempted or used any means calculated to deceive the public or patrons of the plaintiff into patronizing his business under the belief that they were patronizing the plaintiff, other than by the bare use of the same trade-name. And there is certainly no evidence, if such was his purpose, that he succeeded in doing this with a single individual. The only publicity given the defendants' business after incorporating under the same name, "San Diego Conservatory of Music," so far as appears in evidence, was certain advertisements in the San Diego papers in which he announces the "San Diego Conservatory of Music (Incorporated)," with the name of "B. Roscoe Schryock, Director," displayed and emphasized in black-faced type. This use and display of defendant Schryock's name is calculated to distinguish his conservatory of music from the one which it is claimed owes its identity and standing to the name and personality of Chesley Mills, the plaintiff in this action. From the obvious attitude of these two rival musicians towards each other, it is probable that the last thing either of them would desire would be to have any of their patrons think he was serving the other's brand of music. If the defendant Schryock had located his home and business in the immediate vicinity of the plaintiff's school of music for the first time in connection with the incorporatng under the same name, it might be argued from that circumstance that he chose the location with a view to confusing the public as to the identity of the two schools; but the record discloses that Schryock had been on the ground and teaching music there nearly, if not quite, as long as had plaintiff, and in the neighborhood of two years before he incorporated under the same name that plaintiff was using.

It seems clear from the settled rule in this state that the mere appropriation of a geographical name which has previously been adopted and is in use by a rival in business affords no ground of action unless accompanied by acts of unfair competition calculated to deceive the public into patronizing the usurping concern under a mistake as to identity. The name "San Diego Conservatory of Music" is admittedly not one that is subject to exclusive appropriation as a trade-name, and the rule applicable to such trade designations is laid down in the leading case of Weinstock, Lubin & Co. v. Marks, 109 Cal. 529, 42 Pac. 142, 30 L. R. A. 182, 50 Am. St. Rep. 57, in the following words of the syllabus:

"Although there can be no property right in a trade-name which is not the subject of a trade-mark, yet it is a fraud on a person who has established a trade and carried it on under a given name that some other person should use the same name * * * in such a way as to induce persons to deal with him in the belief that they are dealing with one who has given a reputation to the name."

As is said in Banzhaf v. Chase, 150 Cal. 180, 88 Pac. 704:

"The gist of the action is not the appropriation and use of another's trade-mark, but is based upon the fraudulent injury to and appropriation of another's trade."

If in this case the defendants' acts were confined to the mere appropriation of the trade-names used by plaintiff, without acts calculated to mislead those desiring to patronize the plaintiff into patronizing the defendant through a mistake in identity, no cause of action is shown.

I am not sufficiently satisfied, however, to justify dissenting from a majority of the court that the mere fact of the appropriation of the name of plaintiff's business to a rival business, to be carried on in the same immediate vicinity may not in itself sufficiently establish a condition calculated to mislead plaintiff's patrons, and justify a finding of the trial court to that effect, beyond reversal on appeal for want of evidence. The attempt to deprive plaintiff of the benefit of the trade-name under which in good faith he had established his business was morally indefensible, and I do not know that the appellate court should go out of its way to strain a legal point in defendants' favor.

I cannot, however, agree with the conclusions of the opinion that there is evidence of intention on the part of defendants to mislead the public as to the separate identity of the two music concerns, or that they have been guilty of anything more than a constructive fraud.

Opinion of Supreme Court, In Bank, Denying Hearing.

PER CURIAM. [8] In denying the petition for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District, Division 2, it seems

proper to note that by the complaint the alleged damage was confined to loss of patronage in that the use of its name by defendants has actually misled and does still mislead the public to patronize defendants in the belief that they are patronizing the plaintiff, and that the reputation of the plaintiff's business has been greatly injured and damaged. The only evidence in fact introduced on the subject of actual damage related to an entirely different matter. As the pleadings stood the evidence was inadmissible, and the finding of actual damage is without support in the evidence.

The petition for hearing in this court is denied.

All concur.

48 Cal. App. 300

GASCHLIN v. SIERRA. (Civ. 3322.)

(District Court of Appeal, First District, Division 1, California. June 3, 1920. Hearing Denied by Supreme Court, Aug. 2, 1920.)

1. Trial ⊜165—Giving fair intendment on motion for nonsuit does not prevent weighing of evidence.

The rule that the court must, on motion for nonsuit, indulge every fair intendment that can be drawn from plaintiff's testimony, does not mean such court must surrender its right to estimate the weight and sufficiency of the evidence as a whole, or to determine whether the evidence is sufficient to support plaintiff's case.

2. Wills ⊜93—Evidence held to show grantor intended testamentary disposition by deed.

In a grantee's action to quiet title, evidence *held* to show that grantor intended to make a testamentary disposition by deed.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Fred G. Gaschlin against Celso T. Sierra, individually and as executor of the will of Karl Theodore Schuppert, deceased. From a judgment of nonsuit, plaintiff appeals. Affirmed.

August L. Fourtner, of San Francisco, for appellant.

Wm. T. Satterwhite, of Oakland, and J. E. Harper, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the defendant in person and as executor of the will of Karl Theodore Schuppert, deceased, in an action by the plaintiff to quiet title to a certain piece of real estate against said defendant and said estate. The court granted a motion for nonsuit at the close of the plaintiff's case, basing its action in doing so upon its conclusion from the plaintiff's testimony that the deed from said Karl Theodore Schuppert to the plaintiff, on which he relied to establish his ownership of said property, had never been delivered to him. The facts of the case, as shown by the plaintiff's testimony, may be briefly summarized as follows:

Karl T. Schuppert had for some years prior to December 6, 1911, been, and on that date was, the owner of a house and lot on Waller street in San Francisco. He and the plaintiff had been on friendly terms for a number of years, and the latter had done for the former, who was the older man, many little kindnesses. On the 6th day of December, 1911, Karl T. Schuppert, taking the plaintiff with him, went to the office of a scrivener, and there caused a grant, bargain, and sale deed of said premises to be made to the plaintiff as the grantee thereof, which deed, when drawn, he signed and acknowledged before a notary public. When this had been done, Schuppert, taking the deed, went with the plaintiff to the offices of the Merchants' National Safe Deposit Company where Schuppert had a safe deposit box. When they arrived there, Schuppert sat down and, taking the deed from his pocket handed it to the plaintiff, saying:

"This is what the old man has done for you. This is yours."

The plaintiff read the deed through and handed it back to Schuppert, who placed it in his safe deposit box. Schuppert then caused the plaintiff to be entitled to access to the box, and he received a key to it. At some time during this episode Schuppert asked the plaintiff to give him $10, which he did, and in this connection it may be noted that the consideration named in the conveyance was $10. The parties then left the safe deposit vaults and went to the premises on Waller street, where the plaintiff was residing, and when they arrived there Schuppert said to him:

"Fred, remember what I tell you. When I am gone, when I am passed out, take that deed and have it recorded."

Thereafter, and up to the time of his death, Schuppert remained in the full possession and control of the premises in question, collecting or causing to be collected its rents, and applying the same to his own uses. The plaintiff never saw the deed again, except upon one occasion, in the month of October, 1913, when Schuppert, being ill and in bed, requested the plaintiff to go to the safe deposit vaults and get the deed and bring it to him. This the plaintiff did, and left the deed with Schuppert. A few days later, at the latter's request, he took the deed again to the safe deposit vaults, and left it there. On June 14, 1917, Schuppert died, and the defendant Celso T. Sierra was appointed executor of his last will and testament. When the safe deposit box was opened after the death of Schuppert, it was found to be empty, and

there is evidence to the effect that at some time between October, 1915, and the date of Schuppert's death he had sent for and destroyed the deed; at any rate, it was never found nor produced at the trial of the action.

The trial court held these facts insufficient to show a delivery of said deed, and the only question before this court is as to whether the trial court was in error in so ruling upon the motion for nonsuit.

[1] It is conceded by the parties hereto that upon a motion for nonsuit every fair intendment that can be drawn from the testimony offered in support of the plaintiff's case is to be indulged in by the trial court in his favor. This does not mean, however, that the trial court, in passing upon a motion for nonsuit, must surrender its right to estimate the weight and sufficiency of the evidence taken as a whole, or to determine whether, giving to such evidence such fair and reasonable intendment, it is sufficient to support the plaintiff's case.

[2] Putting ourselves in the position of the trial judge in this respect, we are unable to arrive at the conclusion that the plaintiff had sufficiently shown a delivery of the deed in question to him with the intent on the part of its grantor to presently convey title to the premises in question. It is true that the grantor had of his own motion caused the deed to be signed and acknowledged by himself, and that he had asked the defendant to give him $10, the consideration named in the deed, which the defendant had done; but these facts would be insufficient to show a transaction between the parties for the purchase and sale of the premises coincident with the preparation, signing, and acknowledgement of the deed. It is also true that, when the parties arrived at the safe deposit vaults, the grantor handed to the grantee the deed in question, saying:

"This is what the old man has done for you. This is yours."

But evidently the grantor's intent at the time was merely to show the plaintiff the deed as evincing the former's desire and purpose that the plaintiff should at some later time come into the ownership and enjoyment of the property described therein. Evidently, also, the plaintiff himself so understood Schuppert's action, since, after reading the deed, he handed it back to him, and never thereafter until the death of the grantor attempted either to possess himself of said deed or to exercise any acts of ownership or control over the premises. Further light is shed upon this particular episode by the words of the grantor, when, upon arriving at his home upon the premises, he said to the plaintiff:

"Fred, remember what I tell you. When I am gone, when I am passed out, take that deed and have it recorded."

We think it is plain upon the face of this transaction, taken as a whole that it was the intention of the grantor not to invest the grantee in said deed with the present title and ownership in the premises described therein, but rather to invest the grantee named in said deed with the right to its possession and to the ownership of said premises after the grantor's death, or, in other words, to make a testamentary disposition of the property. A strong light is shed upon this intent by the subsequent action of the grantor in instructing the grantee to go to the safe deposit vaults and get the deed and bring it to him at his home where he was lying ill, and in again a few days later instructing the grantee to return said deed to its place of deposit. The action of both parties upon this occasion indicates clearly that it was not understood by either of them that the grantor in said deed had so far surrendered possession and control over it to the grantee named therein as to constitute such a delivery thereof as would suffice to pass the title to the property.

Upon the trial of the cause, and while testifying in his own behalf, the plaintiff himself made this statement:

"I was to assume possession of the property, to have the benefit of it, when he died, and from that time on I claimed the ownership of it."

This statement on the part of the plaintiff is wholly inconsistent with the idea that it was understood by the parties to the conveyance that their acts at the time of the making of said deed and of its deposit in the safe deposit vaults amounted to such a delivery of the instrument as would invest the grantee with the present title to the premises described therein. We are of the opinion, therefore, that the trial court was not in error in granting the defendant's motion for nonsuit at the close of the plaintiff's case.

This being so, the judgment is affirmed.

We concur: WASTE, P. J.; KNIGHT, Judge pro tem.

48 Cal. App. 38

KEISER v. BUTTE CREEK CONSOL. DREDGING CO. et al. (two cases). (Civ. No. 3066.)

(District Court of Appeal, Second District, Division 1. California. June 1, 1920.)

1. Bills and notes ⊂=397 — That indorsers were officers of maker corporation does not excuse notice of presentment.

The fact that defendants, indorsers of corporation's notes, were also directors or officers with full knowledge of the corporate affairs and of the failure to pay the note does not excuse lack of notice of presentment and dishonor.

2. Bills and notes ⊂=526 — Evidence held insufficient to show waiver of presentment and dishonor.

In an action against a corporation upon its note and against its officers as indorsers, evidence of a statement by one of the parties in the hearing of the others, made to plaintiff, asking him to wait, stating that he was taking no risk, that they were all responsible on the note, *held* insufficient to show a waiver of notice of presentment and dishonor, of which strict proof is required.

Appeals from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Two actions by E. T. Keiser against the Butte Creek Consolidated Dredging Company and others resulted in judgments for defendants, and separate appeals were taken by the plaintiff and presented upon one record and one set of briefs by stipulation. Affirmed.

Joseph E. Hannon and J. Vincent Hannon, of Los Angeles, for appellant.

Kemp, Mitchell & Silberberg and C. E. Joslin, all of Los Angeles, for respondents.

JAMES, J. Separate appeals were taken in the two actions the titles of which appear first above. As precisely the same questions of law were involved, the parties stipulated to present both cases upon one record and one set of briefs. The appeals were taken by the plaintiff from a judgment entered in favor of respondents, the latter being indorsers upon two promissory notes executed by the defendant corporation in favor of the plaintiff. All of the respondents except Ira D. McCoy, as well as the plaintiff, were, at the times the two promissory notes were executed, directors of defendant corporation. McCoy was secretary of the same corporation. All of the respondents were at all times familiar with the transactions having to do with the execution of the two notes, and had actual knowledge of the fact that the notes were not paid at maturity. It is admitted that no formal presentment and demand for payment of the obligations was made upon the makers of the notes, and no notice given to the indorsers of dishonor thereof.

[1] The first point made on behalf of appellant is that the fact that the directors and McCoy the secretary (the indorsers) at all times had full knowledge of the fact that the corporation had not satisfied its obligations to the plaintiff, relieved him of the duty of making demand upon the payor and giving notice of dishonor to the indorsers. Appellant cites to this point a decision from another state which supports that view, the case being Hull v. Myers, 90 Ga. 674, 16 S. E. 653. Respondents make question with the soundness of that decision, claiming that its reasoning is illogical, and refer to the case of Hudson Furniture Co. v. Harding, 70 Fed. 468, 17 C. C. A. 203, 30 L. R. A. 513. In the latter decision the federal court distinctly decides the question the other way, and refers pointedly to Hull v. Myers, with this observation:

"The case of Hull v. Myers, 90 Ga. 674, 16 S. E. 653, is urged upon our attention in support of this contention. The decision of the court upon this question is bottomed, as we think, upon incorrect reasoning, and is without the support of authority."

Upon an examination of the two decisions, we prefer the determination as made in the federal case as representing a more careful consideration of the question and better logic in its reason. Respondents also cite McDonald v. Luchenbach, 170 Fed. 434, 95 C. C. A. 604, and Houser v. Fayssoux et al., 168 N. C. 1, 83 S. E. 692, Ann. Cas. 1917B, 835, both of which give support to the proposition that the fact that an indorser on a note of a corporation is also a director, with full knowledge of the corporate affairs, does not excuse the lack of notice of presentment and dishonor. In this case it was shown that the various indebtednesses of the defendant corporation, including that to the plaintiff, were discussed at different meetings of the board of directors, both before and after the particular obligation sued upon here became due. In so far as those discussions showed familiarity of the indorsers with the true situation as to nonpayment of the obligations, they add nothing to the statement of fact already made herein and conceded by respondents, that the indorsers at all times were possessed of such knowledge.

[2] Appellant further argues, however, that after the maturity of the two notes and at a meeting of the directors at which all of the indorsers were present, a statement was made by one of the directors which was in itself of potent effect in establishing a waiver of the notice to the indorsers. This statement was testified by plaintiff to have been made by respondent Hubbard, in which Hubbard said to the plaintiff:

"'Can't you just wait? You are taking no risk whatever; we are all responsible on that note—on those notes.' Nobody said anything to the contrary. That statement was made in the presence and hearing of each of the parties whose names appear on the back of the notes."

The secretary and several of the directors testified that they were present at the meeting, and did not hear any one request the plaintiff to forbear payment of the note. This testimony created a conflict as to a portion at least of the statement made by plaintiff attributing the words quoted to Hubbard. It left lacking categorical contradiction of the words, "You are taking no risk whatever; we are all responsible on that note—on those notes." There is merit in the argument of respondents that the court in drawing its deductions had the right to conclude that no part of the statement attributed to Hubbard was made. However, conceding that the contradiction which in express terms only covered a portion of the Hubbard statement left without denial the assertion of Hubbard that plaintiff was taking no risk, that "we are all responsible," we do not believe that this expression was of such positive scope as to entitle it to be considered as evidence of a waiver of the presentment and notice of dishonor. Strict proof is required, and statements to bear the import attempted to be attached to those here made must be clear and unequivocal. Keyes v. Fenstermaker, 24 Cal. 329. In that case it is said that the law is settled that a promise to pay by an indorser, made after maturity with full knowledge of the payee's neglect to make demand and give notice, must be established by clear and distinct evidence. To the same effect is another case cited by respondents, to wit, Glidden v. Chamberlin, 167 Mass. 486, 46 N. E. 103, 57 Am. St. Rep. 479.

The points discussed are the principal ones argued upon this appeal. Under the evidence shown, we think that the court was justified in each of the findings made. We conclude also that the rulings upon the admission of evidence were without prejudicial error.

The judgments are affirmed.

We concur: CONREY, P. J.; SHAW, J.

48 Cal. App. 34

HASKETT v. HARTWICK et al. (Civ. 2936.)

(District Court of Appeal, Second District, Division 1, California. June 1, 1920. Hearing Denied by Supreme Court July 30, 1920.)

Sales ⊂=52(6)—Evidence held to show plaintiff, and not another, was seller of property.

In an action by conditional seller of automobile to recover possession thereof as against purchaser and his vendees, evidence *held* to show that plaintiff, and not another, was the owner and had sold the automobile to defendant purchaser.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action by R. C. Haskett against C. B. Hartwick and others. Judgment for defendants, and plaintiff appeals. Reversed.

E. A. Klein, of Bakersfield, for appellant.
E. J. Emmons, of Bakersfield, for respondents.

JAMES, J. Plaintiff in this action brought to recover the possession of an automobile was aggrieved by the judgment entered against him; hence this appeal.

Defendant Hartwick had possession of the automobile in question. He attempted to transfer title thereto for a valuable consideration to Berges, and Berges in turn attempted to sell the machine to Swett. Berges and Swett appear as alleged innocent purchasers resisting the claim of Haskett, the plaintiff. In support of his side of the case, plaintiff introduced a conditional-sale contract made between him and Hartwick whereby he agreed to sell and Hartwick agreed to buy the automobile. An initial payment on account was acknowledged in the writing to have been received by Haskett, and monthly installments were provided to be paid until the whole sum agreed upon was satisfied. In the meantime the contract contained provisions reserving title in the vendor and providing that in case of default in payments Haskett might take possession of the property. All of these provisions were the familiar ones usually contained in contracts of that kind. Haskett's testimony further showed that payments as agreed upon had not been made by Hartwick. Plaintiff, learning that Hartwick had attempted to dispose of the machine and that it had passed out of his possession, resting finally in the hands of Swett, brought this action to recover possession or the value of the automobile. The original parties defendant were Hartwick and Swett, Berges having afterwards been permitted to intervene and become a party to the suit. Berges' defense was similar to that of Swett. We do not find that any appearance was made on the part of Hartwick. By the answers and the intervention pleading, issue was made as to the ownership of the automobile being in the plaintiff, and facts were alleged for the purpose of showing that plaintiff was estopped from denying the authority of Hartwick to transfer title to the machine.

The material point in the case is as to whether the evidence sustains the findings of the trial judge. In those findings it was determined that the plaintiff was not the owner or entitled to possession of the automobile; that Hartwick had purchased the property

from a motorcar company in the city of Los Angeles on August 18, 1917; and that said motorcar company was the owner thereof at the time of said sale. The judgment was that plaintiff take nothing, and the defendants Berges and Swett recover their costs. In order to establish ownership in Hartwick, Berges and Swett called a bookkeeper of the Leach Motorcar Company, the original vendor of the machine, who testified that the books of that company showed a transaction had with Hartwick, commencing on August 18th and concluded on the 20th, whereby the company sold to Hartwick the automobile. This bookkeeper spoke only by the authority of the records in his possession, and had no direct part in the claimed transaction had with Hartwick. On the other hand, plaintiff produced a bill of sale of the machine made directly to him by the same motorcar company and dated August 20th. He supplemented that evidence with the sworn testimony that he (the plaintiff) was engaged in a brokerage business in the course of which he purchased automobiles for persons who desired them and made sale of the desired automobiles to such persons upon similar contracts as that which he exhibited and which he testified had been signed by Hartwick; that at about the date of the bill of sale Hartwick had requested that he purchase for him from the Leach Motorcar Company the automobile in question; and that he (the plaintiff) had, after agreeing upon the terms of the contract, made a bargain with the motorcar people and had actually received delivery of the automobile on the premises of the Leach Company, and had then turned it over to Hartwick under the contract already referred to. When his attention was called to the fact that it appeared that Hartwick had had dealings with the Leach Company regarding the same machine, he testified that he knew in fact that Hartwick had had negotiations affecting the same car; that Hartwick had turned in an old automobile on account and had given a check, which check was dishonored for lack of funds; and that the motorcar company had canceled the sale before delivery was made to Hartwick. The testimony of the plaintiff was in no wise contradicted, unless it may be said that the testimony of the bookkeeper of the Leach Company presented a contradiction as to the facts. The case, as we view it upon the evidence, presented no such conflict. Plaintiff produced Hartwick's written contract as to the making of which there was no denial whatsoever. By that contract it appeared that plaintiff had conditionally sold to Hartwick the automobile, reserving title in himself until all payments had been made. No witness was introduced to contradict plaintiff's statement as to the termination of the negotiations between Hartwick and the motorcar company looking to a sale of the machine to the former. Plaintiff's testimony was, as already noted, that that deal had fallen through because Hartwick's check given in part payment of the price was dishonored. The mere fact that upon the books of the Leach Company there appeared a record of a transaction with Hartwick was not inconsistent at all with the explanation given by plaintiff of that transaction. That the motorcar company did not cancel that record, or make an entry evidencing the nullity of the purported deal with Hartwick, indicates only that such was not their method of bookkeeping or that they had been neglectful in recording the facts showing the termination of the transaction. The evidence did not show facts sufficient to justify the legal conclusion that the plaintiff by any act of his became estopped from asserting his title and right to possession of the automobile as against subsequent purchasers thereof; neither did the court so find.

For the reasons given, it seems quite plain that the determination of the trial court cannot be sustained.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

47 Cal. App. 745

RICHMOND v. DENNY et al. (Civ. 3393.)

(District Court of Appeal, First District, Division 1, California. May 26, 1920.)

1. Records ⟸17(2, 3)—Unless satisfied that destroyed record was as claimed, court may refuse to restore it.

On application to restore a lost or destroyed record in a divorce action, *held* that under St. 1906 (Ex. Sess.) p. 73, § 2, the trial court, not being fully satisfied that the provision for alimony, alleged to have been part of the original divorce decree, correctly expressed the order made, was justified in refusing to direct the restoration, particularly in view of petitioner's long delay, the application not being made until more than 30 years after the divorce, and also after the death of the petitioner's former husband.

2. Witnesses ⟸258—Testimony as to date of action based on record not made by witness inadmissible.

In an action to restore the record of a destroyed divorce judgment, it was not error to refuse to allow a witness to testify as to the date of the action from a record of a title and trust company, which was not made by the witness or under her direction.

3. Evidence ⟸320—Testimony based on hearsay properly excluded.

Testimony based on hearsay is properly excluded.

4. Witnesses ⊂⊃313—Tests showing that plaintiff had a remarkable memory properly excluded.

In an action for the restoration of a lost or destroyed record, tests showing that plaintiff had a remarkable memory were properly excluded.

5. Witnesses ⊂⊃164(2) — Conversation with deceased defendant in proceeding to restore lost record inadmissible.

In an action to restore the alimony provision of a lost or destroyed record in a divorce action, testimony as to a conversation between plaintiff and her former husband, since deceased, showing that he knew the divorce had been granted and the amount of alimony, etc., was properly excluded.

6. Appeal and error ⊂⊃1041(2)—Refusal to allow amendments to complaint not prejudicial.

Where the amended petition sufficiently presented the facts for restoration of a lost or destroyed record, the refusal to allow amendments was not prejudicial.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Eva F. Richmond, formerly Eva F. Denny, against Helen V. Denny, executrix, and others. From the judgment refusing to restore the lost or destroyed record in accordance with plaintiff's application, plaintiff appeals. Affirmed.

Louis P. Dunkley and George F. Owens, both of San Francisco, for appellant.

Jas. P. Sweeney and Frank J. Fontes, both of San Francisco, for respondents.

WASTE, P. J. This is an appeal from a judgment, or order, of the trial court refusing to restore a lost or destroyed record, in conformity with appellant's application for restoration of the records in the case of Eva F. Denny v. Orion O. Denny, a divorce action instituted by the appellant against her husband, since deceased, in 1884, the record of which was destroyed in the conflagration of April 18, 1906. The court found, in substance and restored, the complaint, the summons, service of which was made and default entered, the findings, and the decree of divorce. It refused to incorporate in the decree an alleged provision granting the plaintiff the sum of $250 per month as and for permanent alimony, for the maintenance and support of plaintiff alone, commencing September 1, 1884. The restoration of the decree of divorce as presented would have laid the foundation for a judgment in favor of the petitioner, which could have been made the basis of a claim against the estate of the deceased.

The lower court found that—

"In view of the impecunious condition of the defendant [the deceased husband] in said action at the time of said trial, as disclosed by the evidence herein, that no such amount as the sum of $250 per month was awarded to plaintiff for the support of herself alone; * * * that, at the time of the destruction of said records by fire, the said Eva F. Richmond (formerly Eva F. Denny) was a resident of the city and county of San Francisco; that, in failing to apply for the restoration of said record for more than 32 years since the date of said decree of divorce, and more than 10 years after the destruction of the records herein, and more than 6 months after the date of the death of said Orion O. Denny, the said Eva F. Richmond, formerly Eva F. Denny, was guilty of laches, in allowing an unreasonable length of time to elapse before the filing of said petition herein, thus rendering uncertain and unsatisfactory to the court the testimony offered as to the contents of the proposed record."

[1] The act providing for the restoration of lost or destroyed records provides, in part:

"If, upon such hearing the court shall be satisfied that the statements contained in such written application are true, the court shall make an order reciting what was the substance and effect of such lost, injured, or destroyed judgment." Stats. Ex. Sess. 1906, p. 73, § 2.

While the attorney of record for the plaintiff in the divorce action testified that, to the best of her recollection, the complaint prayed for, and the decree contained, a provision awarding $250 to the plaintiff as her permanent alimony, the uncontradicted testimony of the plaintiff was that she testified, upon the trial of the divorce action, that her husband had no business or occupation; that his father put him in business in Seattle; that he did not "make good"; that she and her husband were living upon the bounty of defendant's father; that the largest amount that the defendant had ever received from his father, as an allowance, was $150 per month; and that these facts were true. There was therefore sufficient warrant for the court's action in holding the evidence unsatisfactory, and in refusing to include the alimony provision in the decree as restored, and ample justification for the remark of astonishment of the trial judge, the same one before whom the action was tried some 32 years ago, that he, "having heard that the man was only getting $150, ordered him to pay $250."

The lower court, not being fully satisfied from the evidence adduced in support thereof that the provision for alimony, alleged to have been a part of the original decree of divorce correctly expressed the order previously made by it, was justified in refusing to direct the restoration of the record, to the extent of including it. Kaufman v. Shain, 111 Cal. 16, 21, 43 Pac. 393, 52 Am. St. Rep. 139. Regardless of the question of the effect

of the long delay in making the application, and the strong inference thereby arising, the failure of the petitioner to satisfy the lower court as to the contents of the destroyed decree was fatal to her cause.

Certain errors complained of by the appellant may be briefly disposed of. The objection that the executrix and executors of the estate of the deceased defendant in the state of Washington were allowed to appear and defend the action was expressly waived in the court below, and no motion was made to strike out their answer, the verification of which, by the attorney for the defendant, complied with the requirements of the Code.

[2-4] It was not error to refuse to allow the witness, Mrs. Faltz, to testify regarding the date of the divorce action from a record of the Title Guaranty & Trust Company, which was not made by the witness, or under her direction. The evidence of the plaintiff that she knew her husband, the defendant, was served with summons in the divorce action in San Francisco was based on hearsay, and was properly excluded. Neither was it error to refuse to permit plaintiff's counsel to show by tests of her recollection that she had a remarkable memory.

[5] The appellant urges as one of the grounds of her appeal that the court erred in refusing to allow the plaintiff to testify as to conversations had by her with the defendant subsequent to the divorce action, for the purpose of showing that he was served personally in the city and county of San Francisco, that he knew a divorce had been granted, and that he knew the amount of the permanent maintenance, and the other facts contained in the decree of divorce. On this ground the evidence was immaterial in a proceeding to restore the lost record, and was properly excluded, regardless of the other reasons urged by respondents in their objections, and which seem to have been favored by the lower court. The claim that the rejected testimony would have had some bearing on the matter of laches of the petitioner appears to be an afterthought. Such contention was not made in the lower court.

[6] The alleged facts as to the contents of the destroyed documents were fairly presented by the amended petition for the restoration, and the action of the court in not permitting certain minor amendments was not prejudicial to the rights of the petitioner. The motion for a new trial was properly denied. No statutory provision has been called to our attention permitting a retrial of the limited, and special, proceedings provided for the restoration of lost or destroyed records.

The order is affirmed.

We concur: RICHARDS, J.; WELCH, Judge pro tem.

(47 Cal. App. 533)

TITLE INS. & TRUST CO. v. GOULD.

(Civ. 3310; L. A. 6176.)

(District Court of Appeal, Second District, Division 1, California. May 18, 1920. Opinion of Supreme Court in Bank Denying Hearing, July 16, 1920.)

1. Abatement and revival ⊂=75(1)—Summons on original complaint need not be served on representative of deceased defendant after supplemental complaint showing death.

Where defendant died pending action, and supplemental complaint was filed, in which the substance of the original complaint was incorporated, together with appropriate allegations showing the death of the defendant, the appointment of the executor, and presentation of the claim, it was not necessary to serve the executor with the summons on the original complaint; the supplemental complaint stating a complete cause of action in itself, under Code Civ. Proc. § 1502.

2. Evidence ⊂=571(7)—Court may determine value of legal services, regardless of testimony by attorneys.

In an action on a note, the court, considering the work performed and shown in evidence, was authorized to form its own conclusion as to the value of services performed by plaintiff's attorney, notwithstanding testimony was given by experienced attorneys as to what in their opinion would be a reasonable fee.

3. Executors and administrators ⊂=456(5)—Costs may be taxed against executor personally.

In an action against an executor on a claim which he has refused to pay, it is within the discretion of the court to assess the court costs against the executor personally, without making any particular finding against mismanagement or bad faith.

4. Executors and administrators ⊂=434(5)—Presentation prerequisite to counterclaim.

A claim for damages and for services rendered an estate cannot be set up as a counterclaim in an action by the executor, where not presented against the estate.

5. Executors and administrators ⊂=111(1)—Attorney's fees are allowances, not charges.

Attorney's fees are not charges directly against the estate, but are allowances made to the administrator or executor.

On Hearing in Supreme Court.

6. Executors and administrators ⊂=434(1)—Counterclaim for attorney's fees improper.

Matter of rendering legal services to an estate was one to be adjudicated in the probate proceedings, and could not be set up as a counterclaim in an action on a note by the executor.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by the Title Insurance & Trust Company, a corporation, special administrator of the estate of Samuel F. Baker, deceased, against James H. Blanchard. Defendant dy-

ing pending the action, Will D. Gould, his executor, was substituted as defendant. Judgment for plaintiff, and defendant appeals. Affirmed in the District Court of Appeal, and hearing denied in Supreme Court.

Clara Shortridge Foltz and Will D. Gould, both of Los Angeles, for appellant.

Thos. C. Ridgway and Chas. H. Brock, both of Los Angeles, for respondent.

JAMES, J. This action was brought in the lifetime of James H. Blanchard to recover upon a promissory note made in favor of Samuel F. Baker, of whose estate plaintiff is the special administrator. The judgment was in favor of plaintiff, and the defendant, in his representative capacity as executor of the estate of Blanchard, appeals.

[1] Summons in the action was not served upon Blanchard, but after his death his executor was substituted as party defendant and a claim for the amounts sued for was regularly presented to such executor. The executor allowed the claim for the principal amount of the note and interest, and rejected the same as for any attorney's fees or costs. Supplemental complaint was then filed, in which the substance of the original complaint was incorporated, together with appropriate allegations showing the death of the maker of the note, the appointment of the executor, and presentation of the claim. The summons was issued upon this supplemental complaint and served upon the executor.

One of the points made by appellant is that he should have been served with the summons on the original complaint. However, the plaintiff appears to have proceeded in strict compliance with the law in such a case, and as the supplemental complaint stated a complete cause of action in itself, there was no necessity or requirement that any other summons than that served should have been used. Section 1502, Code Civ. Proc. In Falkner v. Hendy, 107 Cal. 49, at page 52, 40 Pac. 21, at page 22, the court said:

"Section 1502 of the Code of Civil Procedure provides that, if an action is pending against a decedent at the time of his death, it must be presented to the executor or administrator as in other cases, 'and no recovery shall be had in the action unless proof be made of the presentations required.' Regularly, in such cases, a supplemental complaint should be filed, alleging the death and due presentation of the claim."

See Frazier v. Murphy, 133 Cal. 91, 65 Pac. 326.

In McMinn v. Whelan, 27 Cal. 300, at page 313, the court declared:

"By filing the supplemental complaint and issuing a summons thereon, the original action became merged in the action as supplemented by the addition of parties and subject-matter, and the summons last issued should have been served by publication in order to clothe the court with jurisdiction of the persons of the absent defendants."

In the claim as presented to the executor the claimant set forth that—

"$300 is a reasonable attorney's fee therein, and in addition thereto claimant incurred costs of court and sheriff's fees amounting to $11.75."

As before noted, the executor allowed only the principal sum and interest due, and rejected the "balance" of the claim. The trial judge made an allowance of $105 for attorney's fees and included the $11.75 costs. The additional costs incurred in this action, which amounted to $8.35, were assessed against the executor personally. Appellant complains that under the evidence no attorney's fees should have been allowed; also that the item of costs last mentioned should not have been assessed against the executor personally.

The first contention is based upon the fact that it appeared in evidence that one of the attorneys for the plaintiff was a regular paid attorney of plaintiff corporation, and that therefore it appeared that plaintiff had not incurred by reason of this action any charge which it was not obligated to pay in the course of its own business. This contention, however, is not borne out by the evidence, because it is shown that the main counsel in the case was not connected with the plaintiff corporation, but was specially employed by plaintiff, and that plaintiff was liable to this counsel for such an amount as would compensate him for his services. This evidence was sufficient to sustain the allowance as made. On the last question, Prescott et al. v. Grady, 91 Cal. 518, 27 Pac. 755, is not at all decisive in favor of appellant's position. In this case it was particularly alleged in the complaint that a special attorney had been employed, and this attorney testified to different acts which he had performed in the conduct of the case from its commencement. The court, considering the work performed and shown in evidence, was authorized to form its own conclusion as to the value of such services, which were purely legal. Conner v. Blodget, 18 Cal. App. 787, 124 Pac. 733; Eastman v. Sunset Park Land Co., 35 Cal. App. 628, 170 Pac. 642.

[2, 3] Even though testimony had been given by experienced attorneys as to what, in their opinion, would be a reasonable fee, the court, under the circumstances of this case, might have disregarded such testimony. It is within the discretion of the court to assess these costs against the executor personally, without making any particular finding of mismanagement or bad faith. Meyer v. O'Rourke, 150 Cal. 177, 88 Pac. 706. The decision last cited also holds that, where the executor appeals in his representative capacity alone (as is the case here), he is not an aggrieved party in the sense that permits him to contest the allowance of a judge for costs entered against him personally.

[4, 5] By way of counterclaim, defendant charged that an attachment against the prop-

erty of his testator was levied without cause or sufficient reason, and prayed for damages on that account in the sum of $1,000. By cross-complaint he asserted a charge against the estate of Baker for attorney's fees rendered by the deceased after the death of Baker and before the appointment of plaintiff as special administrator. The court properly refused to allow testimony to be given to sustain either alleged cause of action. This ruling in the first place was properly made, because it was not pretended that any claim had been presented against the estate of Baker covering the matters alleged. The presentation of such a claim was a necessary prerequisite to the bringing of suit. As to the attorney's fees, a further answer is suggested to the alleged cause of action made by the cross-complaint, to wit: That attorney's fees are not charges directly against an estate, but are allowances made to the administrator or executor. To this point respondent cites Briggs et al. v. Breen et al., 123 Cal. 657, 56 Pac. 633, 886. The findings made by the trial judge sufficiently disposed of the issues presented.

We find no error in the record sustaining appellant's plea for a reversal.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

Opinion of Supreme Court in Bank, Denying Hearing.

ANGELLOTTI, C. J. The application for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District, Division 1, is denied.

[6] As to the refusal of the trial court to allow testimony to sustain the claim of defendant's testator for attorney's fees for services rendered in the matter of the estate of Baker, if the services were rendered to some one authorized to bind the estate the action of the trial court is correct for the reason that the matter was one to be adjudicated in the probate proceedings.

We concur: SHAW, J.; LAWLOR, J.; SLOANE, J.

48 Cal. App. 41

HENDERSON v. D. S. DENEHY MERCANTILE CO., Inc., et al. (Civ. 2174.)

(District Court of Appeal, Third District, California. June 2, 1920.)

1. Action ⇐38(1)—Complaint seeking goods under Bulk Sales Law held to state one cause of action.

Complaint by judgment creditor, seeking goods sold in violation of Bulk Sales Law (Civ. Code, § 3440), and setting forth the judgment and return of execution nulla bona, need not allege an attachment proceeding; but such allegation could do no harm, and, since but one cause of action is stated, a special demurrer for uncertainty, that it commingled different causes of action, is without merit.

2. Creditors' suit ⇐6, 13—Proceedings supplementary to execution not adequate remedy; resort to supplementary proceeding usually condition precedent.

Generally resort must be had to proceedings supplementary to execution under Code Civ. Proc. §§ 717–720, before a creditors' bill will lie; but where such proceedings do not afford an adequate remedy, as where there has been a void transfer of personal property, and the transferee claims the title, such proceedings do not supersede the remedy by action.

3. Fraudulent conveyances ⇐182(1)—Fraudulent grantee of property personally liable.

A fraudulent vendee, who sells the property, is liable for its value to the creditors of the vendor.

Appeal from Superior Court, Modoc County; Clarence A. Raker, Judge.

Action by J. S. Henderson against the D. S. Denehy Mercantile Company, Incorporated, and others. From a judgment in favor of the named defendant, after sustaining of demurrer to second amended complaint, and plaintiff declining to further amend, plaintiff appeals. Reversed, with directions to overrule demurrer.

J. T. Sharp, of Alturas, for appellant.

Jamison & Wylie, of Alturas, for respondent.

BURNETT, J. The appeal is by plaintiff from a judgment in favor of defendant Denehy Mercantile Company after a demurrer to a second amended complaint had been sustained and the plaintiff had declined to amend. The sole question on this appeal is therefore the sufficiency of said amended complaint. Appellant has made and presented a synopsis of said complaint, which we substantially adopt in the following statement:

On April 30, 1918, M. Hotchkiss & Sons, retail merchants of Lake City, Modoc county, Cal., while indebted to plaintiff's assignors in the sum of $1,197.91, sold and delivered their stock in trade, of the value of $3,000, to the defendants herein.

"That neither the said M. Hotchkiss & Sons nor said defendants, D. S. Denehy Mercantile Company, Incorporated, and John H. Hornback, or either, or any of them, either at least seven days before the consummation of said sale, or transfer, or assignment, or ever, or at all, recorded, or caused to be recorded, nor was there at any time recorded on behalf of either of said persons, or at all, in the office of the county recorder of the county of Modoc, state aforesaid, or any other place, a notice of said intended sale, transfer, or assignment, nor was there ever recorded a notice, or any notice, as

provided in section 3440, division 4, part 2, of the Civil Code of the state of California; that no notice of said intended sale, transfer, or assignment, of any kind, character, or description, was filed, or recorded, or filed for record, either in the office of the county recorder of the county of Modoc, state aforesaid, where said stock in trade was situated, or at any other place."

On August 5, 1918, plaintiff brought suit on his assignors' claims, and on September 5, 1918, procured judgment thereon against Hotchkiss & Sons, and caused a writ of execution to be levied by way of garnishment on defendants in this action, and by way of direct levy on all other known property of said Hotchkiss & Sons in Modoc county, Cal. Defendants denied having any property belonging to Hotchkiss & Sons, and asserted themselves to be the owners of said stock in trade, and refused to turn over the same to the sheriff for application to satisfy the execution. Under the execution upon the other property the net receipts of the sheriff amounted only to $192.46. With this exception the writ was returned nulla bona, and as a result the plaintiff has an unsatisfied judgment for over $1,000 against Hotchkiss & Sons, who were and are insolvent, and have no other property out of which the judgment can be realized. After alleging in conclusion that the transfer of the stock in trade was made to the defendants by Hotchkiss & Sons with intent to defraud the latter's creditors, plaintiff prays judgment against the defendants for the delivery to him of the stock in trade, or sufficient thereof to satisfy his judgment against Hotchkiss & Sons, or, in case delivery cannot be made, for judgment against the defendants, and each of them, for the amount of his judgment against Hotchkiss & Sons, with interest, etc.

The defendant Denehy Mercantile Company interposed a demurrer upon the grounds: (a) That the complaint did not state a cause of action; (b) that several causes were improperly united; (c) that they were not separately stated; and (d) that the complaint was ambiguous, unintelligible, and uncertain. The action is clearly in the nature of a "creditors' bill," and we can see no valid objection to the complaint.

[1] We are satisfied that only one cause of action is attempted to be stated. The alleged facts show plaintiff to be a judgment creditor, who has attempted unavailingly by legal methods to satisfy his judgment, and then invokes the equitable power of the court to subject to his claim the property of the judgment debtor which has been fraudulently conveyed to another party. The allegations in reference to the garnishment and proceedings under execution have no legal relation to a separate cause of action, but are simply indicative of the efforts made by plaintiff to avoid the necessity for resorting to the equitable action. Indeed, it has been held in this state that such attempt must be made before the creditor is in a position to attack the fraudulent conveyance. In Bickerstaff v. Doub, 19 Cal. 109, 79 Am. Dec. 204, it was said:

"A fraudulent sale cannot be attacked by a creditor merely from the fact that he is a creditor, but only when he has a judgment establishing his debt, and an execution issued thereon, or has some process regularly issued, as in the case of attachment, authorizing a seizure of the property."

The complaint herein having set forth the judgment and the return of execution nulla bona, it was not necessary to allege the attachment proceeding, but, of course, it could do no harm. The special demurrer for uncertainty, etc., was based upon the same contention that different causes of action had been commingled, and it is equally without merit.

[2] As to the general demurrer, we may say that no material facts seem to be omitted from the complaint. The general rule is, no doubt, that, since the statute provides for proceedings supplementary to execution (sections 717 to 720, Code Civ. Proc.), resort must be had to such proceedings before a creditors' bill will lie. But if said statutory proceedings do not afford an adequate remedy, as where there has been a void transfer of personal property by the debtor and the transferee claims the title, said supplementary procedings do not supersede the remedy by action. Rapp v. Whittier, 113 Cal. 429, 45 Pac. 703; Phillips v. Price, 153 Cal. 146, 94 Pac. 617. This case falls clearly within the exception, as the complaint alleges:

"That said defendants * * * denied and now deny that they had, or have, any property in their possession belonging to said M. Hotchkiss & Sons, and assert the fact to be that said stock in trade belongs to them, the said defendants, and that they have title thereto."

[3] However, it is due respondent's counsel to say that they do not specifically make this objection. The only reason they advance for their position as to the insufficiency of the complaint is found in this statement:

"If it is an action against defendant, as the vendee of M. Hotchkiss & Sons, for purchasing the stock of goods without giving the notice required by section 3440 of the Civil Code, it fails to state a cause of action. The effect of that statute is simply to make such sale void and leave the title to the property in the vendor so far as the creditors are concerned. In other words, the plaintiff could have levied his execution or attachment upon these goods while they were in the hands of M. Hotchkiss & Sons, and this sale without notice did not prevent him from following the goods and levying upon them in the hands of the vendee of

said M. Hotchkiss and Sons. The remedy of the plaintiff, if defendant purchased the stock of goods without giving the notice required by section 3440 of the Civil Code, was to follow and seize the goods."

The foregoing may be considered as a suggestion that the complaint should show the said steps to have been taken. So considered, it is sufficient to say that therein it clearly appears that just that course was pursued. It appears:

That the property was in the possession of said defendant D. S. Denehy Mercantile Company—the only defendant that has appeared in this court—and that the sheriff levied upon said property the writ of execution. "That after the levy of said writ of execution upon said defendant D. S. Denehy Mercantile Company, it neglected, failed, and refused, and still neglects, fails, and refuses, to deliver over to said sheriff, for the plaintiff, the aforesaid stock in trade, or any part thereof, so received by it as aforesaid from said M. Hotchkiss & Sons, or to pay to said sheriff the value thereof, or any part thereof, or to pay unto said sheriff the amount named in said writ of execution, or any part thereof." That the plaintiff did not take actual possession of the property was due to the action of the company in refusing to permit it, and, of course, it cannot attach any saving virtue to its own wrong.

It may be added that, if respondent company had not interfered, no doubt the sheriff would have taken the property into his possession and sold it to satisfy the demand, and this action would never have been brought. Nor do we think there is any merit in the claim that it does not appear but that the property at the time of the beginning of the action was in the possession of some other party, and, if so, the action would not lie against these defendants. But this is a mistake, both as to the fact and as to the law. The fact is alleged as follows:

"That at all times herein mentioned, and since the 30th of April, 1918, said defendant D. S. Denehy Mercantile Company, Incorporated, has had sole, exclusive, continuous, and unqualified possession of all the goods, wares, and merchandise belonging to said M. Hotchkiss & Sons, and now is the sole and exclusive and unqualified possessor of said stock of merchandise, and the whole thereof."

Moreover, if the company had transferred the property, the fraudulent vendee would still be liable for the value of the property to the creditors of the vendor. Swinford v. Rogers, 23 Cal. 234; 20 Cyc. p. 630.

We are satisfied that the ruling of the trial court was erroneous, and the judgment is therefore reversed, with directions to overrule the demurrer.

We concur: NICOL, Presiding Judge pro tem.; HART, J.

48 Cal. App. 46

BOYD v. BEARCE et al. (Civ. 2168.)

(District Court of Appeal, Third District, California. June 2, 1920.)

1. Bills and notes ⊂⊃523—Evidence held to show fraud in procuring possession of note.

In an action on a note, evidence *held* sufficient to support the finding of the trial court that a fraud was perpetrated on plaintiff by the maker's codefendant, as alleged in the complaint, in securing possession of the note from plaintiff.

2. Bills and notes ⊂⊃155—Provision for acceleration of time of payment on default renders note nonnegotiable.

A note having a provision for acceleration of time of payment of the principal if any installment of interest was not paid was nonnegotiable, and any subsequent purchaser or holder is held to stricter accountability as to notice of any infirmity in the title of the one transferring it than in case of a negotiable instrument.

3. Bills and notes ⊂⊃354—Inadequacy of consideration evidence as to holder's good faith.

Inadequacy of consideration paid for a note is a circumstance proper to be considered in determining the question of good faith on the part of the person who takes it.

4. Bills and notes ⊂⊃354—Maker of nonnegotiable note must inquire into right of person offering to surrender note for half its face value.

Where the maker of a nonnegotiable note has a good deal of paper out, and a third party offers to sell him his own nonnegotiable note for less than half its face value, he is under duty to make some inquiry as to why the third party makes such concession, and under what circumstances he came into the possession of the instrument.

5. Bills and notes ⊂⊃525—Evidence held to show purchase of note by maker was not in good faith.

In an action on a nonnegotiable note delivered by the payee to a third party and by him sold to the maker for less than half its face value, evidence *held* to support the trial court's finding that the note was not purchased by the maker in good faith.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by Josephine P. Boyd against Byron A. Bearce and M. P. Fries. From judgment for plaintiff, defendant Bearce appeals. Affirmed.

Arthur L. Levinsky, of Stockton (Clarence E. Fleming, of Stockton, of counsel), for appellant.

Harris & Hayhurst, of Fresno, and C. W. Miller, of Stockton, for respondent.

BURNETT, J. The appeal is from the judgment rendered in favor of plaintiff by

the superior court of San Joaquin county. The defendant Bearce was indebted to plaintiff in the sum of $2,958.68, evidenced by his promissory note in that amount, dated April 22, 1916, bearing interest at the rate of 7 per cent. per annum. Said note required the "interest to be paid annually, and, if not so paid as it becomes due, to bear interest at the same rate as said principal sum, but if default be made in the payment of interest, then the principal sum of this note shall immediately become due at the option of the holder hereof." The first year's interest on the note was not paid, and plaintiff's attorneys wrote to defendant Bearce on May 11, 1917, demanding payment of the interest, and again on May 18th following, notifying said defendant that the plaintiff elected to declare the whole of said note due and demanding payment of the sum. On May 22, 1917, defendant wrote to said attorneys that he had paid the note in full, having purchased the same from the defendant M. P. Fries on or about the 18th day of May, 1917. About the 15th day of May, 1917, defendant Fries called upon plaintiff for the purpose of inducing her to let him have the Bearce note for collection. After some conversation Mrs. Boyd delivered the note to Fries and he in return gave her his note for $1,600, and for security gave her 3,200 shares of the capital stock of Shasta National Copper Company and an agreement in writing as follows:

"Fresno, Cal., May 15, 1917.

"Mrs. Josephine P. Boyd, Fresno, Calif.—Dear Madam: In addition to the secured note given you this date, I hereby promise and agree to pay all money collected on the Byron A. Bearce note given me this day, over and above the sum of $1,600. M. P. Fries."

On May 15th Fries, at Fresno, called Mr. Bearce, at Stockton, by telephone and asked him what he would pay for the Boyd note. Mr. Bearce finally agreed to pay 50 cents on the dollar and wired Fries to that effect. Several days later Fries came to Stockton with the note and Mr. Bearce, according to his testimony, on seeing that the same was properly indorsed, gave Fries a check for $1,350 and credited him with $250 on account of money which Fries at that time owed to Mr. Bearce. On November 6, 1917, Fries sent Mrs. Boyd a check for $56 in payment of the sum semiannually due on his note for $1,600. This check was received by Mrs. Boyd and delivered to her attorney, Judge Harris, who on November 7th returned the same to Mr. Fries with the statement that Mrs. Boyd had not accepted Fries' note. About six months later Fries sent another check to Mrs. Boyd for $112, covering the first year's interest on his note for $1,600, and this was likewise returned to Fries. Thereafter Mrs. Boyd brought suit against Bearce for the full amount of the note, and the court gave her judgment for said full amount, together with $300 attorneys' fees. Fries was never served and did not appear at the trial. Plaintiff claimed in her complaint that Fries fraudulently obtained possession of said note and that defendant Bearce paid no consideration for it, and that at the time it was delivered to him he was familiar with the facts constituting the fraud consummated by Fries and that said defendant Bearce was not a purchaser in good faith. The court found that the fraud was perpetrated by Fries as alleged in the complaint, and, furthermore, as to Bearce, that it is not true that he paid no consideration for said note—

"and that it is not true that at the time it was delivered to said defendant Bearce he knew of the facts and circumstances of the loaning of said note to said defendant Fries by plaintiff, or the manner in which said defendant Fries came into the possession thereof, or that the plaintiff was the owner of said note, or entitled to the possession thereof, and in that behalf the court finds that the defendant Bearce paid for said note the sum of $1,350, and no more, and gave said defendant Fries in addition to said sum a credit for $250, and no more; that while defendant Bearce did not have actual knowledge of the facts and circumstances of said note as aforesaid and the manner in which said defendant Fries came into possession thereof, said defendant Bearce had sufficient information to put a reasonable person upon inquiry, and such inquiry would have disclosed the fact that said Fries got possession of said note through fraudulent representations; that said note was not indorsed by said plaintiff; that said Fries never had title to said note and never had right of possession thereof, and never had the right or authority to transfer or dispose of or to collect said note or any part thereof."

[1] As to the first of these considerations, it may be said that the finding of the court is abundantly supported. The testimony of plaintiff and her husband, or of either, is sufficient for that purpose. It may be admitted that the transaction as detailed by plaintiff presents a somewhat peculiar aspect, but her account is not inherently improbable, and we cannot say that the lower court was not justified in believing her. The trial judge, of course, had the advantages that go with a personal contact with the witnesses, and having been convinced that plaintiff was "an elderly woman, unskilled in the ways of the world, and apparently an easy prey," he had no difficulty in reconciling her eccentric conduct with the theory of her veracity and entire innocence of any wrongdoing. Indeed, the sufficiency of the showing as to this first branch of the case does not seem to be seriously disputed.

[2] The other question is more worthy of careful consideration. In viewing it, the

trial judge in the first place had regard to the fact that the note, having a provision for acceleration of the time of payment of the principal if any installment of interest was not paid, was nonnegotiable. Wetzel v. Cale, 175 Cal. 208, 165 Pac. 692. Therefore, under the decisions, any subsequent purchaser or holder is held to a stricter accountability as to notice of any infirmity in the title of the one transferring it than in case of a negotiable instrument. This circumstance is of some moment in testing the sufficiency of the showing made to justify the court's conclusion that appellant was not an innocent purchaser.

[3] One fact to which great significance was attached is that appellant paid only about 42 cents on the dollar for his note. There is no evidence that he was insolvent or unable to pay the full amount due, and the circumstances that he was thus permitted to purchase it at such a discount would naturally excite the suspicions of an honest man, and should have led to an inquiry as to the circumstances under which Fries secured possession of the note. Inadequacy of consideration is, indeed, not conclusive, but the authorities generally hold that it is a circumstance proper to be considered in determining the question of good faith. It is so held in Clark v. Troy, 20 Cal. 220. The question was carefully considered by the Supreme Court of Tennessee in Oppenheimer v. Bank, 97 Tenn. 19, 36 S. W. 705, 33 L. R. A. 767, 56 Am. St. Rep. 778, wherein is quoted with approval section 291 of Tiedeman on Commercial Paper, from which we make the following extract:

"And it may be stated, subject to an explanation of terms, that an inadequate price always puts the person upon inquiry and may, certainly, along with other suspicious circumstances, charge him with notice of existing defenses. But every price is not inadequate which is less than the face value of the instrument purchased. Commercial paper of every kind has its commercial value, rising above or falling below par, according to the financial credit of the person liable on it. Only that price is inadequate which falls below the market value, and if the disproportion between the price paid and the market value be very great, it is fair and just to presume that the purchaser had reasonable grounds for suspecting fraud or some other defense to the instrument. Each case must, therefore, stand on its own merits. One-half the face value may, under some circumstances, be a grossly inadequate price, while, under different circumstances, it may be greatly in excess of what the instrument is worth on the market."

[4] Herein, there is no direct evidence of the market value of said note, but it is fair to assume that, if appellant had been insolvent or unable to pay his debts in full, he would have made some showing to that effect. He did testify that a good deal of his paper was out, but he did not claim that he was financially embarrassed in any way. Under such circumstances, where a third party offers to sell to the maker the latter's own note for less than one-half its face value, is it not just to exact of him some inquiry as to why the vendor makes such concession and under what circumstances he came into possession of the instrument? We think the transaction would naturally excite the suspicion of the average man, and his impulse would be to make inquiry of the payee of the note. But, as far as the record shows, appellant did not even question Fries as to any of the circumstances connected with his possession or asserted ownership of the instrument. This conduct was rather singular upon the theory of the good faith of appellant.

Moreover, there are other circumstances in the case "of such a strong and pointed character as necessarily to cast a shade upon the transaction and to put the holder on inquiry," adopting the language of Judge Story in his work on Promissory Notes, § 197,

Among these is the fact that appellant had reason to believe that Fries was impecunious. Appellant had been compelled to sue him for a debt and had recovered judgment, but had not been able to satisfy it. At the time of this transaction Fries owed him about $1,500. It also appears that Fries by his conduct in selling "Tidewater" stock had discredited himself with appellant, and it seems improbable that with this relation existing between the two appellant should have calmly taken it for granted that Fries had become the bona fide holder of the note.

Again, appellant testified that Mrs. Boyd had promised him that she would not transfer the note, and two or three days before said transaction, with Fries appellant received from Mrs. Boyd's attorneys a letter containing the following statements:

"Mrs. Josephine T. Boyd has handed to us your note dated April 22, 1916, for the principal sum of $2,598.68, payable to her at the city of Fresno, on or before three years after date. The interest on this note fell due on April 22d of this year, but she has not received the same. She advised us that she wrote you a letter a short time before it was due, requesting payment, but that she never received any reply. Will you please send this interest to us for Mrs. Boyd?"

These circumstances would naturally inspire caution in considering the proposition of a stranger to sell said note for less than 50 per cent. of its face value.

[5] Moreover, appellant was contradicted in some material respects and, in a legal sense, this would justify the trial court in discrediting his testimony. The fact also that he did not attempt to take the deposition of Fries in corroboration of his own testimony and his manner upon the stand as

a witness may have been deemed significant by the trial judge. We mention the foregoing, not as indicative of any opinion of our own as to the credibility or good faith of appellant, but to demonstrate that the case is one falling within the familiar rule as to the province of the trial court in determining the probative force of the evidence.

It is suggested by appellant that the decision is unjust, because thereby respondent secures the full payment of her note from appellant in addition to having the note of Fries for $1,600. However, the circumstances are such as to create the suspicion, if not to justify the conviction, that said note of Fries, together with the stock pledged to secure its payment, is altogether worthless. At any rate, respondent offered to surrender them to appellant and is willing to do so now.

As we view the record, we think the judgment should be affirmed; and it is so ordered.

We concur: HART, J.; NICOL, Presiding Judge, pro tem.

48 Cal. App. 29

KEELER v. BAIRD. (Civ. 3345.)

(District Court of Appeal, First District, Division 1, California. June 1, 1920. Hearing Denied by Supreme Court July 30, 1920.)

1. Executors and administrators ⇐437(4)—Action on claim after dismissal of former as premature held not barred by limitations.

Where plaintiff's action to establish a claim against the estate of her father, which she elected, under Code Civ. Proc. § 1496, to treat as rejected, was dismissed as premature because the writing on which it was based provided for payment on distribution, a subsequent action brought six months after distribution was not barred by section 1498, requiring action on a rejected claim to be begun within three months after notice of rejection; the fact that plaintiff in the first action elected to treat the claim as rejected not starting the running of limitations, as the action was premature.

2. Appeal and error ⇐842(2)—Conclusion that former action on claim started limitations one of law.

A conclusion of the trial court that a former action on the claim against the estate of decedent started the running of limitations is one of law rather than fact, and where erroneous may be disregarded and corrected by the decision of the appellate court on the facts found.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by Florence Gail Keeler against Mary Frances Baird, as executrix of the estate of B. M. Baird, deceased. From a judgment for defendant, plaintiff appeals. Reversed, with directions.

Geo. Cosgrave, of Fresno, for appellant.

W. P. Thompson and J. P. Bernhard, both of Fresno, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the defendant in an action instituted by the plaintiff against the said defendant, as executrix of the estate of B. M. Baird, deceased, to establish a claim against said estate.

The facts out of which said claim arose maye be briefly summarized as follows: One Alfred Baird was for many years a resident of Fresno county, where he had amassed a considerable amount of property, chiefly in the form of real estate. Several years before his death, which occurred in 1914, he undertook to make a division of certain of his lands between his two children, Florence Gail Keeler, the plaintiff in this action, and B. M. Baird, her brother. In his effort to accomplish this purpose he caused several deeds to be made and placed in escrow, to be delivered at his death. In the deed to plaintiff there was included certain land which he afterward determined to convey to his son, B. M. Baird, and he therefore requested the plaintiff to execute a deed back to him of said particular piece of land. She complied with this request by executing a quitclaim deed on September 24, 1907, conveying the land in question to her father, who on the same day conveyed the same to B. M. Baird, his son. At the same time and as a part of the same transaction Alfred Baird required his said son to execute an agreement in writing by which, in consideration of the conveyance of said land to him, B. M. Baird agreed to pay to the plaintiff "out of his share of his father's and mother's estate, when the same is distributed to him, money or property of the value of $2,000 in lieu of said land." Later on Alfred Baird changed his mind in regard to the deeds which had been placed in escrow, and withdrew and destroyed them, and thereupon made a will by which he divided the remaining portion of his property between the plaintiff and his son, B. M. Baird. By the terms of this will, and apparently having in mind the fact that the plaintiff retained the aforesaid agreement, Alfred Baird directed in his said will that the sum of $2,000 should be paid to his said son; the same being in excess of the portion coming to his daughter under the will. Alfred Baird died on November 22, 1914; his said will was duly offered and admitted to probate, but before the distribution of his estate thereunder his son, B. M. Baird, also died, and the defendant herein, Mary Frances Baird, was appointed executrix of his estate. Plaintiff presented to the latter her claim against the estate of B. M. Baird, deceased, on May 3, 1916, which claim was founded upon the aforesaid written agreement. The ex-

ecutrix took no action in regard to this claim in the way of either allowing or rejecting it. On February 18, 1918, plaintiff commenced an action to compel the allowance of the claim, basing her said suit upon her alleged election to consider the claim rejected. At the time of the institution of this suit distribution had not been made of the estate of Alfred Baird, and said action, being therefore determined on a demurrer to the complaint to have been prematurely brought, was dismissed by the plaintiff. The decree of distribution was entered in the estate of Alfred Baird on March 29, 1918, and thereafter and on October 28, 1918, the plaintiff commenced the present action.

Among other defenses, the defendant pleaded that said action was barred by the provisions of section 1498 of the Code of Civil Procedure.

Upon the trial of the cause the court made its findings in favor of the plaintiff so far as the facts attending the creation and presentation of said claim are concerned; but the trial court further found that the plaintiff, by the institution of her former action upon said claim, had thereby elected to treat her claim as having been rejected on February 18, 1918, the date of the institution of said former action; and the court therefore concluded and found that the present suit, not having been commenced until October 28, 1918, was barred by the provisions of section 1498 of the Code of Civil Procedure. Judgment was accordingly rendered in the defendant's favor, and from that judgment this appeal is taken.

The sole contention of the appellant upon this appeal is that the trial court was in error in its conclusion that this action was barred by the provisions of said section of the Code of Civil Procedure.

In order to determine this question several sections of said Code, with relation to the presentation and rejection of claims and to institution of actions to establish the same, must be considered and construed.

By the terms of section 1496, Code of Civil Procedure, when a claim has been presented to the executor or administrator of an estate he must allow or reject it, and his allowance or rejection thereof must be indorsed upon said claim with the day and date thereof, and the claim bearing this indorsement must be presented to the judge for approval, and if approved by him must be filed with the clerk. The said section further provides that—

In case "the executor or administrator refuse or neglect to indorse such allowance or rejection for ten days after the claim has been presented to him, or if the judge refuse or neglect to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect may, at the option of the claimant, be deemed equivalent to a rejection on the tenth day."

Section 1498, Code of Civil Procedure, provides that—

"When a claim is rejected either by the executor or administrator, or a judge of the superior court, written notice of such rejection shall be given by the executor or administrator to the holder of such claim or to the person filing or presenting the same, and the holder must bring suit in the proper court against the executor or administrator within three months after the date of service of such notice if the claim be then due, or within two months after it becomes due; otherwise the claim shall be forever barred."

[1] It was the conclusion of the trial court, as expressed in its findings, that the institution by the plaintiff of her former action to establish her said claim against the estate of B. M. Baird, deceased, constituted an election on her part to consider said claim as having been rejected by the executrix of said estate, and that she was bound by such election, notwithstanding her dismissal of said former action after the trial court had ruled upon demurrer that the same had been prematurely brought. We are unable to agree with this conclusion. It would seem to be clear from the other findings of the court that said first action was prematurely brought, for the reason that at the time of its institution there had been no distribution to B. M. Baird or his successors in interest of his share in his father's estate, and hence that the claim of the plaintiff was, by the express terms of the writing upon which it was predicated, not then due. Miller v. Miller, 171 Cal. 269, 152 Pac. 728. By the dismissal of the action thus prematurely brought, the plaintiff, in our opinion, placed herself in the same position as though such action had not been commenced, and, in substance and effect, by the dismissal of said action withdrew her option to consider her claim as having been rejected by the executrix of said estate. While no authority has been presented on either side directly construing those provisions of the foregoing sections of the Code of Civil Procedure, which deal with the election of the claimant to deem a claim which has not been acted upon by the executor or administrator of an estate as having been rejected, we think a clear analogy exists between the option which a claimant against an estate may exercise in that regard, and the option which a creditor in an obligation may have to consider the whole sum named in said obligation to be due upon the debtor's failure to pay an installment of the principal or interest thereon. In such a case it has been held that the dismissal of the creditor's action upon the exercise of such option amounted to a withdrawal and waiver of the option. Moore v. Russell, 133 Cal. 297, 65 Pac. 624, 85 Am. St. Rep. 166; Cal. Safe & Loan Society v. Culver, 127 Cal. 107, 59 Pac. 292.

The same principle would seem to be applicable to claims against an estate. The language of section 1498 of the Code of Civil Procedure lends strength to this conclusion, since it is therein expressly provided that the time within which a claimant must bring suit against the executor or administrator of an estate to establish such claim is three months after the date of service of the written notice of the rejection of the claim, if the claim be then due, or within two months after it becomes due; otherwise the claim shall be forever barred. The clear intendment of this section is that it is the giving of said notice of the rejection of the claim by the executor or administrator which sets in motion the limitation of the time within which an action must be brought to establish the claim, and that the option which the claimant has under the preceding section of said Code to consider his claim as having been rejected for the purpose of enabling him to bring an action thereon is not such as in the event of the dismissal of such action shall operate to set in motion the provisions of the later section, so as to bar said claim in the event that no action to establish the same is not commenced within the periods named therein.

[2] The conclusion of the trial court embraced in its findings, to the effect that the plaintiff's institution of the former action was to be deemed such a rejection of the claim as to set the statute in motion, was in the nature of a conclusion of law rather than a finding of fact; and, that being so, this court is in a position, in disagreeing with this conclusion, to consider the other findings in the case sufficient to sustain a judgment in the plaintiff's favor without a retrial of this cause.

It is therefore ordered that the judgment herein be reversed, and that the trial court be and is hereby directed to render and enter a judgment in favor of the plaintiff in the action.

We concur: WASTE, P. J.; KOFORD, Judge pro tem.

47 Cal. App. 623

PYPER v. JENNINGS, Justice of Peace. (Civ. 3332.)

(District Court of Appeal, Second District, Division 2, California. May 21, 1920.)

1. Discovery ⟸97(6)—Proof precedent to requiring delivery up of private paper.

It is a condition precedent to the right of a court to require a person to deliver up a private book or paper for examination that it be made to appear by clear and unequivocal proof that the book or document contains evidence relevant and material to the issues before the court, and that the precise book, paper, or document containing such evidence has been so designated or described that it may be identified.

2. Libel and slander ⟸54—Defendant must justify in sense in which innuendo explains words.

Where the defendant in a libel case sets up the truth as a defense, he must justify the words in the sense in which the innuendo explains them, assuming, of course, that the words are capable of the meaning imputed to them by the innuendo.

3. Libel and slander ⟸94(1)—Plea of justification must be as broad as charge.

The general rule is, in a libel case, that the plea of justification must be as broad as the charge, and in point of law must be identical with it.

4. Evidence ⟸106(5)—Witnesses ⟸37(4)—Reputation not to be established by proof of specific misconduct.

Reputation, or, as it is sometimes called, character, is a fact to be proved by testimony of witnesses who know it, and not by proof of specific instances of misconduct which may or may not have affected it injuriously.

5. Libel and slander ⟸86(2)—Innuendo held not justified.

A publication concerning mayor of city, "They were surprised you ever put him in office, dumfounded at his re-election, and amazed beyond measure that you continue to put up with him," did not justify an innuendo to the effect that he was not worthy of the confidence of the electors.

6. Libel and slander ⟸54—Charge of bad reputation rather than dishonesty.

An article concerning the mayor of San Diego that he might obtain 100 citizens from Tia Juana (in Mexico) to stand by him to suppress crime, was a charge that the reputation of the mayor in such place was such that the dissolute characters there would stand by him in what they would believe to be a simulated effort to suppress crime, and the defendant could not justify by proving specific misconduct on the part of the mayor.

7. Libel and slander ⟸86(2)—Innuendo held not justified by language used.

A statement in writing that the mayor had a bad reputation among certain persons, and that the chief of police of city deserved credit for having control of his temper and must be worthy of the confidence expressed on all sides, did not justify an innuendo that the mayor was not worthy of such confidence.

8. Libel and slander ⟸86(1)—Innuendo may explain but cannot enlarge charge.

The defendant in a libel action may justify the substance of a publication in the sense in which the innuendo explains it, if it explains it fairly, but the import of the words used in the publication cannot be enlarged, extended, or changed by the innuendo, and, if it is, the innuendo, to the extent that it is not borne out by defamatory words will be rejected as surplusage.

9. Contempt ⊂⊃63(4)—Order punishing witness for refusing to produce document must recite facts showing pertinency.

An order punishing a witness for contempt for refusing to produce a book or other document must recite the facts that constitute the contempt and confer jurisdiction upon the court to make the order, and for this purpose must recite facts showing that the document contains evidence pertinent and material to the issue to be tried.

10. Libel and slander ⊂⊃110(3)—Evidence of misuse of trust funds inadmissible to prove charge of gambling.

Where the defamatory words in a libel case charged one with the gambling habit, the truth of the charge could not be proved by evidence that libeled person had misused trust funds.

Application by Alexander C. Pyper for writ of prohibition prayed to be directed to Lacy D. Jennings, Justice of the Peace in and for the Township of San Diego, County of San Diego, State of California, to restrain enforcement of a judgment of contempt. Application granted.

Morganstern & Dorn, of San Diego, for petitioner.

Curtis Hillyer and Wright & McKee, all of San Diego, for respondent.

FINLAYSON, P. J. This is an application for a writ of prohibition to restrain respondent, justice of the peace for the township of San Diego, from enforcing a judgment of contempt rendered by him in an action for criminal libel then pending in his court and entitled "The People of the State of California, Plaintiff, v. The San Diego Sun Publishing Company, a Corporation, and R. A. Lacy, Defendants."

The criminal action, in the course of which the contempt proceedings arose, is based upon a defamatory article alleged to have been published of and concerning Louis J. Wilde, mayor of the city of San Diego. The defendants in the criminal action undertook to prove the truth of the libelous charge. For that purpose they sought to cause to be produced in court certain books in the possession of the petitioner here. These books, so it is claimed, show the payments into and disbursements from a certain trust fund, under the control of Wilde, known as the Community Oil Well Fund. As a basis for their claim that the books contain evidence relevant and material to the issues presented by the complaint in the action for criminal libel, the defendants in that action contended, as does the respondent here, that the entries in the books show that Mayor Wilde was not a man of integrity, in this, that they disclose that he had applied some of the moneys in the Community Oil Well Fund to uses foreign to the purposes for which that trust fund had been created. The fund is one in which private persons only are interested.

While a witness in the justice's court, petitioner was ordered by respondent to produce the books. Upon his refusal to comply with that order petitioner was adjudged guilty of contempt of court and sentenced to imprisonment in the city jail for one day.

Respondent has demurred to the petition, and, at the same time, has filed a written answer. It was stipulated at the hearing that, in so far as the averments of the answer are allegations of fact and not mere conclusions of law, its averments are true. We therefore deem it not only the more expeditious course, but proper, to dispose of the case on its merits, and, for that purpose, to consider the case in its entirety—the facts averred in the answer as well as those alleged in the petition for the writ.

[1] It is the established rule that, as a condition precedent to the right of a court to require a person to deliver up a private book or paper for examination, it must be made to appear, by clear and unequivocal proof: (1) That the book or document contains evidence relevant and material to the issues before the court; and (2) that the precise book, paper, or document, containing such evidence, has been so designated or described that it may be identified. Ex parte Clarke, 126 Cal. 235, 58 Pac. 546, 46 L. R. A. 835, 77 Am. St. Rep. 176; Kullman, etc., Co. v. Superior Court, 15 Cal. App. 276, 114 Pac. 589; Funkenstein v. Superior Court, 23 Cal. App. 663, 139 Pac. 101. For the purpose of this decision we shall assume that, by evidence properly adduced in the justice's court during the trial of the criminal action, the books themselves, and so much of their contents as the defendants in that action sought to introduce in furtherance of their declared purpose to show that Wilde had improperly used certain moneys of the Community Oil Well Fund, were identified with all the particularity required for compliance with the constitutional guaranty against unreasonable searches and seizures. Under the rule just adverted to, however, there was this further requisite: It was essential, as a condition precedent to the right of the justice's court to require petitioner to deliver the books up for examination, that it be made to appear, by clear and unequivocal proof, that the books contain evidence relevant and material to the issues in the criminal action. In our opinion the entries in the books, assuming that they do show that at times Mayor Wilde misused or misapplied certain of the moneys of the trust fund, are not material to any issue in the criminal action. Conceding to the defendants in that action all that they there claimed respecting the nature of the book entries, the entries, nevertheless, would not tend to prove the truth of any of the defamatory matters in the alleged libelous article as charged in the criminal complaint.

The alleged libelous article, published in

the San Diego Sun, a newspaper printed and published in that city, is as follows:

"Editor Sun: Having come from a northern city where one of your city officials is only too well known, it was with considerable amusement that I read an article by him in a morning paper some few days ago. Hearing the public on every hand referring to same as another 'Brain Storm,' proved San Diegans are 'next,' but truly it is said your northern neighbors are not aware of this. They were surprised you ever put him in office, dumfounded at his re-election and amazed beyond measure that you continue to put up with him. San Diego must be virtuous if patience is anything to go by; but there comes a time when patience ceases to be a virtue. According to his own statements in the Sunday paper the 100 citizens didn't show up. Why doesn't he go to Tia Juana? He might get 100 there to stand by him, even though it is said there is honor among thieves. The ungentlemanly remarks and foul language he allows to come in print above his name must disgust even the worst. Although hearing the best reports of the San Diego police department, and personally knowing of some very efficient work done by same, I can speak only in terms of the department. If, however, your police chief is anything like your mayor described him he must be Wilde's twin brother, for he surely drew his own picture to perfection. What I can't understand is that the alleged ungovernable temper of your chief hasn't let loose and made a large and rather dirty grease spot in your city hall. He surely deserves credit for having control of that ungovernable temper (which is more than we can say of some folks), and must be worthy the confidence in him which I can find expressed on all sides. I do feel, however, your mayor is to be pitied rather than censured, but it is a shame that your lovely city must be the goat and suffer such humiliations. You are laughed at, but what can you expect with your jazz cat gambles and brain storms? You have an exceptional council; get rid of your Wild mayor and San Diego will take her place in the top ranks. Yours, from the north, R. A. Lacy, Gen. Del."

While this defamatory article may have a tendency to expose Mayor Wilde to public ridicule, it will be noticed that nowhere does it make any direct charge of dishonesty—certainly none of the character sought to be proved by the books that petitioner refused to produce—though, of course, it is possible that some passages of the letter published in the Sun may have a covert meaning, which, read in the light of such extrinsic circumstances as formerly it was the office of the inducement to narrate, may be susceptible of a construction imputing to the mayor dishonesty in financial transactions. But, unless, by way of innuendo, there is some averment in the criminal complaint that properly places such a construction upon the words of the defamatory article, the defendants in the criminal action cannot adduce evidence of any specific misappropriation of trust funds.

[2] The rule is that where the defendant in a libel case sets up the truth as a defense, he must justify the words in the sense in which the innuendo explains them, assuming, of course, that the words are capable of the meaning imputed to them by the innuendo. Snyder v. Tribune Co., 161 Iowa, 671, 143 N. W. 519; note to Hutchins v. Page, 31 L. R. A. (N. S.) 140; 25 Cyc. 460; Newell on Slander and Libel, p. 793. In Snyder v. Tribune Co., supra, the court said:

"A proper plea of justification either expressly or impliedly admits the truth of the innuendo [for the purpose of the justification]; and, where the defendant sets up the truth, he must justify the words in the sense in which the innuendo explains them, unless the words used in the innuendo enlarge the natural and ordinary sense of the language or otherwise place a false construction thereon."

The complaint in the action for criminal libel, after setting forth the libelous article in hæc verba, proceeds, by the averment of what the pleader deemed to be appropriate innuendoes, to explain certain passages by alleging the meaning that the defendants intended to convey to readers thereof. It is claimed by respondent that these innuendoes give to the libelous article such a meaning that the defendants in that action, for the purpose of proving the truth of the libelous charges, may rightfully show any specific act of dishonesty on the part of Mayor Wilde, and that, for that purpose, the books showing Wilde's disbursements from the Community Oil Well Fund were admissible in evidence.

Taking up now the particular innuendoes relied upon by respondent to justify his order adjudging petitioner guilty of contempt: By way of innuendo, the complaint in the criminal action alleges that—

"By and through the said letter above set forth the said defendants then and there intended to convey to any and all persons who read the same, by the use of the words 'where one of your city officials is only too well known,' that he, the said Louis J. Wilde, was, in the said northern city, unfavorably known, and was not entitled to the respect of those with whom he was acquainted in said northern city *because he, the said Louis J. Wilde, lacked integrity.*"

We have italicized the words of this innuendo upon which respondent particularly relies.

[3, 4] The words used in the alleged defamatory article, "a northern city where one of your city officials is only too well known," at most can import no more than that among the inhabitants, or some of them, of a city north of San Diego, Mayor Wilde bears an unsavory reputation. An odious reputation in some unidentified northern city is therefore the gist or sting of the libelous charge. The defamatory charge implies no particular act committed by Wilde. Nor does it impute a reputation for the commission of any par-

ticularly improper, immoral, or criminal act; but only that, in the estimate of the public in some unnamed city, his reputation is bad —that his good name, credit, or honor, as derived from public opinion in that northern city, is to some extent impaired. The general rule is that the plea of justification must be as broad as the charge, and, in point of law, must be identical with it. Here, in order to justify, by proof of the truth of the words "a northern city where one of your city officials is only too well known," it would be necessary to show that in the northern city referred to by the author of the article, or which the readers understood to be the city referred to, Mayor Wilde's general reputation is not good. Reputation, or, as it is sometimes called, character, is a fact to be proved by the testimony of witnesses who know it, not by the proof of specific instances of misconduct which may or may not have affected it injuriously. Every man is bound, and is supposed to be always prepared, to answer and repel imputations upon his general reputation whenever that reputation is by the rules of law assailable in court, but not to answer specific charges of misconduct where no specific charge is imputed by the defamatory article of which he complains. Particular instances of misconduct on the part of a plaintiff in a civil action for libel, or of the complaining witness in an action for criminal libel, have no necessary connection with his reputation. It may not be known or believed that such specific acts of misconduct have in fact occurred, and so their occurrence may have produced no effect upon the public mind, and, consequently, have nothing to do with the good or bad reputation of the person libeled. Here the defamatory article merely implies that San Diego's mayor has acquired, in some unnamed community, a bad reputation, or at least that his general reputation in such community is, to some extent, impaired. But that is a matter that rests upon public opinion, and may exist without any just foundation. It is the existence of the public opinion, and not the foundation on which that opinion rests, that is the fact put in issue. There is therefore no necessary connection between any specific act of misappropriation of trust funds, such as may be disclosed by the entries in these private books of account, and a loss of Wilde's good reputation in some unidentified city where, it is charged, he "is only too well known." The case of Swift v. Dickerman, 31 Conn. 285, 293, is somewhat instructive in this connection. It was held in that case that where the libelous article reflects upon the general professional reputation of a physician, evidence of specific instances of mistakes in his treatment of his patients is not admissible. The general line of reasoning pursued by the Connecticut court in that case is applicable here. See, also, Cooper v. Greeley, 1 Denio (N. Y.) 347, 365. For these reasons we hold that the order directing petitioner to produce the books of the Community Oil Well Fund was not warranted by anything alleged in the innuendo that seeks to give point to the charge that Mayor Wilde "is only too well known" in the northern city referred to by the author of the defamatory article.

[5] It next is sought to justify the contempt order by this averment of the criminal complaint, alleged by way of innuendo:

"By the use of the words 'They were surprised you ever put him in office, dumfounded at his re-election, and amazed beyond measure that you continue to put up with him,' it was intended to convey to the persons who read said letter that said northern neighbors could not understand how the people of San Diego would re-elect said Louis J. Wilde to the office of mayor of the said city of San Diego, and that he, the said Louis J. Wilde, was not entitled to be re-elected, *nor was he worthy of the confidence of the electors of said city.*"

It is the last clause of this averment, italicized by us, upon which respondent relies to justify his order adjudging petitioner guilty of contempt. But this innuendo, if respondent's interpretation of it be accepted as that intended by the pleader, is much too broad. As construed by respondent to justify his order to produce the books, this part of the innuendo gives to the language of the defamatory article a forced and unnatural meaning. The language of the alleged libelous article is:

"They [your northern neighbors] were surprised you ever put him [Mayor Wilde] in office, dumfounded at his re-election and amazed beyond measure that you continue to put up with him."

These words, read in the light of their context, can only mean that the "northern neighbors," whoever they may be, by reason of Mayor Wilde's reputation as they know it, were surprised, dumbfounded, and amazed. It may well be that in the opinion of these northern neighbors, and solely because of the reputation that he bears among them, Wilde was not entitled to be re-elected and is not now worthy the confidence of the electors of San Diego. But this is not tantamount to a charge that Mayor Wilde, in fact, was not entitled to be re-elected, or that, in fact, he is not worthy the confidence of his San Diego constituents. The gist or sting of the charge is that Mayor Wilde bears a poor reputation among the members of some northern community—that his reputation among them is so poor that they were surprised that the electors of San Diego put him in office, etc. So here again, the fact put in issue is the state of the public mind in some unnamed northern city. The truth of the charge can only be shown by direct evidence of Mayor Wilde's general reputation for trustworthiness in the particular northern city that the

author of the defamatory article had in mind when he wrote the letter to the San Diego Sun. Such evidence can be given only by those who can testify that they know Wilde's reputation in the northern city referred to by the author of the article. To give to that part of the innuendo italicized by us—the part upon which respondent relies to justify his order—an interpretation consonant with the obvious meaning of the defamatory words sought to be explained thereby, it must be construed as meaning that San Diego's northern neighbors, because of what they believe Wilde to be, could not understand how or why he was entitled to be re-elected, or how or why he should be worthy the confidence of the electors of San Diego.

[6] It is alleged in the complaint in the criminal action, by way of innuendo, that by the words "according to his own statements in the Sunday paper the 100 citizens didn't show up. Why doesn't he go to Tia Juana? He might get 100 there to stand by him, even though it is said there is honor among thieves"—the defendants in the criminal action intended to convey to readers of the article that Mayor Wilde had been unable to obtain 100 citizens of San Diego to assist him in suppressing crime in that city, and that therefore he should go to Tia Juana, Mexico, where he would find 100 men who might be willing to assist him in an apparent effort to suppress crime in San Diego, but that they would not make any bona fide effort to suppress crime, because they are men of dissolute character and would be in sympathy with Mayor Wilde and would be guided by him in anything he undertook, "because of the fact that he, the said Louis J. Wilde, was not a citizen of good morals or integrity, or good character, and was not acting in good faith in his declared purpose to suppress crime in San Diego." The sting of the libelous words, as explained by this innuendo, is that Mayor Wilde's reputation among the habitués of Tia Juana is such that they, or 100 of them, would be willing to stand by him in a simulated effort to suppress crime, and would be guided by him in anything he undertook. It is what the 100 denizens of Tia Juana think of Wilde, and not what he actually is, that will determine their attitude toward him and his official conduct. He may or may not be honest in fact. But whether he be in fact a man of integrity or the reverse, the 100 dissolute characters of Tia Juana will be guided by him because, and only because, of what they believe him to be.

The publishers of the defamatory article, in almost every instance throughout their attack upon Wilde, have screened their assault behind either a direct or a veiled reference to Wilde's reputation among persons of a certain community or among those of a certain class. First, there is the reference to Wilde's reputation among the people of a northern city—San Diego's northern neighbors. Now there is a reference to the dissolute characters of Tia Juana, and their attitude toward Wilde—based, necessarily, upon what they think of him. By the defamatory words which we at present are considering, the publishers of the article screen their attack with the veiled implication that Wilde's reputation among the habitués of Tia Juana is such that they believe that he is "not a citizen of good morals or integrity, or of good character, and is not acting in good faith in his declared purpose to suppress crime," and that because they so believe they will be willing to stand behind him and be guided by him. This, manifestly, is the meaning intended. For obviously the 100 frequenters of Tia Juana will be guided by what they believe Wilde to be, not what he may in fact be. Therefore it is his reputation among the men of Tia Juana that Wilde must come prepared to defend, not his innocence of any and every specific charge of dishonesty that defendant may unexpectedly spring at the trial. We are not to be understood as holding that where some specific act of wrongdoing is the sting of the charge the defendant in a libel action cannot justify by proof of the truth of such specific act of misconduct, even though such wrongful act be covertly conveyed to the readers of the article as an implicit concealed in some reference to the reputation of the person libeled. What we do hold is that where, as here, the libelous article, without imputing any specific act of dishonesty, seeks to blacken the good name of the object of the defamatory words by vague references to some ill-defined opprobrious opinion others have of him, without conveying to the readers any sharply edged delineation of that opinion, the defendant can only justify by direct proof of bad, or at least impaired, reputation in the community or among the class of persons referred to in the defamatory article.

[7, 8] It is alleged in the criminal complaint that, by the use of the words "he [the chief of police] surely deserves credit for having control of that ungovernable temper (which is more than we can say of some folks), and must be worthy the confidence in him which I find expressed on all sides," it was intended to convey to readers of the article that the chief of police of San Diego had proper control of his temper and was worthy the confidence of the people of San Diego, but that Wilde "was not worthy of such confidence." This averment also is relied upon by respondent to justify his order directing petitioner to produce the books. But the innuendo, in so far as it undertakes to explain the libelous words by ascribing to them the meaning that Wilde is not worthy the confidence of the people of San Diego, is not supported by the libelous language that it seeks to explain. The innuendo improperly enlarges the plain and unambiguous meaning of the words of the article. The words of

the defamatory article are: "He [the chief of police] * * * must be worthy the confidence in him which I find expressed on all sides." This language cannot be made to carry the covert charge that Mayor Wilde does not deserve the confidence of the people of San Diego. An innuendo seeking to give to the words of the published article any such meaning enlarges the natural and ordinary sense of the words. Without doubt, the ascription to one person of some particular virtue may be made in such a manner as to imply that another, at whom the blow is indirectly aimed, is lacking in that virtue. But here the libelous article affords no basis for the claim that any such contrasting of the two men was intended. It is made sufficiently apparent from the context that praise of San Diego's chief of police cannot be regarded as an indirect reflection upon the mayor. At any rate, the praise of the former cannot be regarded as carrying the imputation that the latter has forfeited his title to confidence by reason of any act of dishonesty. The defendant in a libel action may justify the substance of the publication in the sense in which the innuendo explains it, if it explains it fairly, but the import of the words used in the publication cannot be enlarged, extended, or changed by the innuendo, and, if it is, the innuendo, to the extent that it is not borne out by the defamatory words, will be rejected as surplusage. We think that that part of the innuendo that ascribes to the words of the libelous article the meaning that Wilde is not worthy the confidence of the people of San Diego places a false and unwarranted construction upon the words of the published article, and should be rejected as surplusage.

[9, 10] Finally, it is claimed by respondent that the entries in the books of the Community Oil Well Fund, showing, so it is claimed, the misuse of trust funds by Wilde, are relevant to the issues presented by these averments of the complaint in the criminal action:

"By the use of the following words, 'I do feel, however, your mayor is to be pitied rather than censured, but it is a shame that your lovely city must be the goat and suffer such humiliations. You are laughed at, but what can you expect with your jazz cat gambles and brain storms?' it was intended to have the readers of said letter understand that he, the said Louis J. Wilde, was mentally irresponsible, and that by reason thereof he was to be pitied rather than censured, and that it was a shame that San Diego was made to suffer because of the fact that Louis J. Wilde was the mayor of said city, and that he, the said Louis J. Wilde, was causing persons residing outside the city of San Diego, and therein, to laugh at San Diego, because he, the said Louis J. Wilde, was engaged in gambling, and that he was suffering from mental unsoundness."

Here the stings of the publication are that Wilde is mentally unbalanced and that he has been engaged in gambling. We do not know whether the books of the Community Oil Well Fund show that Mayor Wilde has been engaged in gambling. But, if they do, that fact can afford no foundation for the order adjudging petitioner guilty of contempt. The rule is that an order punishing a witness for contempt for refusing, in open court, to produce a book or other document must recite the facts that constitute the contempt and confer jurisdiction upon the court to make the order. For this purpose the order must recite facts showing that the document contains evidence pertinent and material to the issue to be tried. Overend v. Superior Court, 131 Cal. 280, 63 Pac. 372. Here the order adjudging petitioner guilty of contempt, a copy of which is annexed to respondent's answer, contains no recital that the books of the Community Oil Well Fund show that Wilde has ever been engaged in gambling. The most that the order attempts to show is that the books disclose that Wilde has misused the moneys of a fund intrusted to him. A charge that Wilde "was engaged in gambling" is not a charge of dishonesty of the character involved in the misuse of trust funds. Without enlarging upon the iniquity of gambling, suffice it to say that, however much moral obliquity may inhere in that vice, its unethical features are not of the character that distinguishes such downright acts of dishonesty as the misappropriation of trust funds. Where a charge is made in general terms imputing to another a habit or custom of wrongdoing, it has been held that particular acts of misconduct of the same character as the offense charged are admissible in evidence as tending to prove the truth of the charge; but never has it been held that wrongful acts of an entirely dissimilar character may be given in evidence in proof of the charge. 17 R. C. L. 413. It follows, therefore, that where the defamatory words charge one with the gambling habit the truth of the charge cannot be proved by evidence that the libeled person has misused trust funds.

For the foregoing reasons, we are of the opinion that Wilde's wrongful appropriation of the moneys of the Community Oil Well Fund, if, in fact, he did misappropriate them, was not relevant to any issue presented by the complaint in the criminal action, and that therefore the books that this petitioner was directed to produce contain no evidence pertinent or material to the issues before the justice's court.

Our conclusion is that respondent was without jurisdiction to make the order adjudging petitioner guilty of contempt of court, and that the order is therefore void.

Let the peremptory writ issue as prayed.

We concur: THOMAS, J.; WELLER, J.

183 Cal. 422

MERZOIAN v. KLUDJIAN et al.
(S. F. 9256.)

(Supreme Court of California. July 30, 1920. Rehearing Denied Aug. 26, 1920.)

1. Brokers ⟸86(5)—Evidence held insufficient to show prospective purchaser able to buy.

In a broker's action to recover a commission for furnishing a purchaser ready, able, and willing to buy, evidence showing prospective purchaser's agreements, consisting of oral promises for securing money, *held* insufficient to show his ability to buy on agreed terms.

2. Brokers ⟸63(5)—Vendors' refusal to sell held to excuse tender by purchaser.

Where defendant vendors refused to sell before prospective purchaser had opportunity to show his ability to make the cash payment required, it was unnecessary for purchaser to tender the cash required to bind the sale.

3. Appeal and error ⟸882(11)—Preventing plaintiff broker from testifying to his willingness to aid purchaser did not preclude objection that ability of purchaser was not shown.

In an action for commission for furnishing a party ready, willing, and able to buy, objections by defendants, preventing plaintiff from testifying on his direct examination to his willingness to help the purchaser, did not preclude defendants from asserting the evidence was insufficient to show an able purchaser, so far as it was affected by plaintiff's willingness to extend him credit in making the initial payment, since such burden rested on plaintiff.

4. Appeal and error ⟸843(1)—Where cause reversed on one ground discussion of others unnecessary.

Where a case must be reversed on one ground, it is unnecessary to discuss other objections presented by appellant.

Angellotti, C. J., dissenting.

In Bank.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by A. Merzoian against L. Kludjian and another, individually and as partners. Judgment for plaintiff, and defendants appeal. Reversed.

Harry Sarkisian, of Fresno, for appellants.
F. W. Docker, G. L. Aynesworth, and Astor Elmassian, all of Fresno, for respondent.

LAWLOR, J. This is an appeal by the defendants, L. Kludjian, S. Kludjian, and the said L. Kludjian and S. Kludjian, doing business as Kludjian Bros., from a judgment in favor of the plaintiff, A. Merzoian, in an action brought to recover commissions which plaintiff alleged he had earned in securing for the defendants a purchaser for certain real estate which they owned and which they had employed him as agent to sell on a commission of 5 per cent. The record of the appeal is presented under the alternative method.

On January 16, 1917, the defendants authorized the plaintiff in writing to sell a tract of 40 acres of land in Fresno county, together with certain personal property consisting of agricultural implements, live stock and other accessories used on the ranch. The selling price of this property was to be $20,500, payable as follows: $5,000.00 cash. Balance $1,000.00 per year and interest." It is alleged in the complaint that on or about January 27 the plaintiff found a purchaser who agreed in writing to buy upon the owners' terms, and deposited with the plaintiff the sum of $100; that thereafter and prior to February 2 plaintiff duly notified defendants that he had effected a sale of the property; that the proposed purchaser and the defendants were brought together for the purpose of consummating the sale; "that said purchaser did then and there * * * offer to purchase * * * the property"; that the defendants thereupon refused to make the sale; that the defendants had agreed to pay the plaintiff "a 5 per cent. commission on the selling price" of $20,500, and that the plaintiff, having produced a purchaser who was ready, able, and willing to buy, is entitled to the commission. Judgment was rendered in accordance with the prayer of the complaint for $1,025.

Appellants raise three questions:

"First and foremost of which is whether the prospective purchaser * * * was ready, willing, and able to purchase; * * * second, whether the defendants could have obtained a valid and binding contract from the prospective purchaser; * * * and third, whether the prospective purchaser was produced as such during the life of the contract of employment of the agent and before revocation of the same."

[1] 1. We shall first consider whether John Hatchegian, the prospective purchaser, was ready, able, and willing to make the purchase, and whether the defendants could have obtained a contract from him. In this connection the court found "that at all times said John Hatchegian was ready, able, and willing to purchase said property." Is this finding sustained by the evidence? Hatchegian testified on direct examination:

"Q. About the latter part of January, 1917, did you have any conversation with Mr. Merzoian? A. Yes, sir. * * * On I street. * * * It was further said, he asked me $5,000 for cash payment, and I said I didn't have $5,000. I told him I only had $2,000 cash, and there was another party, named Avadisian, said he was willing to lend $500 more. * * * Mr. Merzoian said at that time, 'In case Avadisian does not loan you $500, I am willing to

help you with $3,000 so you can purchase the place.' * * * Q. Did you have any money in the bank or any place at that time? A. I had $1,000 in the Bank of Italy, and about $1,700 or $1,600 in the First National Bank of Fresno. Then, aside from that, I had another note which was due right away, $400. Q. And all together, then, you had in the neighborhood of $2,000 or $2,500, didn't you? A. I had $2,500. I had $2,500, and Mr. Avadisian was supposed to give me $500. * * * I went down and saw the cashier of the First National Bank, * * * Walrond. I asked him if they were willing to give me $500. They said, 'Yes, if you get a couple of fellows to sign on your note.' * * * Mr. Merzoian at that time had a note for $3,000, and he says his commission would amount to $1,000, that he would deposit the $3,000 in the bank and would get $2,000 and give it to me."

On cross-examination, he gave the following testimony:

"Q. Now, did Avadisian ever have any conversation with you at any time before this particular conversation you have spoken of, wherein he promised to loan you $500? A. Yes, lot of other occasions; many times. * * * He has said on many occasions if I were to buy the place he would lend me $500. * * * Q. Did you at that time, or at any other time since, agree as to when you should return that $500 to him? A. At any time I had money I was going to pay him back. Q. Is Mr. Avadisian related to you by blood? A. Godfather to my children. * * * Q. At the time you signed this paper [his agreement with Merozian for the purchase of the property] you had $1,000 on deposit in the Bank of Italy, did you? A. Yes, sir. Q. How much money did you have on deposit in the First National Bank of Fresno? A. I don't remember correctly; it might be $600 or $500, I don't know just exactly; and I had a note for $400. Q. Do you mean to tell me that on the 27th day of January, 1917, the day you signed this agreement, you had $1,000 on deposit in the Bank of Italy? * * * A. Yes, sir. Q. And you had $500 or $600 at the same time * * * in the First National Bank of Fresno, did you? A. Why, I don't know, five or six, I don't know; I don't remember whether it was $500 or $600 that I had. * * * That is all I had in money, $1,000 in the Bank of Italy, and $500 or $600 in the First National Bank. * * * I had two lots, deeded to my wife. * * * That is all I had. * * * At that time and now I had $2,000, my personal money, and Avadisian was going to lend me $500. That is how I make $2,500. * * * Q. You speak of a $400 note. Who was that given to you by? * * * A. One Michael Jacob. He has got 80 acres at Lone Star and 40 acres on California avenue. The nature of that note was so that I could demand my money at any time that I need it.

"The Court: Ask him if he ever borrowed that $500 from Mr. Avadisian. A. No; I didn't borrow at that time. * * * Q. How much did Mr. Merzoian promise to help you? A. He said, 'I am willing to help you from $2,500 to $3,000.' Q. Did he loan you $2,500 to $3,000 at any time? A. No; he did not."

W. A. Piper, bookkeeper at the First National Bank of Fresno, testified that there had never been an account at that bank in the name of John Hatchegian.

The plaintiff succeeded in bringing together at the office of his attorney, Astor Elmassian, the defendants and the prospective purchaser, John Hatchegian. On direct examination the plaintiff testified as follows regarding this interview:

"Q. Now what was said at this meeting at Mr. Elmassian's office? * * * A. Mr. Elmassian was present over there, and there was Mr. Kludjian brothers, Serop and Leon Kludjian, and Mr. Hatchegian, he like to buy the place. * * * I gave them the $100; told them, 'That is your deposit.' They said no, they won't take it; they don't like to sell. * * * Kludjian brothers said they don't like to sell at all; they said, 'We have trouble with my brother, we don't like to sell the place.' Q. Was there anything said at that time about furnishing an abstract of the place? A. No. * * * We said about that, but they said they don't like to sell."

On cross-examination, he further testified as to what was said at this interview:

"I talk about selling his place. That is all I told him [Kludjian]. I told him I got customer. * * * They say they don't like to sell. That is all I know."

Regarding the same meeting in his office, Elmassian stated:

"When Mr. Hatchegian and Kludjian brothers and Mr. Merzoian came in, Mr. Merzoian told the Kludjian brothers that he had sold their property and got a deposit from Mr. Hatchegian of $100, and that he wanted them to bring the abstract so the contract could be drawn up and conclude the business, and then he says Mr. Hatchegian had agreed to pay the $5,000 and $1,000 a year, and to that, as I believe, the older of the Kludjian brothers said they would not sell. * * * He said they would not sell because they had had trouble with the other brother, who had not signed the contract. * * * Q. Now, * * * did Mr. Hatchegian make any statements * * * to Kludjian brothers? A. Yes, he said he wanted to buy the place and pay $5,000 cash and $1,000 a year, but the elder brother of the Kludjian brothers said they would not sell."

He testified as follows on cross-examination:

"Q. On the meeting at your office * * * Hatchegian had made an offer to buy that place, hadn't he? A. Yes. Q. And the Kludjians had refused to make the sale? A. Yes, sir. * * * It appeared that they would not sell the place. They went out and they were mad; and that was the whole—the final transaction. * * * Q. Then they absolutely—in your conversation—absolutely refused, said, 'No, we are not going to sell'? A. They did."

Mattingly v. Pennie, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87, was an action to re-

cover commissions for the sale of mining stock. The plaintiff alleged that by a written contract he had been authorized to negotiate a sale of stock belonging to defendant's intestate; that he had a purchaser who was ready, able, and willing to buy, and that the defendant's intestate had refused to sell. The court, reversing the judgment of the lower court in favor of the plaintiff, said, (105 Cal. at page 522, 39 Pac. at page 203, 45 Am. St. Rep. 87):

"The evidence is also insufficient to show that the supposed purchaser had the ability to purchase the stock at the price named. The only evidence on that point is his own testimony. * * * That testimony amounted to nothing more than a statement of his belief that persons not bound by contract to do so would have advanced the money; and it is clearly not such evidence as, under section 1835 of the Code of Civil Procedure, would justify the jury in finding that he had the ability to pay."

McCune v. Badger, 126 Wis. 186, 105 N. W. 667, was an action to recover a commission for the sale of real estate alleged to have been earned by plaintiff. The trial court directed a verdict for the defendant. We quote from the opinion of the court:

"We are unable to find any reasonably clear evidence that appellant found a purchaser able and willing to take respondent's property and pay therefor the amount in cash which it is conceded she was to have. * * * The most appellant claims he accomplished was to produce a person willing to take the property so that respondent could realize her price upon condition of appellant's furnishing or procuring the money necessary therefor in excess of $2,000, and that he had promise of loans to enable him to do so. He did not pretend his party was ever in circumstances to accept a deed of the property and pay the required amount of money therefor, except upon condition that certain persons, who had promised to loan the money to him on the property, redeemed the promise. * * * The arrangement claimed to have been made contemplated the passing of the title to the property to the proposed purchaser in order to enable him or the appellant to borrow money thereon with which to pay therefor."

In the instant case, the evidence we have quoted (and no other evidence was introduced as to the alleged readiness, ability, and willingness of the prospective purchaser), considered in the light most favorable to respondent, shows that Hatchegian had $1,000 in the Bank of Italy, $500 or $600 in the First National Bank of Fresno, a demand note for $400, and the verbal promises, made without any consideration therefor, of Avadisian and the plaintiff to lend him $500 and $2,000, respectively. Hatchegian, as we have seen, admitted that he had not borrowed the money from Avadisian or the plaintiff. He testified that he had "two lots deeded to my wife," but he did not state whether he could have borrowed money on that property. Moreover, it cannot be said that his testimony is at all certain as to his available assets, and, as we have shown, an official of one of the banks in which he asserted he had money on deposit stated that they had never had an account there in his name. In our opinion, the facts clearly fall within the rule announced in Mattingly v. Pennie, supra, and McCune v. Badger, supra.

Respondent cites McCabe v. Jones, 141 Wis. 540, 124 N. W. 486, an action by a real estate broker to recover commissions for negotiating a sale of real property, where the evidence was held sufficient to sustain a finding that the purchaser procured by the plaintiff was "able" to make the purchase. According to the opinion, "the parties agreed that, if plaintiff would induce Leach to purchase defendant's farm and personal property at the price of $13,000 and pay therefor $7,000 in cash and convey by good title Leach's residence property in Oshkosh, free of incumbrance, defendant would sell at that price and would pay plaintiff $250." The court continued:

"The trial judge reversed the answer to the second question because in his judgment the evidence was conclusive that Leach was not ready, able, and willing to make the trade, and the only question in the case is whether this ruling is correct. The evidence on this question was substantially as follows: Leach's homestead in Oshkosh was subject to a mortgage of $2,000. Leach testified *that he owned $10,000 worth of unincumbered property* in Oshkosh *outside of his homestead;* that he *arranged* with one Elmer Clark to let him have *$7,000 upon mortgage* on the Jones [defendant's] farm at the time the papers should be exchanged; *that he had also provided to turn over his homestead clear of incumbrance;* that these arrangements were *complete* before and at the time when the trade was to be completed. Clark testified that, in accordance with Leach's request he had the $7,000 ready in hand to loan to Leach on the Jones farm, and kept the money ready for two months. * * * *There was no evidence to contradict this testimony of Leach and Clark, nor was there any evidence tending to throw doubt upon their good faith or upon the ability* of either of them to carry out the arrangements which they testified they were ready and willing to carry out."

In our opinion, the facts which we have italicized are clearly distinguishable from those in the case at bar.

[2] It appears from the evidence, which we have already set forth, that the appellants' refusal to sell to Hatchegian was made before he had an opportunity to show whether he was able to make the cash payment of $5,000, and that such refusal could not have been based upon the asserted inability of Hatchegian to complete the purchase. This refusal to proceed with the transaction rendered it unnecessary for Hatchegian to tender the cash required to bind the sale. 9 Corpus Juris, p. 600, and cases there cited.

This point, however, is not urged by the respondent. His brief is devoted, principally, to a discussion of appellants' contention as to the insufficiency of the evidence to show that Hatchegian was ready, able, and willing to make the purchase.

[3] Respondent claims that the appellants are precluded from questioning the sufficiency of the evidence as to the financial ability of Hatchegian so far as it is affected by the respondent's willingness to extend him credit in making the initial payment. We quote from the direct examination of the respondent:

"Q. Did you, Mr. Merzoian, make any statement about being willing to help Mr. Hatchegian purchase the place? A. Yes, sir. Q. And did you make it at that time? A. Yes, sir.

"Mr. Sarkisian (attorney for the defendants): Now, if your honor please, we object to that; that is only a matter of defense.

"The Court: That is right. Mr. Sarkisian. Please, your honor, that is anticipating the defense.

"The Court: Perhaps the prospective purchaser would be the most competent to testify to his ability to pay. I think perhaps we had better wait for that."

With regard to this ruling respondent's contention in his supplemental brief thus states his position:

"The ground upon which the objection of defendant was made and upon which the court ruled out this evidence was that the matter was properly one of defense; that it was rebuttal only and could not be introduced as a part of the plaintiff's original case; that the burden was on the defendants to prove the contrary, and that in the absence of such proof it would stand admitted that the persons who had offered to loan Hatchegian money to make this purchase * * * were able to make their promises good. Having prevailed upon this theory and kept out all evidence for the plaintiff upon this point, he cannot now be heard to complain that the trial court applied his theory consistently and gave judgment against him without any evidence upon this point to sustain its findings."

The respondent does not contend that the exclusion of this testimony constituted error. It may be observed, however, since the judgment must be reversed and the cause remanded for a new trial, that it was a part of the plaintiff's case in chief to show that Hatchegian was ready, able, and willing to make the purchase, and this could be done by proof either that he had the funds in hand, in whole or in part, or that he commanded resources upon which he could obtain the requisite credit. What respondent does contend is that appellants are precluded from asserting that the evidence is insufficient to show that Hatchegian was financially responsive. We do not think this contention can be sustained. Hatchegian himself did not have sufficient funds. He was relying in part upon credit. From what we have already said, it is plain that his resources consisted, apart from the $1,000 in the bank and the $400 note, not of tangible credits, but of unenforceable promises. It is not even claimed that he had a promise from his wife to convey to him the two lots which he declared stood in her name. It was upon these considerations that we reached the conclusion that the evidence does not support the findings that plaintiff produced a purchaser who was ready, able, and willing to buy the property.

[4] 2. In view of the insufficiency of the evidence, it will not be necessary to discuss the third question presented by appellants—whether the contract of agency was revoked before the plaintiff produced the purchaser. Judgment reversed.

We concur: SHAW, J.; OLNEY, J.; LENNON, J.; WILBUR, J.

ANGELLOTTI, C. J. I dissent, for the reason that I am of the opinion that the evidence sufficiently supports the finding of the trial court that the proposed purchaser was "ready, able, and willing to purchase said property upon the terms and conditions set forth in said instrument."

183 Cal. 270

MARTIN v. HILDEBRAND et al.
(S. F. 9004.)

(Supreme Court of California. June 25, 1920. Rehearing Denied July 22, 1920.)

1. Appeal and error ⟹501(3)—Bill of exceptions insufficient to permit consideration of evidence.

Where bill of exceptions contains no specifications of the particulars wherein the evidence is insufficient, the question of sufficiency of the evidence to sustain the findings cannot be considered.

2. Mortgages ⟹300—Offer to purchase not sufficient tender.

An offer to purchase a note and mortgage and a tender of the amount due thereon did not operate either to extinguish the obligation for the debt or to terminate the lien of the mortgage, and holder of mortgage on foreclosure was entitled to interest up to foreclosure and a reasonable attorney's fee.

3. Mortgages ⟹580—Expenses in suit as to title to mortgage not taxable on foreclosure.

On foreclosure of a mortgage providing that mortgagors should pay all moneys expended by the mortgagee for the prosecution or defense of any action in regard to the property, expenses incurred in a suit wherein holder obtained an assignment were erroneously taxed as costs.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

Action by George J. Martin against Ernest H. Hildebrand and others. Judgment for plaintiff, and defendants appeal. Modified and affirmed.

Paul A. McCarthy, R. W. Gillogley, and Walter Christie, all of San Francisco, for appellants.

John H. Crabbe, of San Francisco, for respondent.

SHAW, J. The plaintiff's complaint states a cause of action in favor of the plaintiff for the foreclosure of a mortgage on certain land executed by the defendants Hildebrand and Lettich to the Humboldt Savings Bank to secure the payment of a note of $3,000 dated December 26, 1912, due December 26, 1914, and bearing interest at 6 per cent. per annum payable monthly in advance and compounded monthly if not paid when due. The mortgage was assigned to the plaintiff by an instrument dated February 5, 1916, which was delivered to the plaintiff on July 27, 1916.

The defendants' answer alleged that on August 9, 1916, the defendants Hildebrand and Lettich offered to the plaintiff the sum of $3,146.60 and demanded of plaintiff the return and cancellation of said note and mortgage and a satisfaction thereof, which offer the plaintiff refused, and that defendants have ever since been ready, willing, and able to pay said sum of money in discharge of said note and mortgage.

The court found "that on August 9, 1916, the defendants, Hildebrand and Lettich, offered to plaintiff in gold coin, the sum of $3,146.50, and demanded from plaintiff an assignment of said note and mortgage"; that said defendants did not then state whether the offer was on their own behalf as junior mortgagees, or as owners, or as agents for the owner of the real property; and that the plaintiff rejected said offer because it was insufficient in manner and in the amount offered.

[1] A motion for a new trial was made on the general ground of the "insufficiency of the evidence to justify the decision." The appeal is supported by a bill of exceptions which contains no specifications of the particulars wherein the evidence is insufficient. Consequently "the question of sufficiency of the evidence to sustain the findings cannot be considered." Millar v. Millar, 175 Cal. 799, 167 Pac. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184; Hawley v. Harrington, 152 Cal. 188, 92 Pac. 177; Carter v. Canty, 186 Pac. 347. The defense that the mortgage lien was extinguished by a tender of payment must therefore be considered upon the findings alone.

[2] According to the findings, the offer made by the defendants to the plaintiff on August 9 was not an offer to pay or discharge the mortgage debt, but was, in effect, an offer of the money, coupled with a demand for an assignment of the mortgage to the defendants. It was an offer to purchase the note and mortgage, not an offer to pay or discharge the mortgage debt. Such an offer does not operate either to extinguish the obligation for the debt or to terminate the lien of the mortgage. The court did not err in giving judgment for the amount due on the mortgage with interest, including the reasonable fee for plaintiff's attorney in foreclosing the mortgage, and costs.

[3] In addition to these items the court allowed to the plaintiff and included in the judgment, sums amounting to $159.50 on account of expenditures made by the plaintiff before the assignment to him of the said mortgage as the costs and expenses of certain litigation arising out of an action by Martin against the defendants to quiet the title to the same tract of land. In that case an order was made requiring the Humboldt Savings Bank to assign the note and mortgage to the plaintiff, and the defendants sought to annul the order by a proceeding in certiorari in the Supreme Court, in which they were unsuccessful. Hildebrand v. Superior Court, 173 Cal. 86, 159 Pac. 147. The $159.50 above mentioned was for costs and attorney fees incurred by the plaintiff in making his defense thereto. We are of the opinion that they were improperly chargeable as costs in this foreclosure proceeding. They were not incurred on behalf of the holder of the mortgage, or for its benefit, nor to protect the mortgaged property, but solely for the purpose of carrying out the desire of the plaintiff to obtain an assignment of the mortgage to himself. The mortgage provided that the mortgagors should pay all moneys expended by the mortgagee "for the prosecution or defense of any action in regard to said property." But this did not require them to pay sums expended by a would-be purchaser of the mortgage in the effort to obtain an assignment thereof. It follows therefore that the judgment is excessive in the amount of $159.50 and is to that extent erroneous. It will be unnecessary to reverse the judgment for this error. The proper result can be reached by a modification thereof deducting that sum from the amount of the judgment and affirming it as so modified.

It is ordered by the court that the judgment appealed from be modified by deducting from the amount thereof the sum of $159.50 and that as so modified said judgment be affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; LAWLOR, J.; LENNON, J.; SLOANE, J.

183 Cal. 382

In re BENVENUTO'S ESTATE.
(L. A. 6375.)

(Supreme Court of California. July 27, 1920. Rehearing Denied Aug. 23, 1920.)

1. Executors and administrators ⊂=137—Preliminary order authorizing sale of property unnecessary.

The effect of the amendment of Code Civ. Proc. § 1536, by St. 1919, p. 1179, in omitting the requirement that a sale of a decedent's property must be on order of court, is that a preliminary order is not required to authorize the administrator or executor to negotiate a sale of property for the purposes for which a sale is authorized by the section.

2. Executors and administrators ⊂=137—Decision as to necessity for sale required on hearing of return for confirmation.

The effect of the amendment of 1919 upon Code Civ. Proc. § 1536, regulating the sale of decedent's estates, is that the questions whether a sale is necessary and for the best interest of the estate are now decided on the hearing of the return of sale and application for confirmation, instead of on a petition for an order of sale, as formerly provided by sections 1540, 1542, 1543, and 1544.

3. Descent and distribution ⊂=3—Decedent's property vests in heirs at death, subject to laws then in force.

The property of an intestate decedent vests in his heirs on his death, subject to the burdens imposed on it by the law in force at that time for the purpose of paying the debts of the decedent and the expenses of the administration of the estate, and also subject to the sale by the executor or administrator for such reasons and purposes as may then be authorized by law.

4. Constitutional law ⊂=93(1)—Extent to which the Legislature may, by amendment of law after death of intestate, impose additional burdens thereon, stated.

The Legislature cannot, by amending the law after the death of an intestate, impose on his property any new or additional burdens, or authorize a sale thereof for new reasons or other purposes; but it may enact new laws prescribing a different mode of procedure for making and confirming sales to satisfy such purposes or carry out such objects as were provided for by the law as it was enforced at his death.

5. Executors and administrators ⊂=351—Additional bond for sale required; "ordered."

Code Civ. Proc. § 1389, providing that the court may direct the giving of an additional bond whenever the sale of any real estate belonging to the estate "is ordered," unless the bond already given is sufficient, is not made inapplicable by the amendment of 1919 eliminating the necessity for a preliminary order for sale, since the sale is "ordered" when it is confirmed and the deed is directed to be made.

6. Constitutional law ⊂=306—Executors and administrators ⊂=337—Amendment of statute regulating sale of decedent's property held not to deprive heirs of right to notice.

The amendment of 1919 to the law relating to the sale of decedent's property, eliminating the necessity of a preliminary order of sale, is not invalid as depriving the heirs of their right to personal notice of the sale proceedings, as provided in Code Civ. Proc. § 1380, since the notice required to be given on the filing of a return of sale is sufficient to constitute due process of law.

7. Constitutional law ⊂=93(1)—Executors and administrators ⊂=361—Amendment of statute regulating sale of decedent's property on credit held valid.

The amendment of 1919, repealing Code Civ. Proc. § 1544, prohibiting the administrator from selling real property on a credit exceeding one year and making the limit of credit to be given by the administrator discretionary, *held* not invalid as to pending administration cases; it being a mere incident of the power to sell property for the payment of debts.

8. Executors and administrators ⊂=320—Amendments regulating sale held prospective.

The amendments of 1919 to the law regulating the sale of decedent's property are prospective, in that they do not apply to proceedings already completed at the time they were enacted, but are applicable to all proceedings begun thereafter, including pending administrations, so that they cannot be considered retroactive without expressed declaration to that effect, when applied to the sale of the property of a decedent who died before the amendments were enacted.

In Bank.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

In the matter of the estate of Pietro Benvenuto, deceased. From an order confirming a sale of real estate by Jarrett T. Richards, administrator, Pastine Maddalena Benvenuto appeals. Affirmed.

A. C. Postel, of Santa Barbara (C. H. Brock, of Los Angeles, of counsel), for appellant.

Richards, Heaney & Price, of Santa Barbara, for respondent.

SHAW, J. This is an appeal from an order confirming a sale of real estate made by the administrator of the estate of said decedent. The administrator did not file any petition for an order authorizing a sale, nor was such order ever made. He filed a return of the sale and asked confirmation thereof by the court. Notice of the hearing on the return was given as provided by section 1552 of the Code of Civil Procedure as amended in 1919. At the hearing the court made findings in accordance with the allegations of the return, and thereupon confirmed the sale. Herein the administrator and the court below proceeded under the authority of the provi-

sions of the act which took effect July 25, 1919, amending sections 1516, 1517, 1522, 1523, 1525, 1536, 1545, 1547, 1549, 1552, 1554, 1555, 1559, 1565, and 1570 of the Code of Civil Procedure, and of the act taking effect on the same date repealing sections 1537, 1538, 1539, 1540, 1542, 1543, and 1544. Stats. 1919, p. 1177.

The decedent died intestate on November 22, 1911. His property, of course, descended to and vested in his heirs at that date, subject to administration in accordance with the law then in force. It is contended by the appellant, who is the widow and heir of said decedent, that the amendment of 1919 is invalid with respect to the estates of persons who died before the amendment took effect. She claims that it imposes additional burdens upon the property, and, if operative, would divest rights of the heirs which were previously vested in them. The amendment made no change in section 1516, except that it omits the words "as the court may direct" from the clause declaring that the property of the estate "may be sold as the court may direct, in the manner prescribed in this chapter." Section 1517, prior to the amendment of 1919, provided that—

"No sale of any property of an estate of a decedent is valid unless made under order of the superior court, except as otherwise provided in this chapter."

The amended section omits this clause and in lieu thereof declares that—

"The executor or administrator may sell any property of the estate of a decedent without order of court, and at either public or private sale, as the executor or administrator may determine."

The remainder of the section declares expressly "that no sale of such property *is valid* unless" reported under oath to and confirmed by the court. Section 1536, prior to the amendment, read as follows:

"When a sale of property of the estate is necessary to pay the allowance of the family, or the debts outstanding against the decedent, or the debts, expenses, or charges of administration or legacies; or when *it appears to the satisfaction of the court that* it is for the advantage, benefit, and best interests of the estate, and those interested therein, that the real estate, or some part thereof, be sold, the executor or administrator may sell any real as well as personal property of the estate, *upon the order of the court.*"

[1] In the section as amended the italicized words are omitted. The effect is that a preliminary order of the court is no longer required in order to authorize the administrator or executor to negotiate a sale of the property of the estate for the purposes and reasons for which a sale is authorized by the section. It is further to be noted that section 1380 of the said Code provides that any person interested in an estate may make a written request to the executor or administrator, stating his post office address and that he requires special notice of the filing of petitions for sales of property and certain other petitions described, and that thereafter notice of the filing of such petitions shall be served upon such party within two days after the filing thereof, either personally or by United States mail, and that the court, upon the hearing of the petition, shall find and declare that such notice has been given. The appellant, prior to the sale in question, gave to the administrator the notice as provided in this section.

[2] The amendment of section 1552 made no change in the manner of giving notice of the hearing of the return of sale. The notice was given in the present case in the manner prescribed and in addition thereto the notice as required by section 1380 as aforesaid. The appellant appeared at the hearing. In its order confirming the sale the court states that the sale was made without any order of the court first had or obtained, and without serving any notice upon said appellant of the application for such order, but that the appellant received due personal notice of the filing of the return of sale and of the date of the hearing thereof. The amendment to section 1552, however, provided that upon such hearing the court "must examine into the necessity for the sale, or the advantage, benefit and interest of the estate in having the sale made, and must examine the return and witnesses in relation to the sale, and if good reason does not exist for such sale," or if it was unfair, or for less than its value, the court may vacate the sale or direct a new sale. The change made by the amendment in this respect is that the questions whether a sale is necessary for payment of debts, expenses of administration or legacies, and whether a sale would be for the advantage, benefit, and best interests of the estate, as provided in section 1536, are now to be decided upon the hearing of the return of sale and application for confirmation thereof, instead of upon the hearing of the petition for an order of sale as formerly provided by sections 1540, 1542, 1543, and 1544, which sections were repealed by the amending act of 1919.

[3, 4] The principles governing the question of the validity of the amendments, with respect to estates of persons previously deceased, are well established. The property of an intestate decedent vests in his heirs upon his death, subject to the burdens imposed upon it by the law in force at that time for the purposes of paying the debts of the decedent and the expenses of the administration of the estate, and also subject to sale by the executor or administrator for such reasons and purposes as may be then authorized by law. But the Legislature cannot, by amending the law after his death, impose upon the property of a decedent any new or

additional burdens, or authorize a sale thereof for new reasons or other purposes. It may, however, enact new laws prescribing a different mode of procedure for making and confirming sales to satisfy such purposes or carry out such objects as were provided for by the law in force at his death.

In Brenham v. Story, 39 Cal. 183, one Charles White died intestate in 1853. The law then in force made his property subject to sale only for the payment of his debts and the expenses of administration. In 1861 a special act (special laws being then permitted by the Constitution) was passed by the Legislature purporting to authorize the administrator of the estate of White to sell his real estate, without first having obtained an order of court therefor, "as in the judgment of the said administrator will best promote the interest of those entitled to the estate." St. 1861, p. 152. It further provided for a return of sale and for confirmation thereof by the court. The court said that the estate of the decedent was subject to the payment of his debts and expenses of administration, which were burdens upon it, in the nature of liens; that it was competent for the Legislature, after the death of a decedent, to enact "laws which prescribe the manner in which these paramount claims shall be satisfied"; that such laws "are held to be entirely remedial"; that "such acts have been uniformly held valid where it appeared to be in execution of these liens." The sale was held void, not because of the provision in the act that the sale could be made without first obtaining an order to sell, but because it authorized a sale by the administrator when such sale "would advance the interests of those entitled to the estate; the sale was to be in the interest of the heirs as owners, and not to satisfy the paramount lien imposed by law upon the property of the decedent," and it was said that—

"The Legislature has no more right to order a sale of his (the heir's) vested interest in his inheritance, because it will be, in the estimation of the administrator and the probate judge, for his advantage, than it has to direct the sale of the property of any other person acquired in any other way."

So in Estate of Packer, 125 Cal. 397, 58 Pac. 59, 73 Am. St. Rep. 58, a similar ruling was made. Packer died in 1891. In 1893 sections 1536 and 1537 were amended, so as to provide, as 1536 now provides, that a sale of property of a decedent could be made when it was "for the advantage, benefit, and best interests of the estate and those interested therein." The court held that the property of decedents who had died before said amendments were enacted could not be sold for that reason; the court saying that the Legislature could not, after the title had vested in the heir, "empower the administrator to sell the inheritance for purposes not authorized at the time the title vested and to which it was not subject when it vested." See, also, Pryor v. Downey, 50 Cal. 409, 19 Am. Rep. 656; Estate of Porter, 129 Cal. 89, 61 Pac. 659, 79 Am. St. Rep. 78; Murphy v. Farmers' & Merchants' Bank, 131 Cal. 115, 63 Pac. 368, 731; Estate of Newlove, 142 Cal. 379, 75 Pac. 1083; Estate of Bazzuro, 161 Cal. 74, 118 Pac. 434.

With respect to the power of the Legislature to provide new methods of procedure for the making of sales for purposes authorized by law at the time of the death of the decedent, the decisions also establish the rule above stated. It was clearly stated in Brenham v. Story, supra, as above related. In Murphy v. Farmers' & Merchants' Bank, supra, after a testator's death, sections 1577 and 1578 of the Code were amended so as to authorize the administrator, upon the order of the court, to mortgage the property of the estate to provide money for the payment of the debts. It was held that the devisee took the land subject to a charge for the debts of the deceased and to the law authorizing a sale for payment thereof, and that "to authorize the mortgage of the property for the express purpose of raising money with which to pay these charges is but to change the form of the lien and adds no new burden not already borne by the property, or to which the property may be subjected under the law as it existed when the testator died," and that the amended law was valid with respect to estates of decedents whose death occurred prior to its passage. The decision in Estate of Freud, 131 Cal. 668, 674, 63 Pac. 1080, 82 Am. St. Rep. 407, is to the same effect. The rule is thus stated by Judge Cooley:

"As a general rule, every state has complete control over the remedies which it offers to suitors in its courts. It may abolish one class of courts and create another. It may give a new and additional remedy for a right or equity already in existence, and it may abolish old remedies and substitute new, or even without substituting any, if a reasonable remedy still remains. * * * And any rule or regulation in regard to the remedy which does not, under pretense of modifying or regulating it, take away or impair the right itself, cannot be regarded as beyond the proper province of legislation." Cooley's Const. Lim. (7th Ed.) p. 515.

And with regard to matters of defense, the same author says:

"A party has no vested right in a defense based upon an informality not affecting his substantial equities." Id. p. 529.

In 12 Corpus Juris, at page 975, it is said:

"Existing remedies may be modified or impaired, particular remedies may be taken away, one particular remedy may be made the exclusive one, or one remedy may be substituted for another. * * * There must remain, however, a remedy that is not merely colorable, but is real and substantial."

To all these points many cases are cited in the footnotes. In the light of these authorities we proceed to examine the objections raised by the appellant.

Section 1389, Code of Civil Procedure, provides that the court must direct the giving of an additional bond, "whenever the sale of any real estate belonging to an estate is ordered," unless the bond already given is sufficient as therein prescribed. The appellant claims that, as this may be done only when a sale of real estate "is ordered," the repeal of the sections which provide for the filing of a petition for sale, the making and service of an order to show cause, and the making of an order directing a sale (sections 1537, 1538, 1539, 1542, 1543, 1544) deprives the appellant of the opportunity to ask for an additional bond and the court of the power to require one, and thereby deprives her of the protection which such bond would afford. If this were the effect of the repeal, perhaps the objection would be good.

[5] But we think section 1389 remains applicable to the mode of sale now provided. The court has power, under section 1389, to require an additional bond when a sale "is ordered." By the law as amended the administrator is authorized to make what is in substance no more than an agreement of sale fixing the price and the terms thereof. He makes return of this to the court for approval and confirmation. Section 1517. Thereupon notice must be given, as the law provides, of the time of hearing the return. Upon the hearing the court must examine witnesses and determine whether the sale is a proper one, and it may order a new sale for the causes therein stated, or it may vacate the sale, or approve the one already made. Section 1552. If it approves the sale, it must thereupon make an order confirming the sale and direct a conveyance to be executed. Section 1554. The conveyance must thereupon be made by the executor to the purchaser, and it operates to convey to him all the right, title, and interest of the decedent in the premises at the time of his death. Section 1555. These proceedings constitute an order of sale, and thereby a sale "is ordered." It requires no stretch of construction to bring these proceedings within the meaning of that term as used in section 1389, and to hold that a sale "is ordered" when it is confirmed and the deed is directed to be made. The notice to be given upon the filing of the return of sale is sufficient to constitute due process of law, and it affords to the parties interested the opportunity to appear and ask for an additional bond in case they consider the bond already given insufficient. The amended law does not in this respect deprive the heirs of any right which they previously had, but merely changes to a very slight extent the time and place of asserting such right.

[6] It is also claimed that the heirs are deprived of the right to have personal notice of the proceedings for the sale as provided in section 1380. Under the authorities above cited this could not be considered fatal to the validity of the law as applied to descents cast, for, as above stated, the Code would still provide due process of law before a sale could be actually made. But the liberal construction which the Code declares it must receive "to effect its objects and promote justice" (section 4) justifies the conclusion that the phrase "filing of petitions for sales" in section 1380 may be held to apply to the report or return of sale required by section 1552. Such return must state the terms of the sale agreed on and the purposes for which the money is to be used. It may ask—that is, petition—for a hearing, or the hearing may be asked "by petition subsequently." The sale is not as yet complete, and the return and petition, in substance and in fact, constitute a petition for the sale agreed on. Undoubtedly, if the Code had not previously contained other provisions relating to petitions for sale, section 1380 would be understood to apply to such return and petition for confirmation of the sale. We perceive no sound reason for refusing to give it that meaning with the Code as it now stands. In the present case it was so construed, and the personal service notice was given to the appellant accordingly.

Objection is made to the amended section 1559 giving the administrator authority to employ a real estate broker to negotiate a sale and to charge his commission to the estate. Previously the section required an order from the court to authorize the employment of such broker. We need not determine whether or not this objection is good. No broker was employed. The question is not presented, and as section 1559 is not an essential part of the procedure for the sale, its invalidity, as applied to pending administrations, would not affect the sale here involved.

[7] Section 1544, which was repealed, prohibited the administrator from selling real property upon a credit exceeding one year. Under the scheme of sale provided by the amended sections of 1919, no limit is placed upon the credit which may be given by the administrator upon a sale, except the discretion of the court, and no limit is placed upon that discretion. It is contended that this imposes an additional burden upon the heirs and therefore is inapplicable to cases pending at the time the amendment was enacted. Under the authority of Murphy v. Farmers' & Merchants' Bank, supra, we think this enlargement of discretion as to the time of credit was within the power of the Legislature and a mere incident of the power to sell property for the payment of debts. The appellant refers to other sections prescribing proceedings with relation to sales of land which has been devised by will. It is unnecessary to consider these sections. They

do not apply to sales by the administrator and have no application to the present case.

[8] Appellant further contends that under section 3, providing that no part of the Code "is retroactive, unless expressly so declared," these sections cannot be held to apply to proceedings pending at the time they were enacted, because of the fact that there is no express declaration that they shall so apply. It is not necessary to hold that the sections are retroactive. They are prospective in that they do not apply to proceedings already completed at the time they were enacted, but they do apply to all proceedings begun thereafter. That they were intended so to apply is obvious from the fact that at the same time and as a part of the same scheme the Legislature repealed the sections which provided for the filing of the petitions for sale and orders of sale prior to the making of any sale by the administrator. Unless the scheme as changed by the amendments applies to pending administrations, there would be no mode provided for the sale of property thereunder. There can be no doubt that the legislative intent was that proceedings subsequent to the enactment of the amendments should be governed by the provisions therein contained.

The order is affirmed.

We concur: ANGELLOTTI, C. J.; LAWLOR, J.; WILBUR, J.; OLNEY, J.; LENNON, J.

183 Cal. 392

Ex parte HINKELMAN. (Cr. 2283.)

(Supreme Court of California. July 27, 1920.)

1. Municipal corporations ⟸707 — "Diffuse" defined.

Relative to meaning of phrase "diffusing type of lens," as used in Motor Vehicle Act, § 13, subd. (k), as amended by St. 1919, p. 211, § 10, subd. (k), to diffuse is to spread widely, to scatter or disperse, and any lens in an automobile light, not made of plain glass, would, to some extent, diffuse the rays of light passing through it.

2. Criminal law ⟸304(4)—No judicial notice taken of meaning of "diffusing type of lens."

The phrase "diffusing type of lens," used in Motor Vehicle Act, § 13, subd. (k), as amended by St. 1919, p. 211, § 10, subd. (k), is apparently a trade-name of recent origin, and its use has not as yet become sufficiently general to enable a court to take judicial notice of its trade meaning.

3. Indictment and information ⟸110(47) — Complaint using trade-name of unknown meaning, used in statute, sufficient.

A charge that defendant's headlight was of the "diffusing type of lens," a trade-name used in Motor Vehicle Act, § 13, subd. (k), as amended by St. 1919, p. 211, § 10, subd. (k), of whose meaning the court cannot take judicial notice, was nevertheless sufficient; the meaning of the term being a matter of proof at the trial.

4. Municipal corporations ⟸707—Use of untested headlight by automobile criminal, although not dangerous.

Use of a headlight of more power than had been sanctioned by a testing agent, as provided in Motor Vehicle Act, § 13, subd. (j), as amended by St. 1919, p. 210, § 10, subd. (j), was a violation of such act, although such lights did not produce a dangerous glare.

5. Municipal corporations ⟸707—Motor Vehicle Act, making it offense to use headlights not sanctioned by testing, valid.

Motor Vehicle Act, § 13, as amended by St. 1919, p. 206, § 10, making it an offense to use a headlight that has not been tested and sanctioned by a testing agency, is valid.

In Bank.

Application by Lee H. Hinkelman for a writ of habeas corpus, prayed to be directed to the Chief of Police, City and County of San Francisco, to secure the release of petitioner from custody. Petition remanded.

James M. Oliver and Raymond Benjamin, both of San Francisco, for petitioner.

U. S. Webb, of San Francisco, for respondent.

SHAW, J. Hinkelman was imprisoned on a warrant of arrest issued out of the police court of the city and county of San Francisco on a complaint charging him with violating sections 13 and 32 of the Motor Vehicle Act (St. 1915, pp. 405, 413, as amended by St. 1919, pp. 206, 225, §§ 10, 16). He applied for a writ of habeas corpus, claiming that the complaint does not charge a public offense, and that sections 13 and 32 of said act, so far as they relate to the offense charged, are unconstitutional.

Section 32 declares it to be a misdemeanor for any person to violate any provisions of the act. The particular violation here charged is the driving of an automobile on a public street equipped with a headlight more brilliant and set at a different angle than is permitted by the provisions of section 13. This section makes elaborate and complex regulations relating to headlights. The portions thereof applying to the present case may be summarized as follows:

Subdivision (a) provides that, "at all times during the period from a half hour after sunset to a half hour before sunrise, every automobile while on the public highway shall carry at the front at least two lighted lamps." Subdivision (f) provides that during the time above stated "the headlights of all automobiles upon the highways shall give a light of sufficient power and so distributed as pro-

vided herein." The material provisions of subdivision (g) are as follows:

"The headlights of motor vehicles shall be so arranged, adjusted, and constructed when the car is fully loaded, that any pair of headlights under the conditions of use must produce a light which: (1) Is not less than 1,200 apparent candle power at a point two hundred feet directly in front of the lens, when measured on a level surface on which the car stands and at some point between such surface and a horizontal line passing through the top of the lens; (2) does not exceed 2,400 apparent candle power at a point one hundred feet directly in front and five feet above such level surface and which has no greater power at a height above five feet at that distance; and (3) does not exceed 800 apparent candle power "at a distance of one hundred feet ahead of the car and seven feet or more to the left of the axis of the same and five feet above the level surface on which the vehicle stands."

Subdivision (h) provides that no headlight referred to in subdivision (f) shall be used upon the highways until it shall have been tested as provided in subdivision (h). This subdivision makes elaborate provisions for the making of such tests by testing agency to be appointed by the superintendent of the motor vehicle department. Subdivision (i) requires the superintendent of the motor vehicle department to make a written report of the result of the test and file a copy thereof with each county clerk in the state and with the official of each city, town, or county whose duty it is to enforce the law. Subdivision (j) provides:

"It shall be unlawful for any manufactured device that is sold commercially to be used in connection with the headlight upon a motor vehicle to enable the same to comply with the provisions of subdivision (f) hereof unless such device shall have been first tested as provided in subdivision (h) hereof"

—and shall have been reported favorably by the testing agency, as complying with the requirements of the section, and such report incorporated into the report of the superintendent of the department, and a copy thereof filed in the office of the county clerk of the county in which the device is used, and sent to the city, county, or town police or traffic officers. Subdivision (k) contains the clause which has caused the difficulty in the present case. It reads as follows:

"Diffusing type of lens may be used with a candle power not sufficiently great to produce a dangerous glare. The maximum of such candle power shall be established by the testing agency selected by the superintendent of the motor vehicle department, based upon tests as hereinabove provided. Any device so certified shall be equipped with light bulbs labeled with the true candle power thereof, not exceeding that prescribed."

The complaint on which Hinkelman was arrested charged that he did unlawfully drive along and upon a public highway at half past 8 o'clock p. m. an automobile occupied by himself alone, carrying at the front thereof two lighted head lamps—

"each equipped with a device that is sold commercially to be used in connection with head lamps on motor vehicles to enable them to comply with the provisions of section 13, subdivision (f), of the Motor Vehicle Act, which said device was purchased by the defendant in 1918 and attached to said head lamps by defendant, to wit, a diffusing type of lens, known as a 'Warner lens,' which said type of device was, during the month of July, 1919, tested by the testing agency appointed by the superintendent of the motor vehicle department of the state of California and reported to said superintendent by said testing agency as substantially complying with the requirements of section 13, of the California Motor Vehicle Act, when used with light bulbs of a specific candle power prescribed by said testing agency, and adjusted at a specific angle designated by said testing agency; that *said defendant did then and there drive said automobile with said head lamps adjusted at an angle other than designated by said testing agency and equipped with said device and did then and there use said device with light bulbs exceeding in amount the candle power prescribed by said testing agency, though not sufficiently great as to produce a dangerous glare.*"

The two main purposes of the section are to compel the driver of an automobile to use thereon headlights which (a) shall cast in front of the automobile a light of sufficient power to enable him, when driving in the dark, to see objects in the road at a distance of two hundred feet ahead, and which (b) shall not unduly dazzle the eyes of persons in front who may be looking toward him. The requirement of subdivision (g) that, at an elevation above the level surface equal to the elevation of the top of his lens and 200 feet ahead, the light shall not be less than 1,200 apparent candle power, is intended to meet the first mentioned purpose. The requirements that at a point 100 feet directly in front of the car the light shall not exceed 2,400 apparent candle power, and that at a point 100 feet ahead, 7 feet to the left and 5 feet above the surface, it shall not exceed 800 apparent candle power, are intended to serve the last-mentioned purpose.

[1-3] The meaning of the clause in subdivision (k) above quoted is not clear. The phrase "diffusing type of lens" is not defined in the act. To diffuse is to spread widely, to scatter, or disperse. Any lens not made of plain glass would to some extent diffuse the rays of light passing through it. The phrase is apparently a trade name of recent origin. Its use has not as yet become sufficiently general to enable a court to take judicial notice of its trade meaning. The charge is that the defendant's headlight was of that type. As a pleading this is sufficient and the meaning of the term would be

a matter of proof at the trial. The question whether such a law is sufficiently certain to make the penalty valid is not here decided. But whatever this phrase may mean, it is clear that under the provisions of this clause all lenses of the "diffusing type" must be submitted to the testing agency for approval and subjected to the same tests as to the maximum candle power that are required for other types of lenses. It declares that the maximum candle power of such lenses "shall be established by the testing agency * * * based upon tests as hereinabove provided," and that the device so tested shall have light bulbs "not exceeding that prescribed." This obviously refers to subdivisions (g), (h), and (j). It therefore means that such diffusing type of lens shall not throw a light which, at 100 feet ahead and at a height of 5 feet from the level surface, shall exceed 2,400 candle power, or which, at said height and said distance ahead and 7 feet to the left, shall exceed 800 candle power, as provided in subdivision (g), and also that such device, if sold commercially, cannot be used by any person, unless it has been tested to ascertain this maximum, as provided in subdivision (h), and approved and certified, as provided in subdivision (j). It also makes such lenses subject to another clause in subdivision (h), not above mentioned, which is as follows:

"Provided, however, that if the test indicates that a device which is unacceptable with either of the test lamps will come within the specifications with lamps of another candle power or of the other type, the device may be passed with corresponding limitations as to the incandescent lamps to be used in connection with it."

[4] The complaint shows a violation of the act. It charges that the Warner type of lens was sold commercially, was tested by the testing agency as provided in the act, and was by it reported as complying with section 13 "when used with light bulbs" of a stated candle power, but that the defendant used Warner lenses with light bulbs exceeding the candle power so limited. Warner lenses equipped with light bulbs of the candle power used by the defendant may have been tested, but the complaint shows that they had not been approved or reported as permissible. The defendant is therefore, in effect, charged with using in connection with his headlight a "manufactured device that is sold commercially," which had not been first approved by the testing agency, or reported by said agency to the superintendent of the motor vehicle department as substantially complying with section 13 of the act, contrary to the provisions of subdivisions (h) and (j) above set forth. The fact that the headlights used did not produce a dangerous glare did not make it lawful for Hinkelman to use a headlight sold commercially that had not been tested and sanctioned by the testing agency as provided in subdivision (j). The complaint is therefore sufficient to justify the warrant upon which Hinkelman is detained in custody.

[5] We see no constitutional objection to the validity of these provisions. It may be true that the Legislature has no power to delegate to the testing agency or to any other body the authority to make regulations in the nature of laws prescribing the quality of headlights which shall be used by persons driving automobiles. But the act itself, in subdivision (g), prescribes the qualities of headlights. The office of the testing agency is to furnish a means for the convenient determination of the question whether or not a given light does comply with the regulations laid down in the act. The Legislature has provided that no such light shall be used until the testing agency shall have ascertained and reported that it does comply with the law. Were it not for such provision for a testing agency no one could be reasonably certain that he is complying with the law and no officer of the state could be reasonably certain that the user was not complying with the law, without an elaborate test of the particular light in use. This would entail great expense and inconvenience both to the state in enforcing the law and to persons charged with a violation of it in establishing the defense that they had not violated it. In such cases it is proper for the state to establish an agency for the ascertainment of the facts with respect to any particular kind of headlight that is sold commercially and for general use.

The petitioner is remanded to the custody of the officer.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LAWLOR, J.; OLNEY, J.; SLOANE, J.; LENNON, J.

183 Cal. 800

Ex parte TEATSEN. (Cr. 2282.)

(Supreme Court of California. July 27, 1920.)

In Bank.

Application by John F. Teatsen for a writ of habeas corpus, prayed to be directed to the Chief of Police, City and County of San Francisco, to secure the release of petitioner from custody. Petitioner remanded.

James M. Oliver and Raymond Benjamin, both of San Francisco, for petitioner.

U. S. Webb, of San Francisco, for respondent.

SHAW, J. The application for a writ of habeas corpus in this case is based on the same facts as are set forth in the Case of Hinkelman, 191 Pac. 682, decided concurrently herewith, except that Teatsen is charged with driving an empty motor truck of one ton capacity, instead of an ordinary automobile, and equipped with a Dillon lens, instead of a

Warner lens. Said Dillon lens is also of the diffusive type referred to in section 13 of the Motor Vehicle Act (St. 1919, p. 206). The law on the subject of such vehicles and lenses is the same as applicable to automobiles carrying Warner lenses, and the principles stated in the Case of Hinkelman are decisive of the present case.

It is therefore ordered that the said John F. Teatsen be remanded to the custody of the officer.

We concur: ANGELLOTTI, C. J.; LAWLOR, J.; WILBUR, J.; SLOANE, J.; LENNON, J.; OLNEY, J.

(183 Cal. 348)

Application of DOWDALL. (S. F. 9401.)

(Supreme Court of California. July 26, 1920. On Rehearing Aug. 25, 1920.)

1. Prohibition ⇐11—Court having jurisdiction cannot be restrained from exercising it, even if proceeding erroneously.

Superior court of certain county having jurisdiction of the estate of a decedent under Code Civ. Proc. § 1699, will not be restrained by writ of prohibition from exercising jurisdiction in action for settlement of accounts of testamentary trustees and for termination of trust, notwithstanding pendency of similar action in superior court of another county, since the former court has jurisdiction in the matter, and its action cannot therefore be controlled by writ of prohibition under section 1102, even if proceeding erroneously.

On Rehearing.

2. Trusts ⇐298—Superior court retains jurisdiction of estate for settlement of a trustee's accounts.

Where will creates a trust, the superior court, sitting in probate upon the distribution of the estate, retains jurisdiction of the estate for the purpose of settlement of the trustee's accounts, under Code Civ. Proc. § 1699.

3. Courts ⇐475(2) — Where jurisdiction of settlement of account of testamentary trustee is primarily in court having jurisdiction of distribution of estate, bill in equity should be suspended.

The superior court, which, sitting in probate, has jurisdiction of distribution of estate, has primary jurisdiction of the settlement of accounts under testamentary trust, and if a bill in equity is filed in any other superior court for the purpose of settling the trustee's accounts, the latter court, upon being informed of the jurisdiction of the court in probate, and that an account is to be or has been filed therein for settlement, should postpone the proceeding in its own case, and allow the account to be settled by such court in probate, if proceedings in such court are prosecuted with diligence and good faith.

4. Judgment ⇐543 — Judgment of court in equity, settling accounts of testamentary trustee, valid and binding on court in probate, in subsequent proceeding for settlement thereof.

Where bill is filed in a superior court for settlement of the account of testamentary trustees, and no suggestion is made that the court in which will was probated has primary jurisdiction of the settlement of such accounts, the judgment of former court rendered on such bill is valid and binding on the court in probate on subsequent proceeding therein for settlement of such accounts.

In Bank.

In the matter of the application of Hannah Dowdall for a writ of prohibition to the Superior Court of the City and County of San Francisco, and Frank H. Dunne, Judge thereof. Writ denied.

Walter R. Dunn, of Oakland, for applicant.

Sanderson & Davis, of San Francisco, for respondent.

The following opinion was prepared by Mr. Justice KERRIGAN of the District Court of Appeal, First Appellate District, while acting as justice pro tempore of this court in place of Mr. Justice MELVIN. It is adopted as the opinion of the court.

This is an application for a writ of prohibition directed to the superior court of the city and county of San Franciso, sitting in probate, enjoining it from proceeding with the settlement of the account of certain trustees of a trust created by the will of John Nuttall, deceased.

John Nuttall had by his last will created a trust in favor of the petitioner, which was to continue after the distribution of his estate. His estate was distributed more than 25 years prior to the commencement of this proceeding; and, while the trustees apparently were in touch with the petitioner, and with one another concerning the affairs of the trust during the whole of this period, some 10 years had elapsed since the filing by them of any account. In the month of January, 1920, the petitioner, as the beneficiary of said trust, commenced an action against said trustees in the superior court of Alameda county, where they reside, and where a portion of the real property subject to the trust is situated, by which she sought an injunction to prevent an alleged contemplated sale of part of said property for an inadequate price, and also prayed for an accounting and for the termination of the trust. The trustees appeared generally in that action, and in their answer alleged that under the trust they had no power to sell the property without the consent of the beneficiary, plaintiff in that action, and that they had never attempted to do so; that an offer had been made to them to purchase said property; that the said plaintiff had

an undivided one-third interest therein, the remaining two-thirds belonging to said trustees individually; that they, believing that the price offered was advantageous, had requested said plaintiff to join with them in a sale thereof, but this she refused to do, and thereupon commenced her said action to restrain said trustees from making such sale. They also alleged in their answer that under the terms of the trust they were permitted in their discretion to terminate it after 5 years from the making of the decree of distribution in the estate of said John Nuttall, deceased, but that the trust had never been terminated, and they had continued in charge of the property thereunder by reason of the express desire and request of said beneficiary; and they further alleged that said plaintiff was indebted to them in a certain amount on account of fees and advances in connection with their administration of the trust. Subsequent to the filing of this answer, and when a motion noticed to be heard in said action came on for hearing, said motion was dropped from the calendar in pursuance of an oral stipulation, which was thereafter to be reduced to writing, and whereby it was agreed that the trustees should file their account in the superior court of the city and county of San Francisco (respondent) in the matter of the estate of John Nuttall, deceased. Later this account was filed, but when the parties attempted to reduce to writing their oral stipulation it developed that they could not agree as to the terms thereof, in view of which the petitioner, on February 13, 1920, after notice moved the court in Alameda county to set the case pending there for trial. The judge of that court, upon being apprised of the status of the two proceedings, and that the account of the trustees had been filed in the superior court of San Francisco, declared that, while he believed that he had concurrent jurisdiction with the said San Francisco court to settle said account, he would not, under the circumstances disclosed, interfere with the proceeding there, and he thereupon continued the hearing of the motion to set the case for trial to a day subsequent to the hearing of the account by that court.

When said hearing came on before said San Francisco court the petitioner there applied for an order suspending proceedings in said matter pending the determination of the action in Alameda county, upon the ground that by the commencement of that action the superior court of the city and county of San Francisco was divested of further jurisdiction to hear or determine said matter. That motion was denied, whereupon this proceeding was inaugurated.

[1] On behalf of the respondent it is urged that its jurisdiction to settle the account of said trustees arises by virtue of the provisions of section 1699 of the Code of Civil Procedure, which, in part, provides:

"Where any trust has been created by or under any will to continue after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction thereof for the purpose of the settlement of accounts under the trusts."

The petitioner, on the other hand, contends that while this section may confer upon the San Francisco court having jurisdiction of the estate of John Nuttall, deceased, power to settle the account of said trustees, it is at most a jurisdiction existing concurrently with that of the superior court of Alameda county, and that the jurisdiction of the latter is broader in that it can grant the injunctive relief demanded; and that, having acquired jurisdiction for this purpose, it should be permitted to take control and to dispose of the whole controversy (citing 1 Pomeroy, Eq. Jur. §§ 231–237).

It appears, however, by the uncontradicted affidavit filed on behalf of the respondent herein, that since the granting by this court of the order to show cause why the writ of prohibition prayed for in this proceeding should not issue, the petitioner has consented to the sale of the real property which by her action in the superior court of Alameda county she sought to enjoin and has joined in the conveyance thereof to the purchaser, so that the only relief she is now seeking is an accounting by the trustees and the termination of the trust. The trustees having filed in the superior court of the city and county of San Francisco their account as such trustees, and prayed its settlement and their discharge, it results that if such court is allowed to proceed the petitioner will secure the very relief that she now seeks in the superior court of the county of Alameda. The latter court, recognizing the jurisdiction of the respondent, has by the exercise of proper judicial comity deferred action upon the suit pending before it, and under the circumstances as they now exist it is difficult to understand why the petitioner is still seeking the writ of prohibition against the respondent. In any case it is clear that the respondent has jurisdiction of the matter (Code Civ. Proc. § 1699, supra), so that its action cannot be controlled by writ of prohibition (Code Civ. Proc. § 1102), and, even if proceeding erroneously, it would still be exempt from control by this writ (S. P. Ry. Co. v. Sup. Ct., 63 Cal. 607).

Writ denied.

ANGELLOTTI, C. J., and OLNEY, J., SHAW, J., LENNON, J., and WILBUR, J., concur.

On Rehearing.

PER CURIAM. [2, 3] The petition for rehearing is denied. In view of the argument and the possible misconception of the effect of our opinion, we deem it proper to add some further remarks. By section 1699 of the Code of Civil Procedure the superior

court, sitting in probate upon the distribution of an estate wherein the will creates a trust, retains jurisdiction of the estate for the purpose of the settlement of the accounts under the trust. It follows from this that in this particular case the superior court of San Francisco has had jurisdiction of the estate for the purpose of settling the trustees' accounts ever since the decree of distribution of the estate of John Nuttall, deceased, was made, more than 25 years ago. That jurisdiction remains until the accounts are closed, and the trustee discharged. It is also true that the superior court of each county in the state has general jurisdiction in equity to settle trustees' accounts and to entertain actions for injunctions. This jurisdiction is, in a sense, concurrent with that of the superior court, which, by virtue of the decree of distribution, has jurisdiction of a trust created by will. The latter, however, is the primary jurisdiction, and if a bill in equity is filed in any other superior court for the purpose of settling the account of such trustee, that court, upon being informed of the jurisdiction of the court in probate, and that an account is to be or has been filed therein for settlement, should postpone the proceeding in its own case, and allow the account to be settled by the court having primary jurisdiction thereof. We assume, of course, that the proposition to settle the account in the court in probate is made in good faith, and it will be prosecuted with diligence. Some discretion is vested in the court on this point, and if it appears that the suggestion of the primary jurisdiction of the court in probate is made for delay or in bad faith, we have no doubt that the other superior court might properly proceed to judgment on the bill in equity.

[4] The court entertaining the bill in equity is not without jurisdiction. If no suggestion of the primary jurisdiction of the court in probate is made to it, the judgment of such court in the suit in equity will undoubtedly be valid, and upon any subsequent proceeding in the court in probate under its jurisdiction such judgment would be binding upon that court.

SHAW, J.; OLNEY, J.; WILBUR, J.; LENNON, J., and LAWLOR, J., concur.

183 Cal. 431

In re WALL'S ESTATE. (L. A. 6410.)

(Supreme Court of California. July 30, 1920.)

1. Appeal and error ⟸979(2)—New trial ⟸68—Grant of new trial for insufficiency of evidence discretionary.

The trial court in granting a motion for a new trial, particularly for insufficiency of evidence to support verdict or findings, has a wide discretion, and its action will not be disturbed unless abuse of discretion clearly appears.

2. Costs ⟸263—$200 penalty for useless appeal, delaying a $75,000 estate one year, not excessive.

Where an appeal from an order granting a new trial after verdict against probating a codicil clearly appears to have been for vexation and delaying the estate, which was valued at nearly $75,000, a $200 penalty for such useless appeal, causing almost a year's delay, is not excessive.

Department 1.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Helen A. Gries and another offered for probate the will of Nellie M. Wall, deceased, together with a codicil, and Arnold E. Wall and another contested the probate of the codicil, which was denied, and from a court order granting a motion for new trial the contestants appeal. Affirmed.

E. B. Coil, of Los Angeles, for appellants.

Pierce, Critchlow & Barrette, Lucius K. Chase, Walter L. Mann, and Dockweiler, Mott & Dockweiler, all of Los Angeles, for respondents.

SHAW, J. This is an appeal from an order granting a motion for a new trial with respect to a part of the judgment.

The respondents offered for probate a document purporting to be the will of the decedent, and another document purporting to be a codicil thereto. The appellants contested the probate of the codicil on the ground that the same was not executed by the decedent either in the manner prescribed by section 1276 of the Civil Code or at all. The jury returned a special verdict to the effect that said Nellie M. Wall did not sign the said codicil, nor acknowledge nor declare to the subscribing witnesses that the same was her will, and that said witnesses did not sign the codicil at the request of Nellie M. Wall in her presence and in the presence of each other. Judgment was entered in accordance with the verdict, denying probate to the codicil. Thereupon the proponents moved for a new trial of the issues relating to the codicil on the grounds of newly discovered evidence; insufficiency of the evidence to justify the verdict; that the verdict was against the law, and for errors of law occurring at the trial. The court granted the motion on all of said grounds, and set aside the part of the judgment which denied probate to said codicil.

[1] The trial court in acting upon a motion for a new trial, particularly on the ground of insufficiency of the evidence to support the verdict or findings, has a wide discretion, and its action thereon, either for or against the motion, will not be disturbed on

appeal, unless it clearly appears to the appellate court that the discretion was abused. This proposition has been so often decided that it is unnecessary to cite authorities in support of it. In the present case, three eyewitnesses, daughters of the decedent, testified directly and positively that the decedent acknowledged her signature to the document proposed as a codicil to them, and declared the same to be a codicil to her will, and that two of them, namely, Helen A. Gries and Bessie Elliott, then and there at her request, signed their names thereto as witnesses to the execution thereof in her presence and in the presence of each other. It is difficult to conceive of clearer or more positive evidence establishing the execution of the will than was presented in this case. The contradiction thereof consisted of the evidence of the three other children of the decedent, to the effect that in their opinion the signature to the codicil was not the signature of the decedent, and the testimony of a handwriting expert to the effect that, after comparing the same with numerous admittedly genuine signatures of the decedent, it was his opinion that the signature to the codicil was not genuine. There was also some testimony of circumstances tending to show that the subscribing witnesses to the will were not present at the house of the decedent on the day the will was signed by her, as claimed by the proponents. In support of the genuineness of the signature there was the additional testimony of two bank cashiers, who had been for some years accustomed to identifying the signature of the decedent on checks and other documents in connection with her account at the bank, each of whom testified, in effect, that they believed the signature to the codicil to be her genuine signature.

[2] It is obvious that in this state of the evidence it was within the discretion of the court to grant a new trial. If he believed the evidence of the witnesses for the proponents, it was his duty to do so. While it is true that on cross-examination the said witnesses contradicted themselves and showed evidence of considerable agitation, there was nothing from which, as a matter of law, we can say the court should have refused to credit their testimony. The judge who tried the case was the judge who granted the new trial, and he saw and heard the witnesses as they were testifying, and was in a much better position to determine their credibility than this court could possibly be. It is unnecessary to consider the other points presented in the motion for a new trial. Upon this ground alone the order must be affirmed. This proposition is so well established that we are unable to perceive any reason for the taking of this appeal, except a desire for vexation and delay. It is a proper case for the imposition of a penalty on the appellants. It appears that the estate was of the value of something near $75,000. A penalty of $200 for a useless appeal which has caused a delay of almost a year cannot be considered excessive.

The judgment is affirmed, and it is ordered that the respondents recover of the appellants the sum of $200 as damages on account of the appeal, and their costs.

We concur: OLNEY, J.; LAWLOR, J.

183 Cal. 415

INYO COUNTY v. GIVEN et al. (L. A. 6044.)

(Supreme Court of California. July 28, 1920.)

1. Appeal and error ⊜916(1)—Denial taken as true on appeal from judgment on pleadings.

Defendant's denials of allegations of complaint must be taken as true on appeal from judgment for plaintiff on the pleadings.

2. Dedication ⊜1—Governed by principles affecting conveyances and gifts.

A dedication, being a voluntary transfer of an interest in land, partakes both of the nature of a grant and of a gift, and is governed by the fundamental principles which control such transactions.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dedication.]

3. Dedication ⊜31—Not binding until acceptance.

A dedication, like a contract, consists of an offer and acceptance, and is not binding until acceptance, proof of which must be unequivocal.

4. Dedication ⊜37—Acceptance may be "actual" or "implied."

Acceptance of dedication may be actual or implied, being "actual" when formal acceptance is made by the proper authorities, and "implied" when a use has been made of the property by the public for such a length of time as will evidence an intention to accept the dedication.

[Ed. Note.—For other definitions, see Words and Phrases, Actual Acceptance; Implied Acceptance.]

5. Dedication ⊜29—Sale of lots with reference to map not irrevocable dedication before acceptance.

The mere making of sales of lots with reference to a map showing streets does not constitute an irrevocable dedication to the public; an acceptance being necessary to constitute dedication as between owner and public.

6. Dedication ⊜35(1)—Order of abandonment not acceptance of offer of dedication.

Board of supervisors' order, vacating and abandoning certain streets delineated on plat, did not constitute an acceptance of the offer of dedication.

7. Dedication ⟹35(1)—Rescission of abandonment not an acceptance of offer of dedication.

Board of supervisors' order rescinding an order vacating and abandoning certain streets and avenues delineated on a plat, did not constitute an acceptance of an offer of dedication, where prior to the order of abandonment the offer of dedication had been withdrawn; the only effect of the order rescinding the abandonment being to leave the matter in the condition in which it was prior to the order.

8. Dedication ⟹35(1)—Suit 13 years after rescission of offer not acceptance of dedication.

Commencement of action by county to have certain street declared a public highway, and to abate an obstruction thereon, 13 years after offer of dedication had been made, and after it had been rescinded, *held* not to constitute an acceptance of offer of dedication.

9. Dedication ⟹65—Street became dedicator's property on abandonment.

Under Pol. Code, § 2643, board of supervisors of county had power to abandon rights of public in streets, and on such abandonment the proffered easement reverted, and the land became the private property of the dedicator.

Department 2.

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by the County of Inyo against Paul M. Given and another. Judgment for plaintiff, and defendants appeal Reversed.

A. H. Swallow, of Bishop, for appellants.

Jess Hession, of Independence, for respondent.

The following opinion was prepared by Mr. Justice KERRIGAN of the District Court of Appeal for the First Appellate District while acting as justice pro tempore in this court in place of Mr. Justice MELVIN. It is adopted as the opinion of this court.

This action was brought by the county of Inyo to have a certain street decreed a public highway and to remove and abate an obstruction thereon. As judgment went for plaintiff on the pleadings a review of the same becomes necessary. Plaintiff alleged, in substance, that in December, 1900, one A. M. Given filed in the recorder's office of Inyo county a plat of the Given addition to the town of Big Pine, and that on said plat certain streets, avenues, and alleys were delineated, including a street known as Washington street; that subsequently Given sold lots in said addition to certain persons, and that said Washington street was dedicated by Given to the use of the public, and particularly to certain purchasers named in the complaint; that thereafter in December, 1913, defendant Paul Given made an oral application to the board of supervisors, without any petition in writing, for an order vacating and abandoning certain of these streets and avenues delineated on said plat, including that portion of Washington street north of the north line of Center street. That to procure this order it is alleged defendant made certain false representations to the board of supervisors concerning the sale of said lots, and that as a result thereof the board in December, 1913, made an order without the knowledge, consent, or acquiescence of any of the abutting owners, vacating certain of the streets, including that portion of Washington street above mentioned. Further allegations recite that in so doing the board exceeded its authority and that thereafter in January, 1914, after learning of the false representations, it made an order revoking and rescinding that portion of the order and resolution relating to Washington street. It is also charged that while Washington street was a public highway, dedicated as aforesaid, defendant Lena T. Given placed certain obstructions thereon, and that she refused to remove the same upon demand being made. Defendants demurred to the complaint on the ground that it failed to state a cause of action. The demurrer was overruled. Defendants answering, denied that the portion of Washington street referred to had ever been opened or used as a street or public highway, or that it was ever accepted as such by the county, and alleged that no lots abutting upon the streets or portions thereof vacated by the order of the board had ever been sold to any person. They also denied that any false representations were ever made to the board to induce the members thereof to make the revoking order, or that the board ever relied upon any such representations in making the same. On the trial defendants moved for judgment on the pleadings on the ground that the amended complaint did not state facts sufficient to constitute a cause of action or entitle the plaintiff to any relief against the defendants, or either of them. The trial court held, however, that the board of supervisors had no authority or jurisdiction to make the order vacating and abandoning the streets, and further concluded that as the answer did not controvert the allegations of the complaint constituting dedication, it did not state facts sufficient to constitute a defense, and ordered judgment for the plaintiff on the pleadings. It is defendants' contention that the court erred in overruling their demurrer, and further erred in not giving judgment in their favor. We are of the opinion that the judgment as rendered finds no support in the record.

[1] The allegations of the complaint with reference to the dedication of the land recite that defendants' predecessors in interest had sold to different persons lots in the tract

according to the map or plat, and that there was thereby created an irrevocable easement in the streets and avenues delineated on such map. As above indicated the answer of defendants not only specifically alleges that no lots had ever been sold on the streets or portions thereof vacated by the order of December, 1913, but it also denies that any part of that portion of Washington street affected by the order had ever been opened or used or accepted by the public as a highway. These denials of plaintiff's conclusion that there was a dedication must be taken as true; judgment having been entered on the pleadings.

[2-4] Counsel for both parties have discussed at length the questions of the power of boards of supervisors to abandon highways, or to revoke, upon a proper showing, an order made with reference thereto. To our minds, however, the controlling question in this case is whether or not there has been an offer and acceptance of dedication of the street in question to public use as a public highway. Considering a dedication as a voluntary transfer of an interest in land, it partakes both of a nature of a grant and of a gift, and is governed by the fundamental principles which control such transactions. Hence a dedication, like a contract, consists of an offer and acceptance, and it is settled law that a dedication is not binding until acceptance, proof of which must be unequivocal. 18 Corpus Juris, p. 72. The acceptance may be actual or implied. It is actual when formal acceptance is made by the proper authorities, and implied when a use has been made of the property by the public for such a length of time as will evidence an intention to accept the dedication. Elliott v. McIntosh (App.) 183 Pac. 692. Two things, however, are necessary to a complete dedication, an offer and acceptance. A dedication without acceptance is, in law, merely an offer to dedicate, and such offer does not impose any burdens nor confer any rights, unless there is an acceptance. The rule therefore is that acceptance on the part of the public is necessary to a valid dedication of land as a highway. 1 Elliott on Roads and Streets, § 122; 8 Rul. Cas. Law, p. 898. Respondent claims, however, that defendants are estopped to deny that the streets delineated on the map were accepted, by reason of the filing of the map and the sale of lots with reference thereto, and it was upon this theory, no doubt, that the trial court based its decision.

That some confusion exists in the authorities in this state where the subject has received consideration there can be no doubt. Some of the cases confuse the doctrine of dedication with other doctrines pertinent only to private interrelations growing out of sales. The case of Town of San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405, is of such a character. It is there held that where an owner of land lays off a town and makes a map thereof showing it to be divided into streets, alleys, and lots, and then sells lots with reference to such map, he thereby makes an irrevocable dedication of the space represented on the map as streets, to the use of the public, and that in such a case no formal acceptance is necessary by the town authorities. The rule announced in this case is mere dictum, as it appeared that there was an acceptance. The rule declared in that case is one of constructive dedication, and undoubtedly could be invoked in an action between the dedicator and his grantees. But the purchasers here, if there be any, are not complaining. This action is one brought by a county to abate an obstruction upon property which it claims to be a public highway. There is a distinction between the rights accruing to the public generally and the purchasers of lots according to a map upon an offer of dedication. Eltinge v. Santos, 171 Cal. 278, 152 Pac. 915; People v. Reed, 81 Cal. 70, 79, 22 Pac. 474, 15 Am. St. Rep. 22.

[5] As before stated, so far as the public is concerned, there must be an acceptance to complete an offer of dedication. Dedication is the joint effect of an offer by the owner to dedicate land, and an acceptance of such offer. There can be no dedication without the participation of both. City of Anaheim v. Langenberger, 134 Cal. 608, 610, 66 Pac. 855. Contrary to the doctrine announced in the Le Breton Case, the mere making of sales of lots with reference to a map does not therefore constitute an irrevocable dedication to the public. As between an owner of land and the public, this act alone is not sufficient to constitute dedication. An acceptance must be had either by user or by some formal act. See note, 57 Am. St. Rep. 753. So far, therefore, as the Le Breton opinion can be construed as militating against the rule, it should have no weight. People v. Reed, supra. The rule that such act simply constitutes an offer to dedicate which does not become effectual until acceptance is reflected in a long line of cases in this state. People v. Reed, supra; Archer v. Salinas City, 93 Cal. 53, 28 Pac. 839, 16 L. R. A. 145; Schmitt v. San Francisco, 100 Cal. 307, 34 Pac. 961; Koshland v. Spring, 116 Cal. 689, 48 Pac. 58; Prescott v. Edwards, 117 Cal. 298, 49 Pac. 178, 59 Am. St. Rep. 186; Niles v. City of Los Angeles, 125 Cal. 572, 58 Pac. 190; City of Anaheim v. Langenberger, supra; City of Los Angeles v. McCollum, 156 Cal. 148, 103 Pac. 914, 23 L. R. A. (N. S.) 378; Eltinge v. Santos, supra; Elliott v. McIntosh, supra.

[6, 7] Here the answer denied that the streets in question had ever been opened or used as a street or public highway, or that it was ever accepted as such by the county, and it further denied that lots abutting thereon had

ever been sold to any person. The affect of the allegations of the answer therefore is that the land in question, not having been accepted, is not a public street, unless it can be said that the effect of either of the orders of the board amounted to an acceptance of the offer of dedication. It is not contended, nor could it successfully be, that the order of abandonment amounted to an acceptance. If it had any effect in this relation it can be construed only as a rejection of the offer. The manifest object of the petition to the board was to remove any presumption to dedication from the record that the filing of the map or plat of the property had created, for at the time the application was made, so the complaint avers, the plaintiffs had erected a fence across the property, thereby evidencing their intention to revoke the offer of dedication. The only effect, if any, of this order of the board rescinding its vacating order was to leave the matter in the condition it was prior to the order of abandonment, and at that time, as above shown, the offer of dedication had been withdrawn.

[8] The only other act or circumstance that could possibly be construed as an acceptance is the filing of the present action, but the mere filing of this action 13 years after the offer was made, and after it was rescinded, can in no manner be construed as an acceptance. City of Anaheim v. Langenberger, 134 Cal. 611, 66 Pac. 855. There is, therefore, nothing so far as the pleadings show that would in any manner indicate an acceptance of the offer of dedication.

[9] It might be said in conclusion that it is very doubtful if the board had power to set aside the order abandoning the highway. If we assume that the streets and portions thereof in question had become highways, there is no question but that the board of supervisors, acting in its legislative capacity, had the power to abandon the rights of the public therein (Pol. Code, § 2643), and no petition was necessary to bring about this action Symons v. San Francisco, 115 Cal. 555, 42 Pac. 913, 47 Pac. 453; Brown v. Board of Supervisors, 124 Cal. 274, 57 Pac. 82; Swift v. Board of Supervisors, 16 Cal. App. 72, 116 Pac. 317. Having done so, the proffered easement reverted, and the land thereby became the private property of the dedicator. Keena v. Board of Supervisors, 89 Cal. 11, 26 Pac. 615. In the absence of a new offer of dedication the only manner in which plaintiff could again acquire the property would be by condemnation proceedings.

It is true that the complaint alleged fraud in the procurement of the abandoning order, but this is denied in the answer, and, judgment having been had on the pleadings, this denial stands admitted as true. The conclusion we have reached that there was no acceptance of the offer makes further discussion of this question unnecessary.

From what we have said it follows that the judgment should be, and it is hereby, reversed.

WILBUR, SLOANE, and LENNON, JJ., concur.

183 Cal. 300

MERCANTILE TRUST CO. OF SAN FRANCISCO v. ALL PERSONS CLAIMING, etc. (McGLADE, Respondent). (S. F. 8428.)

(Supreme Court of California. July 27, 1920.)

1. Appeal and error ⟸714(5)—Brief cannot be looked to to show that court struck out evidence.

Where a record showed the proper admission of an abstract under Code Civ. Proc. § 1855a, as secondary evidence of a lease destroyed by fire, and decision of court was seemingly made with such evidence in the record, information in the brief that court admitted evidence only tentatively, and later struck it out, cannot be considered.

2. Appeal and error ⟸843(1)—Where reversal is required on one ground, other grounds not considered.

Where a reversal is necessary upon one ground, other grounds for reversal need not be considered.

3. Evidence ⟸588—Testimony held not overcome by geometrical inconsistency.

In a proceeding to quiet title to property in a block in a city, a decree for defendant *held* plainly not supported by the evidence, since the evidence upon which the witnesses all agreed, and which was supported by all probabilities, cannot be overcome by its inconsistency geometrically with an estimated street frontage.

4. Evidence ⟸372(12)—Abstract of record of destroyed lease admissible as ancient document, although instrument was defective.

In view of the provisions of Code Civ. Proc. § 1951, that the record of an instrument affecting real property may be used in evidence, and Civ. Code, § 1207, that the record of any instrument recorded prior to January, 1915, may be so used notwithstanding defect in execution or in the certificate of acknowledgment or the absence thereof, and that where record was made within 15 years, genuineness of instrument must be proved, there is a prima facie presumption that such an instrument, more than 15 years old, and recorded before January, 1915, is genuine, although the record shows an instrument which would not prove itself because of such defects.

5. Evidence ⟸370(8)—Abstract of destroyed record admissible without other proof of genuineness.

The fundamental purpose of Code Civ. Proc. § 1855a, is to make abstracts of record available

as secondary evidence, where the records were destroyed, and where such abstract shows the record of an instrument which, if not destroyed, could have been introduced without other proof of its genuineness, and would have raised a prima facie presumption of its genuineness, such abstract is admissible without other proof of genuineness.

6. Evidence ⊂372(12)—Abstract of recorded lease held admissible without further proof of genuineness regardless of certificate of acknowledgment.

An abstract of a lease recorded more than 15 years before trial is sufficient as secondary evidence of the record under Civ. Code, § 1207, regardless of whether there was a certificate of acknowledgment or not, and is admissible in evidence without further proof, in a case where secondary evidence is admissible.

7. Evidence ⊂70—Abstract not noting defect raises presumption of proper acknowledgment.

Where an abstracter under duty to note the absence of a certificate of acknowledgment conforming to statutory requirements made no record thereon such failure raises the presumption that it had a proper certificate, which presumption is strengthened by the fact of recording, which could not lawfully be done without such certificate, making the abstract competent prima facie evidence thereof in quieting title.

8. Evidence ⊂372(12)—Scope of curative act in respect to abstract of destroyed recorded instruments.

Where abstract of destroyed record of a lease, made more than 15 years before, was offered as evidence, and the lease was executed by a party affixing his mark, any defect in not showing that the execution was witnessed, as required by Civ. Code, § 14, and Code Civ. Proc. § 17, come directly within the curative provision of Civ. Code, § 1207; but, where the abstracter under duty to note any such defect has not done so, the abstract is evidence that there was no such defect.

9. Evidence ⊂372(10)—Ancient documents rule held not applicable in suit to quiet title.

In a suit to quiet title against defendant claiming by adverse possession, where abstract of record of destroyed lease, made more than 15 years before, was offered in evidence, objection that payments of rent were as consistent with the defendant's theory of tenancy in only a part of the property as with the plaintiff's theory of tenancy in all is suggestive of a rule applicable to ancient documents, but which has no reference to a record which itself proves the instrument or to secondary evidence of that record; no such requirement being contained in the Code sections making an abstract competent primary evidence, where the record was destroyed.

10. Evidence ⊂273(4)—Lease defectively executed admissible as showing acknowledgment of tenancy.

In an action to quiet title, an acknowledgment by defendant that he held the property, not as owner or adverse claimant, but as tenant, made in his lease, is not affected as evidence of a declaration against interest by the fact that the lease may not have been validly executed on the part of lessor by his attorney in fact; the power of attorney not being shown.

11. Evidence ⊂186(9)—Abstract of destroyed record of lease held admissible, being presumed to set out all material points.

In an action to quiet title against defendant, who claimed by adverse possession, where abstract of destroyed record of lease was objected to as being a mere summary, such abstract was admissible, as it must be presumed to set out all the materal points of the lease as recorded.

12. Evidence ⊂372(4)—Exactitude and certainty of proof of ancient instruments not required.

In a suit to quiet title, the same degree of exactitude and certainty of proof cannot be required in dealing with old instruments and muniments of title as with the recently executed ones, particularly where the record has been destroyed and the Code sections, making available abstracts of such records, may not be given a construction which would avoid their purpose.

In Bank.

Appeal from Superior Court City and County of San Francisco; George A. Sturtevant, Judge.

Suit by the Mercantile Trust Company of San Francisco against all persons claiming any interest in, or lien upon, certain described real property or any part thereof to quiet title, in which Mary F. McGlade appeared as a defendant. Judgment for the named defendant, and plaintiff appeals. Reversed.

Morrison, Dunne & Brobeck, of San Francisco (R. L. McWilliams, of San Francisco, of counsel), for appellant.

Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for respondent.

OLNEY, J. This is a so-called "all persons" suit, brought to establish the title of the plaintiff to certain real estate in the city of San Francisco. One Mary F. McGlade appeared in the action as a defendant and answered, claiming to be herself the owner of a one-half interest in a portion of the property, with the result that as to this portion the action assumed the character of an ordinary suit to quiet title by the plaintiff against Mrs. McGlade. The trial court found that Mrs. McGlade was in fact the owner of the interest claimed by her, and gave judgment accordingly, from which the plaintiff appeals. One of the grounds urged by the plaintiff for reversal is that the evidence does not justify the finding of ownership in the defendant.

The property as to which the plaintiff sought to establish title was the major portion of the block lying between Washington

and Oregon streets on its southerly and northerly sides, respectively, and fronting on its eastern side on The Embarcadero, formerly East street, which forms the waterfront of the city. Washington and Oregon streets run very nearly east and west, but The Embarcadero at this point runs nearly northwesterly and southeasterly, so that Washington street starts from it at an angle, and the corner of the block formed by Washington street and The Embarcadero is a gore or an acute angle of about 45 degrees. The portion of the property in which the defendant claims an interest is this gore.

The plaintiff is admittedly the owner of the record title to all the property to which it sought to establish title, including the gore. It acquired it from one Richard D. Chandler subsequent to the San Francisco fire and earthquake of 1906. Chandler had acquired it in 1882 from one Garrison, who in turn had acquired it from the state in 1854. The defendant's claim is of title by adverse possession of the corner on the part of her father, one Drobaz, who died in 1905, and to a one-half interest in whose estate she succeeded. Included in the property originally acquired by Garrison from the state and subsequently conveyed by him to Chandler, and passing from the latter to the plaintiff, was the lot immediately to the west of the corner. Drobaz appears in possession of this lot in 1866, admittedly as a tenant of Garrison, and continued in such possession, paying rent therefor, first to Garrison and then to Chandler, until the time of his death. After his death this possession as tenant was continued by his heirs until all the improvements were destroyed by the fire of 1906. Along with the possession of this lot, Drobaz had possession of the corner, and the final question in the present controversy is as to whether he held such possession as tenant, or under a claim of adverse and independent ownership. Drobaz never paid any taxes on the property, but the block was not accurately described on the tax assessment maps, and it seems to be assumed that the corner was never assessed.

The lot to the west of the corner was improved with a two-story building when Drobaz appears in 1866 in possession of it as tenant. The corner to the east was unimproved, and had not been filled, and was still covered by the waters of the bay. Between 1866 and 1875 Drobaz inclosed the corner with a small fence and used it for drying nets, and filled it in. In 1875 he constructed a building on it immediately against the building on the lot to the west. Both buildings were destroyed by fire about 1877, and thereupon Drobaz erected a new building covering both pieces of property. The new building was apparently built as a unit, and without reference to any difference in ownership between the eastern and western portions of the land it occupied. There was, however, a stairway leading to the second story from Washington street, which, according to the testimony of all the witnesses on the point, was on, or approximately on, the east line of the old building occupied by Drobaz as tenant. This new building remained until the fire of 1906, when all possession by the heirs of Drobaz ceased, without any attempt on their part to retake possession and without any assertion of interest until after the commencement of the present action in 1911.

[1, 2] There was considerable evidence introduced in addition to that showing the foregoing, some of which tended to show a claim of ownership by Drobaz to the corner, and other of which tended to show that he occupied it only as a tenant in conjunction with the lot to the west, which he admittedly held in that capacity. It is not necessary, however, for the purposes of this opinion to state more than one bit of this evidence. The public records of San Francisco were for the most part destroyed by the fire of 1906, and for the purpose of permitting the use of secondary evidence of them, the Legislature in 1911 adopted a new section of the Code of Civil Procedure numbered 1855a. The material part of it reads:

"When, in any action, it is desired to prove the contents of any public record or document lost or destroyed by conflagration or other public calamity and after proof of such loss or destruction, there is offered in proof of such contents (a) any abstract of title made and issued and certified as correct prior to such loss or destruction, and purporting to have been prepared and made in the ordinary course of business by any person, firm or corporation engaged in the business of preparing and making abstracts of title prior to such loss or destruction; * * * the same may, without further proof, be admitted in evidence for the purpose aforesaid. * * *"

Pursuant to this section, there was received in evidence on behalf of the plaintiff an old abstract of title for the purpose of proving the record of a certain lease. This lease, according to the abstract, was one by Garrison to Drobaz covering all the property occupied by the latter, that is, covering the corner now in dispute, as well as the lot to the west, and describing it all as a single piece without division. It was made, according to the abstract, in 1876, which, it is to be noted, was about the time that Drobaz first constructed a building on the corner. So far as the bill of exceptions shows, the abstract was admitted for the purpose of showing the record of this lease without objection, was never stricken out, and the decision of the trial court was made with it as a part of the evidence before it. We are informed by the briefs, however, that it was admitted in evidence only tentatively, and that finally the court concluded that it was not admissible, and made its decision as if it were not in evidence. If this were the fact, as undoubtedly it was, since both sides assume it, the plain-

tiff should have insisted upon some ruling being made by the lower court which would appear in the bill of exceptions, and show the rejection of the evidence. As the record now stands, the question as to its admissibility is not presented, and the decision of the lower court against the plaintiff appears as if made with this evidence before it, although its very cogent and persuasive character is plain. Whether, in spite of its character in this respect, there was other evidence sufficient to overcome it and to sustain the decision, we need not consider, however, since a reversal is necessary on another ground.

[3] The whole theory of the defendant's case is that, while Drobaz was tenant of the lot to the west of the corner, he was not a tenant as to the property east of the east line of the building on that lot. The proof is plain, and is not controverted that west of this line the property he occupied was occupied by him only as a tenant. The proof by the defendant as to the location of the westerly boundary of the property in which she claimed an interest by reason of the adverse possession of her father was always as to the location of the east line of the old building to the west of the corner, and of the stairway built on that line when the old building was destroyed in 1877 and a new one erected covering both pieces of land. The evidence is also unanimous that this line ran at right angles to Washington street. It is evident, also, that almost necessarily it must have so run. The lot to the west fronted on Washington street, and was not a corner lot. There was nothing to require a building upon it to be built upon a bias. It is almost inconceivable that a building erected on such a lot would run, not at right angles with the street on which it fronted, but on a bias of about 45 degrees. Nevertheless, the property in which the judgment decrees that the defendant has an interest is described as a parallelogram whose frontage on Washington street is the distance between the corner on The Embarcadero and a point which it appears clearly from the evidence was located as the point where the east line of the old building began, and whose sides are the line of The Embarcadero on the east, and a line parallel thereto on the west. In other words, the west line of the property in which the defendant is decreed to have an interest runs northwesterly from a point on Washington street and at an angle of about 45 degrees with it, while the west line of the property in which alone, according to the proof, the defendant claims or can have an interest runs from the same point northerly and at right angles to Washington street. The major portion of the property described in the decree is west of this right angle line, and is a part of the property admittedly occupied by Drobaz as tenant and the plaintiff's title to which was not questioned at the trial.

The defendant's only answer to this point is that the witnesses testified that the gore occupied by Drobaz had a length on The Embarcadero of 70 or 73 feet, and that this is inconsistent with a west line running at right angles to Washington street, since such a line would intersect The Embarcadero at a point considerably less than 70 or 73 feet from the corner. But the witnesses were all testifying from memory as to a fact observed many years before. Estimates of distances are rarely accurate, even when the observations on which they are based are fresh. The testimony, on the other hand, that the building on the lot to the west ran at right angles to the street is quite reliable. If the building had run on a bias, particularly a bias anything like as great as 45 degrees, it would have been a most noticeable thing, certain to be observed and remembered. It would be wholly unreasonable to allow the evidence to this effect on which all the witnesses agree and which is supported by all the probabilities of the situation to be overcome by its inconsistency geometrically with the estimated frontage of the gore on The Embarcadero. In this respect the decree is plainly not supported by the evidence, and a new trial should be had.

[4] For the guidance of the court and parties upon a new trial, it is advisable that we pass upon the admissibility of the evidence as to the lease by Garrison to Drobaz, previously mentioned, since the question is certain to arise, and, although not in reality presented by the present record, has been fully argued before us.

No objection is made to the abstract for want of any of the preliminary matters required by section 1855a, Code of Civil Procedure, previously quoted. The objections made are some seven in number. The first and most fundamental is that there was no proof other than the abstract itself of the genuineness of the lease. The same point is put by counsel in a little different form in the reiterated objection that other than the abstract there was no proof that the lease ever in fact existed. Closely connected with the point also is the second objection that the abstract does not show that the instrument as recorded bore any certificate of acknowledgment. This objection is closely connected with the first, because if the record did show a proper certificate of acknowledgment, it would, under our Code, have proved prima facie the execution of the original instrument. Both objections, however, involve a misconception of the statutory provisions permitting (1) the use in evidence of the record of an instrument instead of the instrument itself, and (2) the use of an abstract where the record has been destroyed.

First, in regard to the use of a record. Our Code provides (section 1951, Code Civ. Proc.) that the record of any instrument affecting real property may be used in evidence with

like effect as the original instrument itself. If the record purports to show an instrument which would prove itself, so to speak, as where it bears a proper certificate of acknowlegment of execution, the record is admissible without other proof of the existence or genuinenss of the instrument and, in fact, for the very purpose of showing that such a genuine instrument did exist. There is also at least one case other than this just mentioned where the record alone is admissible and sufficient for the same purpose. That case is the one of a record made before January 1, 1915, and also made more than 15 years before the time at which it is sought to use it in evidence. Section 1207, Civil Code, provides, in effect, that the record of any instrument recorded prior to January 1, 1915, may be used in evidence "notwithstanding any defect, omission, or informality in the execution of the instrument, or in the certificate of acknowledgment thereof, or the absence of any such certificate." The section further provides that when the record was made within 15 years of the time it is sought to use it in evidence, proof must first be made of the genuineness of the instrument. The plain and necessary implication is that such proof is not required where the record is more than 15 years old. The result is that, even though the record shows an instrument which would not prove itself because of the want of a proper certificate of acknowledgment or some defect in the manner of execution, yet if the record be 15 years old and was made prior to January 1, 1915, these latter facts are the equivalent, and serve the purpose of the proof of genuineness ordinarily required as a prerequisite to the introduction in evidence of an instrument or its record. They raise, in other words, a prima facie presumption that the instrument is genuine.

[5] Second, in regard to the use of an abstract of the records. The fundamental purpose of section 1855a, Code of Civil Procedure, heretofore quoted, is to make available as secondary evidence of the record, where the latter has been destroyed, abstracts of the record made under such circumstances as to be reasonably reliable. Such secondary evidence, when introduced in a proper case, proves primarily the record, and, the record being proved, the effect is exactly the same to the extent to which it is proved as if it were itself used in evidence instead of being proven by the secondary evidence of the abstract. In other words, if the secondary evidence of the abstract proves the record of an instrument, which record, if not destroyed, could have been introduced in evidence without other proof of the genuineness of the instrument recorded, and would have the effect of raising a prima facie presumption of genuineness, then the abstract may be introduced without such other proof and with like effect.

[6] Applying these propositions to the case at bar, no objection is made as we have said, that the case is not one where a proper abstract may be used as secondary evidence, or that the particular abstract did not conform to the statutory requirements. The abstract showed, furthermore, the record of a lease executed ostensibly by Drobaz as lessee, recorded prior to January 1, 1915, and more than 15 years before the time of trial. It was sufficient, therefore, as secondary evidence of a record which, under section 1207, Civil Code, regardless of whether there was a certificate of acknowledgment or not, was admissible in evidence without other proof of the genuineness of the instrument recorded, and raised a prima facie presumption of such genuineness. The abstract being sufficient as such secondary evidence, and the case being one where secondary evidence was admissible, it follows that it was admissible without further proof, and had the effect of making a prima facie showing that the lease whose record it showed was genuine.

[7] We would not, however, rest the disposition of these objections entirely on the fact that the record proven was one which came within the provisions of section 1207, Civil Code, with the possible implication that we did not consider the abstract sufficient to prove a record showing an instrument bearing a due certificate of acknowledgment, so that without section 1207, Civil Code, the record would be admissible in evidence without further proof. The abstract, to be sure, contains no notation of an acknowledgment of execution of the lease. But it contains no notation that the record failed to show such acknowledgment. An abstract is but a summary of the record. It does not purport to set it out in full. Some abstractors always note the acknowledgment; others do not. The present abstract in some instances notes it, and in others it does not. Among the latter instances are a number of instruments such as mortgages and trust deeds to banks or bankers which it is inconceivable were not acknowledged. But while a competent abstractor may or may not note the fact of acknowledgment if it appear, he will invariably note its absence if it does not appear. The absence of a certificate of acknowledgment conforming to the statutory requirements for such certificates is a defect which it is his duty to catch and note. If he does not note its absence or some defect in it, he in effect certifies that the record shows an instrument which is properly acknowledged.

In Attebery v. Blair, 244 Ill. 363, 91 N. E. 475, 135 Am. St. Rep. 342, an abstract was offered in evidence under a statute much the

same as ours to prove the destroyed record of certain deeds. It was objected that the abstract did not show that the deeds were under seal, a requisite for their validity according to the Illinois law. The court held in effect that if the record had not shown that the deeds were under seal, it was the duty of the abstractor to note that fact, and, there being no note to that effect, the abstract was evidence that seals were shown by the record. There is no distinction in principle between this case and the present one where the abstract does not note a want of a certificate of acknowledgment or any defect in it. See, also, Warvelle on Abstracts (3d Ed.) p. 244.

We might add that the presumption arising from the fact that the abstract does not note a defective or lacking certificate of acknowledgment is strengthened by the fact that the instrument should not have been recorded unless it bore a proper certificate; and yet it was recorded. Altogether, we have no hesitation in holding that the abstract was sufficient to prove prima facie as a matter of secondary evidence that the record of the lease showed a due certificate of acknowledgment entitling the lease to record, and making the record sufficient evidence in itself without recourse to the curative provisions of section 1207, Civil Code.

[8] What has already been said answers the third objection, which is that the abstract shows that Drobaz, who was illiterate, executed the lease by affixing his mark without showing that the execution in that fashion was witnessed, as required by section 14 of the Civil Code and section 17 of the Code of Civil Procedure. If this defect existed, it came directly within the curative provisions of section 1207, which apply to defects in the manner of execution as well as in the matter of acknowledgments. Furthermore, such a defect is one which again it was the duty of the abstractor to catch and note, and his certificate without such note appearing is in effect a certificate that the defect did not appear in the record, so that the abstract is sufficient prima facie evidence that it did not exist.

[9] The fourth objection is that there is no proof that anything was done under the lease, that is, the facts which appear, such as the payment of rental by Drobaz and his possession of the property, are as consistent with the defendant's theory that Drobaz was the tenant only of the property to the west of the gore as with the plaintiff's theory that he was tenant as to all that he occupied. The rule suggested by the objection is one applicable to ancient documents. It has no reference to a record which of itself proves the instrument or to secondary evidence of that record. It is not a requirement of the Code sections which make the record competent primary evidence and the abstract competent secondary evidence of the record.

[10] The fifth objection is that according to the abstract the lease was actually executed, not by Garrison himself, but by one Pratt on his behalf as his attorney in fact, and the existence of a power of attorney by Garrison to Pratt was not shown. Of course, if one were claiming title through Garrison by means of an instrument purported to be executed for him by some attorney in fact, or were seeking to rely upon such an instrument as against him or against an interest at the time in him, proof of authority on the part of his purported agent would be essential, unless the instrument were an ancient one and the circumstances such that authority would be presumed. But in the present case it is sought to use the instrument, not against Garrison or any interest he had, but against the interest of the other party to it, Drobaz. As a declaration against interest on the part of Drobaz, an acknowledgment by him that he held the property not as owner but as tenant, the effect of the instrument is not changed by the fact that it may not have been validly executed on the part of Garrison.

The sixth objection is that the lease calls for a monthly rental of $250, while so far as the evidence shows the only rental paid by Drobaz was $150 a month. If there were this discrepancy in fact between the terms of the purported lease and the actual conduct of the parties, it would seem that it would affect only the weight to be given to the evidence, not its admissibility. The claimed discrepancy, however, does not in fact exist. The only evidence as to the amount of rental paid by Drobaz is as to rental paid subsequent to the expiration of the term of the lease. There is no evidence whatever as to the amount of rental actually paid by Drobaz during the time the lease, if genuine and acted upon the parties, would have been in force.

[11] The seventh and last objection is that the abstract is but a summary of the contents of the lease, and does not purport to state them in full, and it may be that there were further terms not set out which would materially change the weight and effect to be given to the instrument. But it was the duty of the abstractor to set out the substance of all material terms. Taylor v. Williams, 2 Colo. App. 559, 31 Pac. 504; Attebery v. Blair, 244 Ill. 363, 91 N. E. 475, 135 Am. St. Rep. 342; Warvelle on Abstracts (3d Ed.) p. 2; 1 Cor. Juris, 366. The strong probability and the presumption are that there were no material terms not set out.

[12] Upon this whole subject we would say that in dealing with old instruments and muniments of title, the parties and witnesses to which are dead, and as to whose execution or the circumstances under which

they were executed, or as to whose exact contents in case they or the original record of them is lost, certain and positive evidence is not possible, the same exactitude and certainty of proof cannot be required as is properly required in the case of more recent events. The courts must go upon probabilities and presumptions. To do otherwise would be to destroy valid titles, not to sustain them. In the present case the abstract in question was made by one of the best-known and most reliable abstractors of the early years of San Francisco. It is before us, and we venture to say that no lawyer of experience in the examination of titles in that city but would, on examining the abstract, feel reasonably certain that it set forth with accuracy the material terms of the instruments noted in it and defects in acknowledgment or execution which would be manifest on the face of the record. The courts should not, by a narrow construction of the Code sections which make this evidence available, blind themselves to the light which it affords, in many cases, because of the wholesale destruction of our public records, the only reliable light which can now be had.

Our conclusion is that the abstract was admissible for the purpose of proving the lease and its execution by Drobaz.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LAWLOR, J.; WILBUR, J.

(183 Cal. 409)

UNION TANK LINE CO. v. RICHARDSON, State Treasurer. (S. F. 8954.)

(Supreme Court of California. July 28, 1920. Rehearing Denied Aug. 26, 1920.)

1. Taxation ⟸164—All "car-loaning companies operating upon railroads in this state" subject to tax.

Const. art. 13, § 14, relating to taxation of car-loaning companies "operating upon railroads in this state," *held* applicable to all car-loaning companies which are carrying on their business upon railroads in the state.

2. Taxation ⟸168—Oil tank line corporation held liable for gross earnings tax; "car-loaning companies operating upon railroads in this state."

Oil tank line company, incorporated in and with principal place of business in other states, which leased tank cars to corporation within the state by lease executed in other state providing for payments to be made in other state, *held* subject to gross earnings tax under Const. art. 13, § 14, subd. "a", imposing such tax on "car-loaning and other car companies operating upon railroads in this state."

In Bank.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by the Union Tank Line Company against Friend W. Richardson, as Treasurer of the State of California. Judgment for plaintiff, and defendant appeals. Reversed.

U. S. Webb, Raymond Benjamin, and Frank L. Guerena, all of San Francisco, for appellant.

Morrison, Dunne & Brobeck, of San Francisco (Herbert W. Clark, of San Francisco, of counsel), for respondent.

LAWLOR, J. This is an appeal from a judgment in favor of the plaintiff, the Union Tank Line Company, a corporation, in an action brought to recover from the defendant, Friend W. Richardson, as treasurer of the state of California, taxes paid under protest.

There is no dispute as to the facts. The plaintiff is a new Jersey corporation, having its principal place of business in the state of New York. It was doing, and was qualified to do, business in this state, where it had a managing agent. The company was engaged in the acquiring, by purchase or otherwise, of oil tank cars and the leasing thereof to shippers throughout the United States. All contracts between the plaintiff and shippers were entered into and executed in New York at the plaintiff's office, where, it appears, all payments under such contracts were made to the company. Plaintiff maintained and operated repair shops for the repair of its cars in the city of Richmond, county of Contra Costa, and in the town of El Segundo, Los Angeles county. At some time prior to March 1, 1913, plaintiff entered into a contract with the Standard Oil Company of California by which the former undertook to lease to the latter, for its use and service in the transportation of petroleum oil and other oil products within and outside of the state, such cars as might be required. In this agreement it was provided that the oil company should repair plaintiff's cars at prices which should be mutually agreed upon from time to time; that the oil company should furnish the labor and should use materials specified by the plaintiff; that all materials should be inspected by the plaintiff's agents; that the tracks of the oil company at Richmond and El Segundo should be considered "home tracks" for any part of the plaintiff's equipment, and that the plaintiff should have free and reasonable use of those tracks; that the oil company should "perform, or assume the expense of, all switching within or about its plant where such switching is occasioned by the natural operation of the plant or by instructions of the car company"; "that the time any car

shall be considered to be in the possession of the oil company shall be from the day the car is placed until it is unloaded, both inclusive, and that any car prior to the time of its being placed, or ordered placed for loading, by the oil company, and after the time it is unloaded shall be subject" to the plaintiff's orders and not to those of the oil company, "except that the oil company shall carry out the instructions of the car company with respect to the distribution of its empty cars"; and that plaintiff's cars should not be sublet without the plaintiff's consent. This contract was the only contract of lease into which the plaintiff entered with any person or corporation in California, and none of plaintiff's cars other than those furnished to the oil company was operated over rail lines in this state. It is admitted that, although the plaintiff, as already shown, reserved the right to direct the movements of its cars after unloading, that right was not exercised during the period in question. The rail carriers in the state which hauled plaintiff's cars paid to the plaintiff three-fourths of one cent per mile per car, while the oil company paid a rental to the plaintiff and regular freight rates to the carriers. Plaintiff owns no railroad or rolling stock in this state other than the cars leased to the oil company. Plaintiff's vice president and treasurer testified that the provision in the contract above referred to regarding the use of the oil company's "home tracks" was for the purpose of avoiding demurrage charges, that plaintiff did not allocate particular cars for the use of the oil company, and that, to his knowledge, no cars had been sublet by the oil company either with or without the plaintiff's consent.

In 1916 the state board of equalization assessed and levied against the plaintiff the tax authorized by subdivision (a) of section 14 of acticle 13 of the Constitution. In accordance with that constitutional provision, the tax was measured by the gross receipts from the operations of the company within the state. The tax was paid to the defendant under protest, and thereafter this action was commenced to recover the amount thus paid. The court made findings of fact and conclusions of law and gave judgment for plaintiff in the sum of $4,712.54, the amount prayed for.

In the first paragraph of section 14 of article 13 of the Constitution it is provided that—

"Taxes levied, assessed and collected * * * upon railroads, including * * * refrigerator, oil, stock, fruit, and *other car-loaning and other car companies operating upon railroads* in this state * * * shall be levied, assessed and collected in the manner hereinafter provided." (Italics ours.)

It is conceded that the only question on this appeal is "whether the respondent was a car-loaning company operating upon railroads in this state within the meaning of the above-quoted section."

[1] It is to be observed that the verb "operate" may be used either transitively or intransitively (Rhodes v. Matthews, 67 Ind. 131, 140), and that it is used here intransitively—"*operating upon* railroads in this state." (Italics ours.) This must be so, because the language of the section is not confined to car-loaning companies operating cars. If it had been intended to limit the scope of the taxing provisions to those companies which operated cars, language appropriate to a clear expression of such intention would presumably have been chosen. The American Universities New Unabridged Dictionary defines "operate," when used in the intransitive, as follows: "To have or produce a desired result or effect; to act effectively." And Funk & Wagnalls' Standard Dictionary gives to the word the meaning, "To effect any result; have agency; act." If we substitute one of these definitions for the word itself as it is used in the section, the context reads, "car-loaning companies * * * acting effectively upon railroads in this state." The only interpretation which can reasonably be given to this portion of the section is that it authorizes the taxation in the manner prescribed of all car-loaning companies which are carrying on their business upon railroads in this state.

[2] And, adopting this interpretation, we think that the plaintiff clearly comes within the purview of the section. While it is true that the only contract under which plaintiff's cars were sent into this state was executed outside of the state, nevertheless that contract was performed by the plaintiff by delivering cars over, and by permitting its lessee to use those cars upon, the railroads within the state. There is nothing in the section which requires that, in order for a public service company to be taxable thereunder, all its business must be transacted within the state. The fact that a portion of plaintiff's business (the execution of its contracts and all payments thereunder) is carried on outside of the state is immaterial in this connection. Likewise it is immaterial that the plaintiff does not use its cars in this state for the transportation of its own products, for it cannot be reasonably contended that the section relates only to cars so used when it expressly designates *car-loaning* companies. A car-loaning company obviously does not loan them to itself for the transportation of its own products.

Plaintiff cites Wright v. Union Tank Line Co., 143 Ga. 765, 85 S. E. 994, to show that under these facts the plaintiff was not "doing business" in the state. The distinguishing feature of that case, however, was that the state of Georgia was endeavoring to collect from the plaintiff, not only a tax upon

tangible property, but also a tax upon its franchise to do business in Georgia. No such question is involved here.

Section 14 of article 13 was adopted by amendment in 1910. It was the result of a movement inaugurated in 1905 to separate the systems of state and local taxation. The first paragraph (which we have quoted) provides that all taxes upon those public utilities which are enumerated therein shall be levied in the manner prescribed in the following subdivisions and shall be for state purposes only. Subdivision (a) prescribes the manner of collecting taxes on railroads, express companies, telegraph and telephone companies, gas and electric companies; subdivision (b) for taxes on insurance companies; subdivision (c) for taxes on banks, and subdivision (d) for taxes on franchises. The following rule of construction is enunciated in 12 Corpus Juris, at page 710:

"The court should look to the history of the times and examine the state of things existing when the Constitution was framed and adopted, with a view to ascertaining its objects and purposes."

In 1905 a commission was appointed by the Governor to devise a plan for the separation of state from local taxation. That commission reported in 1907, but the amendment which it recommended at that time failed of adoption at the general election of 1908. Another commission was appointed in 1909 "to recommend a plan for the revision and reform" of "the system of revenue and taxation in force in this state." It was this commission, then, which formulated this amendment and presented it to the Governor in 1910 in the form of a report which reads (page 18):

"The amendment opens the way for a separation of state from local taxation. * * * The taxes reserved for the state are: * * * (2) On the property of * * * refrigerator, and *all other car companies.* * * *" (Italics ours.)

To hold that plaintiff, because of the terms of its contract with the Standard Oil Company under which it relinquished to the lessee the control over its cars, was not subject to the payment of the tax authorized by subdivision (a) would be in effect to hold that any concern conducting a business in this state of one of the classes enumerated in the section could evade the payment of this tax by entering into a similar arrangement by which it would receive the earnings of its property in the state while the control thereof was stipulated to be in a lessee.

Plaintiff has caused certain of its oil cars to come into California and to be hauled over and upon the railroads in this state. It is therefore in the language of the Constitution, "operating upon railroads in this state."

Judgment reversed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SHAW, J.; LENNON, J.; WILBUR, J.; SLOANE, J.

48 Cal. App. 131

STEVENS v. PARKFORD et al. (Civ. 2785.)

(District Court of Appeal, Second District, Division 1, California. June 10, 1920.)

1. Sales ⊜273(5)—No implied warranty that refrigerating plant contracted for would answer purpose.

In sale of a refrigerating plant, furnished precisely according to order, there was no implied warranty the machine would answer the particular purpose for which it was intended.

2. Sales ⊜441(3)—Evidence held not to show refrigerating plant did not comply with guaranty.

In an action for the price of a refrigerating plant sold, evidence *held* insufficient to justify the finding that the plant did not produce refrigeration in accordance with plaintiff seller's guaranty that it would be equal to the melting of one ton of ice daily.

3. Sales ⊜65—Seller entitled to recover, irrespective of his performance of separate contract.

Plaintiff, who properly installed certain cold storage receptacles for defendant in accordance with specifications, is entitled to payment without regard to whether or not he failed to comply with his separate contract, made months before, under which he installed a refrigerating plant.

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

Action by Will P. Stevens against E. A. Parkford and C. B. Ford. From a judgment for defendants, plaintiff appeals. Reversed.

Andrew M. Strong, of Los Angeles, for appellant.

Warmer & Jones, of Ontario, for respondents.

SHAW, J. Plaintiff, insisting that the findings are not supported by the evidence, appeals from a judgment entered in favor of defendants.

The complaint sets forth three causes of action. By the first count it is alleged that in December, 1914, plaintiff sold, delivered, and installed in defendants' hotel, known as the Casa Blanca Hotel, certain described cooling boxes, for which defendants agreed to pay him the sum of $537.50, all of which is unpaid. The second count declares upon a written contract, dated October 21, 1914, under and pursuant to which it is alleged that

plaintiff furnished and installed in said hotel a one-ton refrigerating plant and appurtenances to be used in connection therewith, for which defendants agreed to pay the sum of $763, no part of which has been paid. The third count is for $17.50 alleged to be due for a pump and oil sold defendants, as to which, since judgment therefor was rendered in favor of plaintiff, there appears to be no controversy.

While the court found that plaintiff furnished and properly installed the cooling boxes, for which defendants agreed to pay him the sum of $537.50, it further found that payment therefor so to be made by defendants was conditional and dependent upon the refrigerating system operating according to warranties set forth in the contract, dated October 21st, for the installation of the same; in other words, payment for the cooling boxes was made to depend upon the successful operation of the refrigerating plant, which, as found, "did not operate according to the provisions and warranties set forth in said contract," and did not produce refrigeration in accordance with the guaranty contained in the contract dated October 21, 1914, under which the refrigerating plant was installed.

[1] The contract for the refrigerating plant contained full and complete specifications therefor, and not a scintilla of evidence, in so far as we are advised, was offered tending to show that, as installed, it was not constructed in strict accordance with the specifications therefor. In other words, as to the refrigerating plant, defendants got precisely what they contracted for, and there was no implied warranty that the machine would answer the particular purpose for which the buyers intended to use it. Seitz v. Brewers' Refrigerating Mach. Co., 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837; Fuchs & Lang Mfg. Co. v. Kittredge & Co., 242 Ill. 88, 89 N. E. 723; Bancroft v. San Francisco Tool Co., 120 Cal. 228, 52 Pac. 496. Hence, to sustain the finding complained of, we must look to the express warranties, if any, contained in the contract. Other than as to furnishing and installing the machinery in a workmanlike manner as provided in the specifications and as to which no complaint is made, the only obligation assumed by plaintiff is the following:

"I guarantee that the above-described machine and apparatus will produce refrigeration equal to the melting of * * * tons of ice daily (with continuous operation)."

Since the contract provides for a "one-ton refrigeration machine," the guaranty should be read as providing for refrigeration equal to the melting of one ton of ice daily, and the provision "with continuous operation" is modified by another provision in the contract that "length of operation to be not over eight hours per day, provided all doors are kept closed, except when in actual service." So the guaranty was that the apparatus, operated eight hours per day, with the doors closed, except when in actual use, would produce refrigeration equal to the melting of one ton of ice per day. The record is entirely silent as to the performance of the machinery under the condition so expressed. The entire evidence offered by defendants was to the effect that the apparatus did not work satisfactorily, in that meats, poultry, milk, and cream on occasions deteriorated and became unfit for use. But plaintiff's guaranty was, not that the apparatus would produce refrigeration sufficient to preserve commodities placed in the cooling boxes, but solely that it would, subject to the conditions stated, produce refrigeration equal to the melting of one ton of ice daily, and as to which no evidence whatsoever was introduced. For aught that appears to the contrary, such degree of refrigeration might have been produced, and, notwithstanding such fact, the commodities placed in the cold storage receptacles deteriorated.

[2] Since no question is raised as to the construction of the plant in accordance with the specifications, and the only guaranty was as to the degree of refrigeration to be produced, that was the only question which the court was called upon to try. The fact that it did not perform the service satisfactorily to defendants, or that meats, fruits, and milk deteriorated, is wholly immaterial, provided the apparatus produced the degree of refrigeration guaranteed by plaintiff. The evidence is insufficient to justify the finding that the plant did not produce refrigeration in accordance with the plaintiff's guaranty.

[3] The court also erred in finding that the cold storage boxes installed by plaintiff under his contract were covered by the contract for the installation of the refrigerating plant. The two contracts were entirely distinct and separate. That for the cold storage boxes, constructed in accordance with specifications, was made months after the contract for the refrigerating plant, and the position of plaintiff in reference thereto is precisely that of a third party who had put in the cooling boxes. While it is true that the contract of October 21, 1914, under which the refrigerating plant was installed, required defendants to provide the storage chambers and insulate and construct them in accordance with plaintiff's plans and instructions therefor, the construction thereof by plaintiff, under a contract wherein no reference was made to the prior contract for other work, did not render payment dependent upon whether or not the refrigerating plant should operate successfully. If done by a third party, he would have been entitled to payment, regardless of whether the refrigerating plant produced refrigeration equal

to the melting of one ton of ice per day or not. And so plaintiff, having properly installed the cold storage receptacles in accordance with the specfications, is entitled to payment, without regard to whether or not he failed to comply with the contract under which he installed he refrigerating plant.

The judgment is reversed.

We concur: CONREY, P. J; JAMES, J.

48 Cal. App. 67

GRIZZEL v. GOOD FELLOWS GROTTO, GRILL & OYSTER HOUSE. (Civ. 3205.)

(District Court of Appeal, Second District, Division 2, California. June 3, 1920.)

Master and servant ⊂330(3)—Evidence held to show employer of injured mechanic was independent contractor and want of negligence on owner's part.

Judgment for owner of building, sued by carpenter injured in work thereon, *held* sustained by the evidence, showing plaintiff's employer was an independent contractor for the work, and failing to show any negligence of defendant.

Appeal from Superior Court, Los Angeles County; Louis W. Meyers, Judge.

Action by Elam Grizzel against the Good Fellows Grotto, Grill & Oyster House. Judgment for defendant, and plaintiff appeals. Affirmed.

David A. Jacobs, of Los Angeles, for appellant.

Duke Stone, of Los Angeles, for respondent.

THOMAS, J. Plaintiff brings this action against the defendant to recover damages for personal injuries sustained while employed in the making of certain repairs on a building owned by defendant. The record discloses the fact that plaintiff was, at the time of the trial, a man 42 years of age, and a carpenter with some 10 or 12 years' experience in that calling in the city of Los Angeles; that as the result of a conversation had with one Aaron he went to work on the said building. According to his own testimony, plaintiff had no conversation in reference to his being employed, or his employment on said work, with any one except the said Aaron. In that conversation plaintiff made no inquiry as to whether Aaron was the agent, acting in any capacity for the defendant, or whether he was acting in the matter as an independent contractor.

It further appears from the record that Aaron had entered into a verbal contract with the defendant to construct a certain skylight in the building already referred to, that the price to be paid by defendant to said Aaron was stated and agreed upon, that the price so agreed upon was a lump sum, and that for this lump sum Aaron was to furnish all materials and labor. As to these facts there is no conflict in the evidence. After the conversation between Aaron and plaintiff, the latter went to work and proceeded to put in the skylight. After the opening in the ceiling was made, and because of some mistake or miscalculation of said Aaron, by reason of which the opening was not cut in the proper place, plaintiff was directed by Aaron to extend the same. During this work it was necessary to saw off certain rafters of the building, and to do this plaintiff and another man employed by Aaron placed a "2x10" scantling board across the opening and sat upon it. While thus proceeding to saw off the rafters, the ceiling, for some reason not disclosed by the evidence, gave way, causing plaintiff to fall, from which he sustained the injuries, damages for which are here sought. The case was tried to the court without a jury; the court finding for the defendant on all the issues.

The theory upon which this action is prosecuted by plaintiff is that Aaron was the ostensible agent of the defendant. The defendant, on the other hand, contends that Aaron was an independent contractor. The only evidence contained in the record—and we have read all of it—to support plaintiff's contention as to the claimed ostensible agency is the fact that plaintiff saw a card posted in defendant's place of business by the contents of which it was made to appear that the work was being done by day labor, and that the owner's name was "Good Fellows Grotto." In the blank space on this card, after the words, "Contractor's Name," appeared the words: "None. Day work." This card, as shown by the record without conflict, was the usual and ordinary "permit," which had been obtained by Aaron from the city authorities of the city of Los Angeles to perform the work. It appears that the defendant corporation, or any of its officers, or any one acting for it, knew nothing about this card. It also appears that the plaintiff, after his injuries, and within the time provided by law, made application to the Industrial Accident Commission for compensation against Aaron, and in that application, among other things, gave the name of D. W. Aaron as his employer; that after full hearing on said application at which plaintiff testified that Aaron was his employer, the commission made an award in his favor on account of the same injuries set up in this action; and that thereafter plaintiff made application to the commission to set aside such judgment of award that he might prosecute this action, which application was granted.

It is contended by respondent that, appel-

lant having elected to take compensation against Aaron, the commission was without authority of law, and was not authorized by section 81 of the Workmen's Compensation Act, as it then existed, to set aside said award, and that the judgment entered in this action may be sustained on this ground alone. We think it unnecessary to pass upon this point. As we see it, irrespective of the alleged ostensible agency of Aaron, as claimed by plaintiff, or the absence of jurisdiction of the Industrial Accident Commission to set aside its said award, as claimed by defendant, and even though the action were involved directly against the defendant without the theory of "ostensible agency," the judgment finds ample support in the evidence. In our opinion the evidence shows without conflict: (1) That Aaron was, so far as this case is concerned, an independent contractor; and (2) that there is no proof of negligence on the part of defendant. Either of these propositions, standing alone, would be sufficient to support the judgment entered. Both propositions are, we think, sound.

Having considered all the points raised by appellant, we deem it unnecessary to cite authorities to sustain the conclusion we have reached.

Judgment affirmed.

We concur: FINLAYSON, P. J.; WELLER, J.

48 Cal. App. 84

BROWN v. BROWN. (Civ. 3423.)

(District Court of Appeal, First District, Division 1, California. June 7, 1920.)

1. Appeal and error ⟹907(3)—Evidence presumed to support all findings.

Appeal being on the judgment roll alone, without any bill of exceptions or other record of the proceedings, the evidence must be assumed to support all the findings.

2. Husband and wife ⟹31(2)—Payment of incumbrance held a partial discharge of antenuptial agreement.

Payment by wife of incumbrance on house bought by her *held* but a payment on account of purchase price, within her prenuptial agreement to purchase the house with her funds for the parties in their joint names and as joint tenants, and so not to entitle her to a lien as against, or reimbursement from, the husband.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Emma R. Brown, also known as Emma Strawn Brown, against Robert D. Brown. Judgment for defendant, and plaintiff appeals. Affirmed.

John F. Poole and Stutsman & Stutsman, all of Los Angeles, for appellant.

Edgar K. Brown and L. B. George, both of Los Angeles, for respondent.

WASTE, P. J. Plaintiff brought this action against her husband, alleging in her complaint that certain real property in the city of Los Angeles, purchased by her with her separate funds, was, without her consent and through the unauthorized act of the defendant, deeded to plaintiff and defendant, as joint tenants; that after the execution of the deed defendant assured plaintiff that his apparent interest in said property was merely held by him in trust and for her benefit; that, relying upon these assurances, plaintiff paid $6,500 from her separate funds, in discharging a mortgage and a deed of trust on said property, and in securing the release and satisfaction of the debts secured thereby; that thereafter defendant repudiated the trust and denied any interest of plaintiff in the property, and has not paid any part of the purchase price, or of the amount expended in securing the release and discharge of the incumbrances thereon. Plaintiff further alleges that through fear and intimidation, and without any consideration on her part the defendant, some two years after the purchase, compelled her to sign a contract, reciting that the parties were owners, as joint tenants, of the real property in question, and agreeing that it be sold for the sum of $7,000, the proceeds of the sale to be equally divided between them.

On these facts plaintiff prayed for a decree that the interest of the defendant in the property be declared to be held in trust for her, and that he deed the same to her, and, if such recovery could not be had, that the court impose a lien upon defendant's interest in the property in favor of the plaintiff in the sum of $7,000, the aggregate amount of the purchase price and the incumbrances discharged by her. She also prayed that the agreement entered into between her husband and herself be canceled and set aside.

The lower court found that the real property in question was purchased by the plaintiff, and the title thereto taken in the joint names of plaintiff and defendant, with full rights of survivorship between them, with the plaintiff's consent, and in performance, upon her part, of a prenuptial agreement between the parties, the consideration for which was the marriage of the parties and the defendant's release of his interest in certain property of the plaintiff in Illinois. There were other findings, to the effect that the subsequent agreement, whereby the parties acknowledged their respective interests in the property in Los Angeles to be that of joint tenants, was executed by the plaintiff voluntarily, and of her own free will, and

was not induced by the improper act or through undue influence of the defendant. From the judgment entered in favor of the defendant, plaintiff appeals, claiming that the findings are inconsistent and conflicting, and that the pretended joint tenancy agreement between the parties, on which the court based its judgment, was without consideration, and consequently void.

[1] As the appeal is taken upon the judgment roll alone, without any bill of exceptions or other record of the proceedings, we must assume that the evidence was sufficient to support all the findings of the court. Avery v. Clark, 87 Cal. 619, 629, 25 Pac. 919, 22 Am. St. Rep. 272; Paine v. San Bernardino Valley Traction Co., 143 Cal. 654, 657, 77 Pac. 659. Thus viewed, we find nothing in the alleged inconsistencies in the findings to warrant serious consideration of appellant's contentions.

[2] Appellant argues, in effect, that as the agreement found by the court between the parties related to the purchase by plaintiff, with her own funds, of a home for the parties and in their joint names as joint tenants, and did not specify that she should discharge any incumbrances thereon, the court's finding "that the plaintiff discharged the incumbrances upon said property pursuant to her express agreement" has no support. Aside from the fact that, under the authority of the cases cited, the finding is deemed to be sustained by the evidence, we are of the opinion that the discharge of the incumbrances, amounting to $6,500, was but a payment on account of the purchase price to that extent. The court found that the consideration for the property was $6,900 and that the cash paid down was $400. For the same reason, and because of the fact, as found by the trial court, that the property in Los Angeles was acquired in fulfillment of the contract in which plaintiff agreed to purchase the property with her separate funds in the joint names of plaintiff and defendant and for their joint use and benefit as a home, the finding that the defendant "has not reimbursed plaintiff for any part of the purchase price, or the incumbrances of and upon said property," is not inconsistent with the other finding, which is really only a conclusion that plaintiff has no lien upon the property. From the facts appearing in the judgment roll we are satisfied the lower court was correct in reaching the conclusion that the discharge of the incumbrances on the property was part of the act of purchase, and that consequently plaintiff was not entitled to reimbursement from her cotenant under the terms of the prenuptial contract. No lien arose in her favor, therefore, by reason of such payments. The contention that the finding, that no money was paid for the execution of the joint tenancy agreement, is inconsistent with and contradictory of the further finding that "there was a good and valuable consideration therefor," falls with its own statement.

The appellant assumes that the court based its judgment upon the joint tenancy stipulation, executed some two years after the purchase of the Los Angeles property, and asserts that that agreement is not supported by any consideration. In making this contention she is evidently mistaken. The court rests its decision upon the prenuptial contract, and the deed by which the Los Angeles property was acquired, which latter instrument expressly designates the grantees as joint tenants. The facts appearing from the judgment roll warrant this conclusion, and the inferences which may be drawn therefrom afford ample support to the lower court's judgment. To hold otherwise would result in declaring an absurdity, for the respective rights of the parties were fixed and determined by the prenuptial agreement, and the deed by which the property was acquired. Nothing in addition to those rights was gained or lost, by either party, by reason of the subsequent agreement.

This conclusion on our part renders it unnecessary to consider the contentions of the appellant, that by this later agreement the defendant obtained an advantage over the plaintiff in violation of the fiduciary relations existing between husbands and wives, thereby rendering the transaction void. Furthermore, the finding of the trial court is that the agreement, whatever its effect, was not improperly secured by the defendant.

The judgment is affirmed.

We concur: WELCH, Judge pro tem.; RICHARDS, J.

47 Cal. App. 753

ROSS v. SAN FRANCISCO-OAKLAND TERMINAL RYS. CO. et al. (Civ. 3244.)

(District Court of Appeal, First District, Division 1, California. May 27, 1920. Hearing Denied by Supreme Court July 26, 1920.)

1. Trial ⊜139(1)—To justify submission of question of fact, proof must raise more than conjecture.

To justify the submission of any question of fact to the jury, the proof must raise more than a mere conjecture or surmise that the fact is as alleged, and must be such that a rational mind can reasonably draw from it the conclusion that the fact exists.

2. Trial ⊜139(1) — Directed verdict proper unless substantial evidence tends to establish case.

A directed verdict is proper, unless there is substantial evidence tending to prove for plaintiff all the controverted facts necessary to establish his case.

3. Trial ⟸143—Conflicting evidence to deprive court of right to direct verdict must be substantial.

To warrant a court in directing verdict, it is not necessary that there should be an absence of conflict in the evidence, but to deprive the court of the right, if there is a conflict, it must be substantial.

4. Street railroads ⟸112(2)—Res ipsa loquitur doctrine inapplicable to collision between car and pedestrian.

The doctrine of res ipsa loquitur has no application to the case of a collision between a street car and a pedestrian on the street, which is as likely to be due to the fault of the person struck, or some third person, or to some unforeseen and unpreventable cause, as to the negligence of the car's crew.

5. Street railroads ⟸85(6)—Duties of railroad and pedestrian reciprocal.

The duties of a street railroad and of a pedestrian crossing the street at the tracks were reciprocal, each being required to approach the crossing with due regard for the rights of the other, and failure of either to observe due care being negligence on his or its part.

6. Street railroads ⟸117(22) — Contributory negligence of pedestrian crossing ahead of car is ordinarily for jury.

If in view of his distance from an approaching street car, the rate of its speed, and all other circumstances, a reasonably prudent man would accept the hazard and undertake to cross the street at a track ahead of the car, a pedestrian may do so, and the propriety of his conduct is ordinarily a question for jury.

7. Negligence ⟸134(11)—Proof of negligence unconnected with injury does not make case.

Mere proof of a defendant's negligence, without connecting such negligence with plaintiff's injury, does not make out a case.

8. Negligence ⟸134(2) — Circumstantial evidence sufficient.

The connection between defendant's negligence and plaintiff's injury may be made by circumstantial evidence.

9. Death ⟸58(1)—Care on part of pedestrian killed by street car presumed.

In the absence of anything to the contrary, when a pedestrian attempting to cross a street is killed by the street railway's car, there is a presumption that he exercised ordinary care.

10. Appeal and error ⟸1001(1)—Rule that if probabilities are balanced plaintiff must fail does not control appellate court.

The principle of law that if the probabilities are equally balanced on the issue whether the accident involved was produced by a cause for which defendant was responsible plaintiff must fail is more applicable to guide the jury in its deliberations on the facts than as a rule to guide the appellate court as to the sufficiency of evidence.

11. Street railroads ⟸114(14)—Evidence held to show traveler rightfully on streets.

In an action against a street railroad company for death of a 16 year old boy crossing its tracks, circumstantial evidence *held* to justify the jury in assuming that the boy was going to his home, and was therefore a traveler rightfully on the street when killed.

12. Evidence ⟸589—Jury can scrutinize testimony of defendant.

In an action against a street railroad company for a death on its tracks, the jury had a right closely to scrutinize the testimony of the motorman of the car claimed to have killed decedent, he being a defendant and an interested witness, in view of all the circumstances, to see if he was on the lookout for approaching pedestrians, as his testimony seemed to imply.

13. Evidence ⟸20(2)—Slowing of street cars before crossings perhaps a matter of common knowledge.

It is almost, if not quite, a matter of common knowledge that street cars slow their speed materially or come to a full stop before attempting street crossings.

14. Street railroads ⟸98(6) — Reliance on practice of stopping cars permissible.

The settled practice of stopping street cars at a usual place as before a crossing, becomes a rule of conduct on which the public has a right to rely to a reasonable extent, and departure therefrom is vitally important in determining the question of negligence of a motorman toward a pedestrian attempting to cross the tracks.

15. Death ⟸58(1)—Reliance by deceased on rule for operation of street cars may be inferred from circumstances.

It may be inferred from circumstantial evidence that a pedestrian killed by a street railway's car at a crossing had knowledge of the rule governing the operation of cars, and put some reliance on it.

16. Street railroads ⟸93(2) — Motorman's failure to stop held to show negligence.

A motorman's failure to stop before a crossing, as his slowing of a car at the point indicated he would, tended to show negligence on his part and on the part of the street railway toward pedestrians.

17. Street railroads ⟸98(6) — Pedestrian crossing entitled to rely on motorman's obedience to rules and use of care.

A pedestrian about to cross a street railroad's tracks was entitled to act on the belief that the operator of the car would obey the rules of the company, run at the customary speed at the point, give usual warning signals, and take the usual precautions to avoid injury to others, not being bound in law to a belief the car would not check its speed as it drew near the crossing.

18. Street railroads ⟸117(8)—Negligence as to person crossing held jury question.

In an action against a street railway for death of a boy on its tracks at a crossing, whether or not the manner in which the motorman operated the car at the crossing was such that he should have assumed that persons might ignorantly attempt to cross in front so near the car as to make collision probable, *held* for the jury.

19. Evidence ⟹219(2)—Testimony that motorman attempted to suppress evidence admissible.

In an action against a street railway and its motorman for death of a boy on its track at a crossing in the nighttime, testimony of motorman by deposition that immediately after accident a shoe worn by decedent was found back of the pony truck of the car, and that he put it out of sight in a garbage can, *held* admissible as admission by supression of evidence.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action by A. Ross against the San Francisco-Oakland Terminal Railways Company and S. Serpico. From judgment for defendants, plaintiff appeals. Reversed.

Hearing denied by Supreme Court; Olney, J., dissenting.

Elston, Clark & Nichols, of Berkeley, for appellant.

W. H. Smith, of Oakland, and A. L. Whittle, of San Francisco, for respondents.

WASTE, P. J. This is an action against the defendant street railway company, and its motorman, S. Serpico, for damages resulting from the death of plaintiff's minor son, Andrew Ross.

It is charged in the complaint that at the time he was killed, Andrew Ross, a boy of the age of 16 years, was walking across Telegraph avenue in the city of Berkeley, when a street car of the defendant company, operated by Serpico at a high, excessive, and careless rate of speed, ran over him, causing his death. It is alleged in a second count that at the time of the accident the motorman so operated the street car as to lead the boy to believe that it was about to come to a full stop, allowing him to continue safely in his course of walking across the street in front of the car, and that, so believing, he attempted to cross the track of defendant, when he was suddenly struck by the car and killed.

The court shut out testimony considered vital by the plaintiff, and at the conclusion of the trial instructed the jury to find for the defendants. From the judgment entered the plaintiff appeals.

There were no eyewitnesses to the accident, which occurred at the intersection of Telegraph and Ashby avenues, on both of which streets the defendant operated its street railway system. Shortly before 1 o'clock on the morning of February 15, 1918, Andrew Ross, then alive and well, escorted a young lady friend to the place where she was working in Berkeley, a point about five blocks north of Ashby avenue, and three blocks east of Telegraph avenue. Leaving his companion at the front steps, he walked west on Derby street towards Telegraph avenue. At that time Ross lived at 2150 Woolsey street, which is three blocks south of Ashby avenue, and two blocks west of Telegraph avenue. It is thus apparent that in order for him to reach his home, from the place where he left his friend, it was necessary for him to cross both Telegraph and Ashby avenues.

As some time prior to 1:20 o'clock, the motorman on a car of the defendant, running south on Telegraph avenue, discovered the body of Ross lying on the south side of Ashby avenue, near the west rail of the Telegraph avenue track. A sergeant of police, who was summoned, found the boy in a dying condition. He was semiconscious, but could not talk. One of his legs was crushed off, and pieces of the left foot and left shoe were gone. His clothing was badly torn, and he had the appearance of having been rolled and crumpled underneath something. He died soon after being removed to the emergency hospital.

Between the time Ross left his friend, east of the crossing, and the time he was found, car 397 of the defendant company had passed that point. It was a car, which on leaving Berkeley after its final trip, had turned into Telegraph avenue to run to the car barn in Oakland for the night. The car never stopped after entering Telegraph avenue. It slowed down, but did not stop at Dwight Way, on which an intersecting line of the defendant was operated. The motorman gave it "a big kick" after crossing that street; that is, he applied the power for a time, then shut it off, and allowed the car to coast toward Oakland, the grade on Telegraph avenue being down hill, without applying the brakes at any point to check its speed, which, so he testified, was 15 or 16 miles per hour. As he neared Ashby avenue Serpico had his car under full control, and about 100 feet north of that street he applied the brakes, and gradually reduced the speed to 4 or 5 miles per hour. When the front of his car was about 25 feet from the car rails on Ashby avenue, he "gave it some more juice," and went on towards the carhouse, without stopping, as he was required by the rules of the company to do, before crossing Ashby avenue, on which was operated a cross-line of the same company. After the car had passed over the intersecting rails of the cross-line tracks, and had proceeded some 10 or 15 feet, Serpico and the conductor, who was sitting in the forward compartment of the car with him, felt a jar, or jolt, different from that caused by the trucks running over the cross-rails. The car jumped two or three times, the cause of which, the motorman testified, he "thought was a stone on the track * * * he supposed it was a medium-sized rock." The car was not stopped, but proceeded to the car barn. Serpico testified that he heard no outcry at the time, and saw no one crossing, or near the car track, although the streets at that point were well lighted.

When the car turned in at the barn it was discovered that the middle guard on the westerly side was missing, and the rear guard

was hanging by a single hook. There was blood on the side of the car, on the flange of the front drive wheel, and hair and blood on the air compressor, a few feet back of the wheel. The missing side guard was later picked up near the spot where the body of Ross was discovered. A subsequent investigation of the scene of the accident disclosed the fact that his body had been dragged from a point almost on a line with the northerly crossing of Ashby avenue clear across that street, and close beside the westerly rail of the south-bound track. The marks and blood stains on the ground indicated that he had been rolled, or dragged, some distance before any part of the car ran over his body, which lay at just about the spot where the crew of the car felt the jar, or jolt, as it passed over something.

From the foregoing facts, which appear without contradiction, no one can doubt for an instant that the boy, Ross, was killed by being run over by the street car of the defendant railway company, operated by the employé, and codefendant, Serpico. Respondents in their brief apparently concede the point, but argue that the proximate cause of the injury and death rests in surmise and conjecture, and that the evidence fails to establish that it was proximately caused by the negligence of the defendants. That was the view adopted by the lower court, as indicated by its action in removing the cause from the consideration of the jury. The appellant contends that it was error for the court to direct a verdict in the case, claiming that upon the evidence the presumption was that the boy was killed through the negligence of the defendant; that although that presumption might be rebutted it was a question for the jury whether the facts and circumstances in the case did so. The respondents answer that there was no evidence tending in any way to show that the plaintiff's son was killed by any act of it; and particularly contends that, if it be admitted that the boy was killed by the street car, there is nothing tending in the slightest to show any negligence on its part. The ruling of the lower court presents the main issue for determination upon this appeal.

[1-4] In order to justify the submission of any question of fact to a jury, the proof must be sufficient to raise more than a mere conjecture, or surmise, that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists. When the evidence is not sufficient to justify such an inference, the court may properly refuse to submit the question to the jury. Janin v. London, etc., Bank, 92 Cal. 14, 27, 27 Pac. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82. A directed verdict is proper, unless there is substantial evidence tending to prove in favor of a plaintiff all the controverted facts necessary to establish his case. In other words, a directed verdict is proper whenever upon the whole evidence the judge would be compelled to set a contrary verdict aside as unsupported by the evidence. To warrant a court in directing a verdict, it is not necessary that there should be an absence of conflict in the evidence, but, to deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one. Estate of Baldwin, 162 Cal. 471, 473, 123 Pac. 267. The doctrine of res ipsa loquitur has no just or proper application to the case of a collision between a street car and a pedestrian on the street. Such mishap is quite as likely to be due to the fault of the person struck, or of some third person, or to some unforeseen and unpreventable cause, as to the negligence of those operating the car. Tower v. Humboldt Transit Co., 176 Cal. 602, 607, 169 Pac. 227. Consequently it was not sufficient for the plaintiff in the instant case to merely show the happening of the accident. It was necessary that he go further, and fasten the blame for the injury upon the defendants.

[5, 6] At the time of the happening of the accident in question, the duty of the defendants, and of the decedent, were reciprocal. Each was required to approach the crossing with a due regard for the rights of the other, and if either failed to observe the care required, it was negligence for which the guilty party is responsible. Bickel v. Penn. R. R. Co., 217 Pa. 456, 462, 66 Atl. 756, 118 Am. St. Rep. 926. In Kansas City, etc., R. R. Co. v. Gallagher, 68 Kan. 424, 75 Pac. 469, 64 L. R. A. 344, the court held that, while it is the duty of a pedestrian upon a city street, who is about to cross the track of an electric street railway company, to exercise his faculties, and take ordinary care to avoid collisions with the cars, if he does look and listen he will be held to an apprehension of that which he should have seen and heard, and if he fails to look and listen he will be held to the same liability in case of disaster as if he had done so. But a traveler may cross an electric street railway track in front of an approaching car which he sees and hears and not be negligent. If, in view of his distance from the car, the rate of its speed, and all other circumstances of the event, a reasonably prudent man would accept the hazard and undertake to cross the highway, a traveler may do so, and the propriety of his conduct is ordinarily a question for the jury. See, also, Baltimore & Ohio R. R. Co. v. Griffith, 159 U. S. 603, 611, 16 Sup. Ct. 105, 40 L. Ed. 274.

In support of the action of the lower court in the instant case, in directing the jury to return a verdict in favor of the defendants, the respondents rely upon Puckhaber v. Southern Pacific Co., 132 Cal. 363, 64 Pac. 480, as deciding this case. As was said by the writer of that decision, the facts of the

case were of the most meager character. Upon a dark and foggy morning, about half past 5 o'clock, the mutilated dead body of a young man, a total stranger in the locality, was found lying upon a side track in the railroad yards of the defendant, near the dead body of another man, also a stranger in the village. There was no witness to any accident. It was claimed by the plaintiff that the deceased was killed by a backing engine and tender which passed over the particular spot to the roundhouse about an hour earlier on the same morning. The negligence of the defendant was claimed to be established by showing that the tender of the engine had no light upon the rear end. The court held that, conceding these facts, the case was still too weak to support a verdict, for the reason that there was a total lack of evidence showing any causal connection between the absence of a light upon the tender and the death of the deceased. This was held to be true, even though it be assumed to be the law of this state that, in the absence of evidence upon the subject, it will not be presumed that the deceased was himself guilty of negligence. The court said:

"It is as necessary for the plaintiffs to show that the defendant's negligence caused the injury as it is for them to show that defendant was guilty of negligence, or that the party was injured." Puckhaber v. Southern Pacific Co., supra, 132 Cal. 365, 64 Pac. 481.

[7, 8] By proving a defendant's negligence, without in some way fastening that negligence to the injury, a case is not made out. Union, etc., Co. v. S. F. Gas. Co., 168 Cal. 58, 62, 141 Pac. 807. These rules, however, do not require demonstration of the connection between the proved, or admitted, negligence and the resulting injury. It is not necessary that an eyewitness be produced to testify directly to the fact. The connection may be made by circumstantial evidence in the same way that any other fact can be so proved. County of Alameda v. Tieslau, 30 Cal. App. Dec. 546, 549, 186 Pac. 398. The conclusion reached by the court in the Puckhaber decision was, no doubt, correct upon the facts there considered. The circumstances disclosed in other cases, possibly possessing some degree of similarity, may not fit the facts of that case. Peters v. McKay, 136 Cal. 73, 76, 68 Pac. 478.

[9] While, as before stated, the presumption arising from the doctrine of res ipsa loquitur does not apply to accidents like the one in which young Ross was killed, another, and an equally binding, presumption does arise, to wit, that the deceased, in such cases, exercised ordinary care. The rule of law referred to in the Puckhaber decision is, perhaps, more clearly stated in a later case, in which the court said:

"When death is caused under circumstances such as this, without eyewitnesses, the law comes to the aid of the plaintiff who is pressing a suit for damages for the death, and that law is found in the presumption of the Code of Civil Procedure, namely, that a person takes ordinary care of his own concerns. Code Civ. Proc. § 1963, subd. 4. * * * This is a controvertible presumption, it is true, but until controverted it is evidence in accordance with which the jury is bound to decide. Code Civ. Proc. § 1961." Crabbe v. Mammoth Channel G. M. Co., 168 Cal. 500, 506, 143 Pac. 714.

In applying this principle of law to personal injury cases the Supreme Court of the United States has said:

"The presumption is founded on a law of nature. We know of no more universal instinct than that of self-preservation—none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming, and death. There are few presumptions, based on human feelings or expression, that have surer foundation." Baltimore & Potomac R. R. v. Landrigan, 191 U. S. 461, 474, 24 Sup. Ct. 137, 140, 48 L. Ed. 262.

When recourse must be had to this rule of human conduct, in determining the question of responsibility in cases of accidents, like the one now being considered, "it is fair to presume, until the contrary is proven, and this presumption is sustained by a rule of law that one who was killed while crossing a railroad track was exercising due and proper care for the protection of his * * * life. The presumption which arises in favor of the instincts of self-preservation and the known disposition of men to avoid injury and personal harm to themselves is sufficient to constitute prima facie evidence that the person killed was at the time of the accident free from contributory negligence." Fleenor v. Oregon Short Line R. R. Co., 16 Idaho, 781, 802, 102 Pac. 897, 903.

Existing facts and circumstances very similar to those surrounding the death of the boy Ross, in this case, have been frequently considered by the courts, in the light of the foregoing rule of self-preservation. In Robbins v. Penn. Co., 257 Fed. 671, 168 C. C. A. 621, the decedent left the house of a friend, which was on the east side of the street, and south of the two railroad tracks, for the purpose of mailing a letter at the post office, which was on the west side of the street, and on the north side of the tracks. At the time she started on this errand the south track was occupied by a long, slowly moving east-bound freight train. At about the time the caboose, at the rear of this train passed out of the street, an engine drawing a short west-bound train on the northerly track, and running at a speed of 55 to 60 miles an hour, suddenly burst into view, without ringing of bell, or blowing of whistle. The proof tended to show that it was this west-bound train on the northerly track which struck and killed the decedent. No one saw the decedent

after she left her friend's house, and the point of collision was left to inference. The trial court directed a verdict in favor of the defendant, one of the grounds being that the plaintiff had not sustained the burden of showing that the defendant's alleged negligence was the direct and proximate cause of decedent's death. The trial judge concluded that the "decedent must either have crossed behind the east-bound train immediately on its clearing the sidewalk, when she was not in position to see the west-bound train, or have gone ahead without looking to see whether a train was coming from the east. This conclusion is not," said the Circuit Court of Appeals, in reversing the lower court, "in our opinion inevitable, at least on the theory that the collision occurred at the west crossing. Defendant had the burden of proving decedent's negligence. The law presumes that, following the instinct of self-preservation, she exercised due caution, and that before crossing the tracks she looked and listened for approaching trains." After citing a number of cases, some of which we have already alluded to, the court considered the circumstances, and held that as different inferences might be drawn from the circumstances surrounding the accident, the decision of the question rested with the jury.

A case having some of the essential features of the case at bar was considered by the United States Supreme Court in Baltimore & Potomac R. R. v. Landrigan, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. Ed. 262. The deceased was employed on the night force of the railroad company. The usual and direct route to his home took him over a well-lighted crossing. A few minutes after he left the roundhouse his body was found near the crossing, with flesh and blood scattered along the track. There were no witnesses to the accident. At that time a switching crew was making up a train, one of the Pullman cars of which broke loose by reason of an alleged defective method of coupling, and was shunted over the crossing. A passenger train passed the same point just about the same time. On these facts the trial court refused to direct the jury to render a verdict for the defendant, but submitted the case to the jury, which found for the plaintiff. On appeal it was held that it was not error for the lower court to instruct the jury that in the absence of all evidence to the contrary there was a presumption that the deceased stopped, looked and listened before attempting to cross the tracks, citing Texas & Pacific Ry. Co. v. Gentry, 163 U. S. 353, 366, 16 Sup. Ct. 1104, 41 L. Ed. 186. The railroad company also contended that as there was no evidence from which it could be determined that it was the uncoupled Pullman car, and not the passing express train, which injured the deceased, it was error to submit the issue to the jury. The Supreme Court held that the action of the lower court was right, saying, "There was certainly evidence on the issue from which reasonable men might draw different conclusions."

In Dalton v. Chicago, etc., Ry. Co., 104 Iowa, 26, 73 N. W. 349, a highway crossing accident occurred at night. The decedent was struck by a passing train of the defendant. There were no witnesses to the conduct of the deceased. The contrary not appearing, it was held that it must be presumed that the decedent exercised care on approaching and going upon the crossing, and that whether the circumstances were such as to overcome that presumption was a question for the jury. Other cases to the same effect are Eckhard v. St. Louis Transit Co., 190 Mo. 593, 89 S. W. 602, 608; Lewis v. Rio Grande Western Ry. Co., 40 Utah, 483, 123 Pac. 98, 99; Lotz v. B. & O. Ry. Co., 247 Penn. 206, 93 Atl. 274; Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 210, 29 Sup. Ct. 270, 53 L. Ed. 453; Korab v. Chicago, etc., Ry. Co., 149 Iowa, 711, 128 N. W. 529, 41 L. R. A. (N. S.) 32, 38. In the last case cited, in which no witnesses appeared to testify to the accident, the court set aside a directed verdict in favor of the defendant, and held the decedent's administrator entitled to the benefit of the presumption of due care on the part of the deceased, saying:

"If the record is such that, under the rule to which we have referred, a presumption of due care obtains, then proof of an act which may or may not have been negligent according to the circumstances under which it was done will not justify a holding as a matter of law that the presumption of care is thereby rebutted."

The respondent contends that we should view the evidence as presenting only a question of probabilities, and cites Tremelling v. Southern Pacific Co. (Utah) 170 Pac. 80, 83, to the effect that—

"If the probabilities are equally balanced that the accident was produced by a cause for which the defendant is responsible or by one for which he is not, the plaintiff must fail."

[10] This principle of law is more applicable as a rule to guide the jury in its deliberations upon the facts than it is as a rule to guide the appellate court in passing on the sufficiency of the evidence. Peters v. McKay, 136 Cal. 73, 76, 68 Pac. 478. The foregoing cases bearing on the point and others which have been examined by us present facts with many essentials similar to the circumstances surrounding the accident in which Ross was killed. In few, if any, were the facts as strong. Yet the action of the trial courts in refusing to direct verdicts for the defendants was upheld on the one hand, and the granting of such relief was reversed on the other.

[11, 12] In the instant case, the decedent was a traveler. The plaintiff sought to intro-

duce evidence to establish that the decedent Ross, on leaving his friend at her doorstep, a few minutes before he was killed, stated to her that he was going to his home, the purpose being to show that his intended route would take him across the tracks of the defendant, and that he was a traveler crossing the street when killed, and not a trespasser suddenly approaching the car from the west, and attempting to steal a ride, as was suggested by the defense, at the trial. This testimony was excluded by the court. Whether or not the action of the trial court, in refusing to admit the declaration as to the boy's intention, was error, we are of the opinion that, in the absence of testimony, the jury had the right to assume that he was going to his home, and was therefore a traveler, rightfully upon the streets. The hour of the night, the circumstance that he had just escorted his friend to her home, coupled with the further facts that he was a sober, industrious, working boy, and that his home was situated in a southerly and westerly direction, across the intersecting tracks of the company at Ashby and Telegraph avenues, in almost a direct line from the point where he left his companion—all these circumstances readily give rise to such an inference. The intersection of the streets mentioned, according to the testimony, was well lighted, and the car was equipped with a headlight. The details of the accident, it is true, were few, but they were related by a defendant, who was also an employé of the railway company. He was an interested witness, and although he testified that he did not see the boy before the accident or at any time, yet, there being no obstruction to the view, the jury would have the right to closely scrutinize his testimony, in view of all the circumstances, to see if he was on the lookout for approaching pedestrians, as his testimony would seem to imply. Wahlgren v. Market Street Railway Co., 132 Cal. 656, 665, 62 Pac. 308; 64 Pac. 993.

[13-15] The motorman was also guilty of a violation of the rules of the company requiring him to bring his car to a full stop before crossing Dwight Way and the Ashby avenue tracks. After passing the former street, he had "given his car a big kick," and it was coasting on the downgrade toward the car house, on its last trip late at night, at a rate of speed which, if the testimony of the motorman be true, would not be considered excessive. By his own testimony, Serpico would make it appear that when about 100 feet north of the Ashby avenue tracks, he retarded the speed of his car from 15 or 16 miles an hour to 4 or 5 miles an hour, at which speed he was going when he was about 25 feet north of the crossing. He then "gave it more juice." It is very easy to infer from the circumstances that young Ross was acquainted with the rule requiring the cars to stop before crossing intersecting tracks. He had been living in the vicinity some little time, and it is almost, if not quite, a matter of common knowledge that the street cars do slow their speed materially, or come to a full stop, at such points. The settled practice of stopping a street car at a particular place becomes a rule of conduct upon which the public has a right to rely to a reasonable extent, and a departure from such rule is a vitally important element in determining the question of negligence, for it constitutes a departure from the standard of safety which the defendant has itself adopted. Godfrey v. Old Colony Street Railway Co., 223 Mass. 419, 111 N. E. 878; Kostuch v. St. Paul Street Railway Co., 78 Minn. 459, 81 N. W. 215; McDivitt v. Des Moines Street Railway Co., 141 Iowa, 689, 118 N. W. 459, 462. It may be inferred from circumstantial evidence that a deceased person had knowledge of a rule governing the operation of cars, and that he put some reliance upon it. Boston & M. R. R. v. Rafalko, 228 Fed. 440, 143 C. C. A. 22.

[16, 17] In addition to the presumption, in the instant case, the motorman by the operation of his car gave every indication that it was his intention to comply with the rule. He slowed his car from a rate of speed at which he was coasting toward the car barn, as he approached the crossing. His failure to finally stop, as his handling of the car indicated he would, tended to show negligence on his part. Simoneau v. Pacific Electric Ry. Co., 159 Cal. 494, 503, 115 Pac. 320. Ross was entitled to act upon the belief that the operator of the street car would, upon his part, obey the rules of the company, and run the car at the speed which was customary at the particular place, and that he would give the usual warnings and signals, and take the usual precautions to avoid injury to others. He was not, in law, bound to believe that the car, provided he saw it some distance away, would not check its speed as it drew near the intersecting crossing. Scott v. San Bernardino Valley Ry. Co., 152 Cal. 604, 610, 93 Pac. 677.

[18] Under the circumstances of this case, we do not feel that it can be said, as a matter of law, that the motorman ought not reasonably to have expected that persons might attempt to cross the track at a point which would in fact be dangerously near, but which to them would not appear so. The circumstances might be such as to charge him with knowledge of this likelihood. Due care would be required of him in such case, to anticipate such probability, and the results reasonably arising from the consequences of his own action. It should have been left to the jury to say whether or not the manner in which he operated the car at the Ashby crossing was such that he should have assumed that persons might ignorantly attempt

to cross in front so near the approaching car as to make a collision probable. Bresee v. Los Angeles Traction Co., 149 Cal. 131, 138, 85 Pac. 152, 5 L. R. A. (N. S.) 1059; Runnels v. United Railroads, 175 Cal. 528, 533, 166 Pac. 18; Drouillard v. Southern Pacific Co., 36 Cal. App. 447, 451, 172 Pac. 405; Haughey v. Pittsburg Ry. Co., 210 Pa. 363, 366, 59 Atl. 1110; Phillips v. Milwaukee & N. R. Co., 77 Wis. 349, 46 N. W. 543, 9 L. R. A. 521; Tegels v. Great Northern Ry. Co., 120 Minn. 31, 138 N. W. 945.

[19] The plaintiff's son being dead, and there being no eyewitnesses to the accident, the plaintiff was compelled to rely upon the motorman, Serpico, who was also a defendant in the action, to establish the circumstances surrounding the accident. He did not appear at the trial in person, but his deposition was read in evidence. Therein he testified that when his car reached the car barn immediately after the accident, a shoe, admitted to be one the deceased was wearing, was found back of the pony truck of the car. Serpico testified that at that time, "I was so nervous and mixed up—I know something had happened. I don't know if I picked up the shoe or the conductor give it to me, * * * I put it in a garbage can what the city uses; * * * it has a tin lid that lifts up and down. * * * After it was in there of course it was out of sight." When this testimony was offered the court sustained the objection of the defendants that it "bore no relation whatever to the case," and excluded the testimony from the jury. Only this general objection was made. We think this was error. Serpico was a defendant, and the employé of his codefendant. A strong inference arising from his action, and certainly a most plausible explanation of his conduct, is that he was attempting to conceal evidence, which in his mind had an important bearing upon the "something" that had happened. His conduct was indicative of a belief, and in the nature of an admission, that his cause could best be served by suppressing the evidence of the injury. Testimony showing, or tending to show an attempt on the part of a party to a suit to cover up, conceal, or otherwise prevent pertinent facts from being presented to the court or jury is competent and proper. Such efforts may be shown, not as part of the res gestæ, but in the nature of an admission, the effect of which is a matter for the consideration of the jury. Silva v. Northern Cal. Powder Co., 32 Cal. App. 139, 146, 162 Pac. 412; Clark v. Tulare Dredging Co., 14 Cal. App. 414, 437, 112 Pac. 564.

The judgment is reversed.

We concur: RICHARDS, J.; GOSBEY, Judge pro tem.

48 Cal. App. 116

LAMPTON v. DAVIS STANDARD BREAD CO. et al.

SAME v. DAVIS STANDARD BREAD CO.

(Civ. 3298.)

(District Court of Appeal, First District, Division 1, California. June 9, 1920.)

1. Municipal corporations ⟸705(1)—Driver of vehicle must be on alert.

The driver of a vehicle must proceed carefully, and be on the alert lest he collide with others.

2. Municipal corporations ⟸705(3)—Driver near schoolhouse required to exercise greater care than usual.

The proximity of the place where defendant was driving to adjacent school grounds, and the hour at which children might with certainty be expected to be on the street, imposed on him a greater degree of caution than ordinary circumstances would require; what would be but ordinary negligence in reference to a grown person would be gross negligence as respects a child.

3. Evidence ⟸123(11), 244(11)—Conversations with defendant employé admissible, not as res gestæ, but as admissions.

In an action against a company and its employé for injuries to a schoolboy when a horse driven by the employé ran him down, testimony as to conversations with defendant employé shortly after the accident *held* not admissible as part of the res gestæ, nor as against the employer, but admissible as evidence against the employé under Code Civ. Proc. § 1870, subd. 2, being admissions concerning the occurrence.

4. Evidence ⟸146, 222(10)—Admissible evidence not excluded because of collateral effect; admissions of one defendant not excluded because not binding on other.

Statements made by defendant employé in conversations after the accident sued for, not binding upon defendant employer, though binding upon the employé, could not properly be excluded, as admissible evidence cannot be excluded because having an ulterior or collateral effect detrimental to a party.

5. Evidence ⟸215(1)—Photograph of statement made at police station by defendant admissible as admission.

In action against a company and its employé for injuries to a child run down by a horse driven by the employé, photographic copy of detailed statement, made by the employé at the police station after the accident, *held* admissible against him as his admission.

6. Appeal and error ⟸883—Defendants, not taking advantage of offer to dismiss as to one, cannot complain of refusal to rule on motion.

Where plaintiffs' counsel offered to dismiss the case as against one of the two defendants, but defendants did not take the opportunity and file written consent, as required by Code Civ. Proc. § 581, subd. 2, but remained silent until after adverse verdict and judgment, they can-

not complain of prejudicial error in the trial court's action in refusing to pass on plaintiffs' alleged motion to dismiss, not being given an exception by section 647.

7. Guardian and ward ⊂⊃130—Averment of official capacity of guardian suing for child held sufficient.

In a child's action for injuries by his father as guardian, allegations of complaint that the father was the duly appointed and qualified guardian of the person and estate of the minor *held* a sufficient averment of the official capacity of the guardian, in the absence of special demurrer, which, being admitted by answer, had effect of stipulation of fact rendering allegation of more specific facts unnecessary.

8. Guardian and ward ⊂⊃130—Denial of appointment and qualification of guardian held insufficient to raise issue.

Where defendants denied the appointment and qualification of plaintiff guardian "for lack of information and belief," thereby placing their denial on such ground as required by Code Civ. Proc. § 437, the denial was insufficient, and the appointment of the guardian, being a matter of public record, was not put in issue, but stood admitted.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Actions by Bill Lampton, a minor, by his guardian, W. W. Lampton, against the Davis Standard Bread Company and Harry Graham, and by W. W. Lampton against the Davis Standard Bread Company. From judgments for plaintiff, defendants appeal. Affirmed.

Hickcox & Crenshaw and E. R. Young, all of Los Angeles, for appellants.

Allen W. Ashburn and Newlin & Ashburn, all of Los Angeles (J. W. McKinley, of Los Angeles, of counsel), for respondent.

WASTE, P. J. The above-entitled cases were tried together before a jury. One is a suit against both defendants, for damages for personal injuries received by the plaintiff Bill Lampton, who sues by his general guardian, W. W. Lampton. The other is a suit by the father against the bread company alone, to recover money for doctor's bills, hospital expenses, and other expenditures, due to the injury.

The accident occurred while the plaintiff, aged seven years, was on his way to the public school located at the corner of Tenth and Valencia streets, in Los Angeles, a portion of the grounds running through to Grattan street, upon which the accident happened. Plaintiff was proceeding northerly on the west side of that street, and in crossing the roadway was struck by a wagon, belonging to the defendant Davis Standard Bread Company, driven by the defendant Harry Graham. At the time the accident occurred Graham was driving at a trot, at about eight miles an hour, but was not looking ahead. The plaintiff was knocked down and seriously injured. One of the horses stepped on his head, breaking the skull, from which pieces of the bone had to be removed. The jury returned a verdict for plaintiff for $8,000, in the suit by the minor, and for $597.75 in the suit by the father. The defendants moved for new trials, which were denied, and then appealed, it being stipulated that both cases may be heard and determined by this court on the same record.

Appellants contend that the evidence does not establish negligence on the part of either of the defendants. The defendant Harry Graham, an employé of the other defendant, the bread company, was engaged in his usual vocation of delivering bread at the time of the accident. He had passed over this particular route twice daily for seven months, and was familiar with the fact that there was an obstruction at this particular place which would render it impossible for him to see a person who was about to step from the sidewalk into the street. He was also aware of the fact that, at that particular time of the day, the children from the nearby school were at their noon recess, and were apt to be in and about the spot where the accident occurred. At the time, so he testified in his deposition, which will be referred to later, he was not looking ahead, but was looking to the right of the wagon, intending to stop and inquire as to the wants of a customer who had called to him. He did not see the boy until one of his horses had knocked him down and stepped on his head. When asked why he did not see the boy he testified:

"It was not my habit to notice people on the sidewalk, and immediately before the accident three poles at the side may have obstructed any view that I might have had of him."

[1] The driver of a vehicle must proceed carefully, and be on the alert lest he collide with others. Bauhofer v. Crawford, 16 Cal. App. 676, 678, 117 Pac. 931; Scott v. San Bernardino Valley, etc., Co., 152 Cal. 604, 610, 93 Pac. 677; Wistrom v. Redlick Bros., Inc., 6 Cal. App. 671, 673, 92 Pac. 1048.

[2] The proximity of the place where Graham was driving to the adjacent school grounds, and the hour, at which children might, with certainty, be expected to be using the street, imposed upon him a greater degree of caution than he might be required to use under ordinary circumstances. That which would be but ordinary negligence in reference to a grown person may be gross negligence as respects a child. Schierhold v. N. B. & M. R. Co., 40 Cal. 447, 454. The jury was instructed with particularity on the law applying to the facts surrounding the accident. The court used rather more than usual care in the matter, and we are satisfied

that the verdict accords with the law and the evidence.

When the case came on for trial the defendant Graham was a soldier with the overseas forces in France. In anticipation of this fact the defendants, on stipulation of the parties, procured his deposition as to the accident, and the manner in which it occurred. With the consent of the defendants, the plaintiff offered, and read in evidence, Graham's testimony taken in that manner. A part of his statement of the occurrence has already been quoted in substance, or in the exact language used. Appellants now complain of the action of the trial court in admitting the testimony of two witnesses, who related certain conversations had with defendant Graham, shortly after the accident, to the effect that—

"Mrs. Bergman (a customer) had called to him, and he looked around to answer her question, and while he was looking around he ran over the child, and that was how it happened. He did not see the boy."

[3] The conversations were not part of the res gestæ, and were not admissible on that theory. They were relevant and admissible as evidence against the defendant Graham, being declarations and admissions concerning the happening for which he was responsible. Code Civ. Proc. § 1870, subd. 2; Roche v. Llewellyn Iron Works Co., 140 Cal. 563, 574, 74 Pac. 147. Furthermore, the statements made by Graham, in the conversations with the two witnesses, were almost word for word the same statements he made when giving his deposition, in explanation of how the accident occurred.

[4] While these statements made by Graham in these conversations were not in the least binding upon the defendant bread company, the court could not properly exclude them for that reason. It is a well-established rule that if evidence is properly admissible upon the issue presented it cannot be excluded because it may have ulterior or collateral effects detrimental to one of the parties. Vallejo, etc., R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 562, 147 Pac. 238; Keyes v. Geary St., etc., R. R. Co., 152 Cal. 437, 441, 93 Pac. 88. In the last case noted certain statements of the gripman, following the accident, were admitted for the purpose of impeaching his testimony given at the trial. The court held that as the statements were properly admitted for that purpose, they could not be excluded because they also tended to show negligence on the part of the defendant, his employer. The exact question now raised in this case was well considered in that decision. See, also, Voorman v. Voight, 46 Cal. 392, 397, to the effect that evidence inadmissible against one defendant may be received in the action against another party. The appellant does not appear to have made any effort to have the trial court limit the effect of the declarations made by Graham, as it would no doubt have done, by proper instructions, if so requested. No error resulted in these admissions.

[5] There was attached to the deposition of defendant Graham a photographic copy of the detailed statement made by him at the police station after the accident. Over the objection of the defendant bread company it was admitted in evidence. Graham identified this statement, in his deposition, and testified to its veracity, and to the genuineness of the writing and his signature thereto. For the same reasons that the conversations, already alluded to, are admissible, this statement was properly submitted to the jury.

During the course of the argument of plaintiff's counsel, he remarked:

"Just to show that we are willing to do the right thing, we will dismiss the case, with your honor's permission, against the defendant Harry Graham at this time."

[6] The court refused to rule on the suggestion at that time, and, after the jury had retired, again declined to do so, giving no reason for not so doing. Appellants did not join in, and took absolutely no part in this proceeding. The record contains no evidence that any dismissal of the action was ever entered. Appellants now ask a reversal of both judgments, claiming prejudicial error in the court's action in refusing to pass on the alleged motion to dismiss the damage case against defendant Graham, but cite neither law nor authority in support of their proposition. We see no ground for appellants' contention. The dismissal, if there was one, was not had "upon the written consent" of the defendant, as required by section 581, subdivision 2, of the Code of Civil Procedure. Under that provision it was ineffectual. If it be contended that the dismissal was attempted under subdivision 4 of said section 581, which provides that an action may be dismissed by the court, when upon the trial and before the final submission of the case the plaintiff abandons it, the dismissal was ineffective for any purpose until made by order of the court and entered upon the minutes. The proposal may have come from the respondent's counsel in such manner, and under circumstances, as not to amount to an abandonment of the case as to Graham. It is possible, and quite probable, as suggested by appellants in their brief, that the purported dismissal was staged "for the purpose of influencing the jury." Had the defendants been vigilant in seizing the opportunity then presented to take advantage of the tentative advantage offered by the incident, they should have promptly filed their written consent to the dismissal, in the one instance, or have insisted upon an order of court and entry in the minutes, in the other. Not having pursued their ostensible advantage, and having remained silent until the opportunity offered was swept away by an adverse verdict and

judgment, appellants are not in position to complain. They were not given an exception to the court's refusal to pass upon the motion, by section 647 of the Code of Civil Procedure, as claimed by them, and to which action, so far as the record discloses, they gave their consent.

[7] Appellants make the final objection that the plaintiff totally failed to prove the appointment and qualification of the guardian of the minor. There is no testimony as to the fact. The allegation of the complaint is "that W. W. Lampton is the duly appointed, qualified, and acting guardian of the person and estate of said minor." This was a sufficient averment of the official capacity of the guardian in the absence of a special demurrer, and, if admitted in the answer, had the effect of a stipulation of the fact, which rendered the allegation of more specific facts unnecessary. Collins v. O'Laverty, 136 Cal. 31, 33, 68 Pac. 327; S. F., etc., Land Co. v. Hartung, 138 Cal. 223, 230, 71 Pac. 337. The defendants denied the appointment and qualification of the guardian for lack of information and belief.

[8] Assuming that they thereby placed their denial "upon that ground," as required by section 437 of the Code of Civil Procedure, such a denial was insufficient, and the appointment of the guardian, being a matter of public record, was not put in issue, but stands admitted. Mulcahy v. Buckley, 100 Cal. 484, 487, 35 Pac. 144; Mullally v. Townsend, 119 Cal. 47, 54, 50 Pac. 1066; Mendocino County v. Peters, 2 Cal. App. 24, 28, 82 Pac. 1122.

Each of the judgments appealed from is affirmed.

We concur: RICHARDS, J.; KNIGHT, Judge pro tem.

48 Cal. App. 147

HENNING v. WUEST. (Civ. 3307.)

(District Court of Appeal, First District, Division 1, California. June 10, 1920.)

1. Evidence ⊂⊃419(15)—Parol evidence admissible to show note was for indemnity against loss on accommodation note.

In an action on a note, evidence was admissible to show an agreement between plaintiff and defendant by which the former signed with others a note to a bank in consideration of the defendant guaranteeing him against loss thereby by giving the note in suit and other facts tending to show that accommodation maker had not suffered loss.

2. Stipulations ⊂⊃17(3)—That renewal note was for balance due held binding, and to preclude contrary findings.

Where parties in an action on a note stipulated that a new note "was given as a renewal on the amount remaining due" on the original note, the stipulation was binding, and precluded a finding that the old note had been paid by the renewal note.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by E. J. Henning against A. Wuest. Judgment for defendant, and plaintiff appeals. Reversed.

Wm. H. Wylie, C. A. A. McGee, of Oakland, for appellant.

Wright & McKee, of San Diego, for respondent.

WASTE, P. J. The plaintiff brought this action to recover the sum of $5,750, alleged to be due on a promissory note executed and delivered to him by the defendant and E. A. Edmonds. Judgment was entered for the defendant. Motions were made for a new trial, and for the entering of a different judgment, on the ground that the facts found were not sufficient to support the conclusions of law. Both motions were denied, and the appeal is from the judgment.

The defendant interposed as a defense, and the court found, that on April 28, 1914, H. B. Tanner and John A. Watson, with the plaintiff as an accommodation maker, made and delivered a promissory note to the Marine National Bank of San Diego, payable 60 days after date, for the sum of $5,750; that thereupon, and on the same day, defendant and Edmonds executed and delivered to plaintiff the note sued upon, also payable 60 days after date, to guarantee plaintiff against all liability by reason of his having joined, as accommodation maker, in the note of Tanner and Watson to the bank; that the promissory note executed by Tanner and Watson to the Marine National Bank was paid in full and discharged by another note for the sum of $4,600, executed October 13, 1914, signed by Tanner and wife, Watson and wife, and plaintiff, payable 90 days after date, and certain payments of cash on account of principal and interest; that the defendant had no knowledge of the making of this last note; that he did not consent to the execution and delivery of the latter note as a renewal of the note of April 28, 1914; that the execution of the said renewal note altered the obligation of the defendant upon the guaranty to plaintiff, and suspended and impaired his rights in respect thereto. It was further pleaded and found that no liability on the part of plaintiff to pay the note to the bank ever attached, and that plaintiff never paid anything by reason thereof, and suffered no loss or detriment by reason of being an accommodation maker thereon.

[1] The appellant concedes in his brief that—

"If appellant paid no money and suffered no loss on account of his accommodation making

of the note to the bank, and respondent's contention as to the alleged agreement be true, then appellant should not recover."

He complains, however, of the action of the lower court in admitting parol evidence to show the nature of the real agreement between plaintiff and defendant, and of the alleged alteration of the defendant's liability by the giving of the new note to the bank. He also contends that the findings are contradictory, and not fortified by the evidence, and do not support the conclusions of law.

The court did not err in admitting the parol evidence tending to prove that there was an agreement between the plaintiff and the defendant, by which the former agreed to, and did, sign the note to the bank with Tanner and Watson, in consideration of the defendant guaranteeing him against loss by reason of his so doing. The admission of such evidence did not violate the rule which forbids the introduction of parol evidence to contradict or vary a written contract. If the note, executed by the defendant, was given to secure plaintiff against loss, by reason of his so acting as an accommodation maker on the note to the bank, and the note was paid, and he suffered no loss or detriment, or if the liability of the defendant was in any way affected by some act of the plaintiff, the note of the defendant was discharged, and parol evidence was admissible to prove the facts. Howard v. Stratton, 64 Cal. 487, 488, 2 Pac. 263. It was proper to show the circumstances under which the note was made, and if the facts were as claimed by the defendant, and found by the court, then defendant's parol contract was executed, and the note paid and satisfied. Schultz v. Noble, 77 Cal. 79, 81, 19 Pac. 182.

[2] There is ample evidence to support the lower court's finding that the note executed by Edmonds and defendant was given to guarantee plaintiff against liability by reason of the note executed to the bank on April 28, 1914. We are at a loss, however, to account for the finding that that note was paid in full by the note of October 13, 1914, and certain payments of cash on account of principal and interest. This finding accords with the allegation of the answer, but there is no evidence to that effect. On the contrary, the stipulated fact, elicited by counsel for the respondent, is that the note of October 13, 1914, "was given as a renewal on the amount remaining due on the note executed * * * the 28th day of April, 1914, for $5,750," or, as again stated, "a renewal note of this prior obligation." This stipulation was binding upon the parties, and precluded any finding in opposition to the stipulated facts. If this finding was upon such a material issue as to be determinative of the action, inasmuch as it was contrary to the admission of the parties, the court below should have granted the motion for the new trial. Haese v. Heitzeg, 159 Cal. 569, 574, 575, 114 Pac. 816; Carpentier v. Small, 35 Cal. 346, 354–359.

We think this finding was most material to the case. The respondent seeks to avoid liability on either of two grounds: First, that the appellant suffered no detriment because the obligation which rendered him liable was fully paid and discharged; and, second, that if it was not so discharged the obligation was so altered and changed, without his consent, upon a renewal being had, as to release him from liability as a guarantor. The lower court has found, contrary to the stipulated fact, that the original obligation was paid, which is not so. It has made no finding that the note was ever renewed. It has found that the defendant had no knowledge of the making of the note of October 13, 1914, which fact was entirely immaterial if the old note was thereby paid, as found by the court. In view of the probability of a retrial of the action, we may remark, in passing, that this finding is contrary to the evidence addressed to the fact. It has further found that the defendant did not consent to any renewal of the note of April 28, 1914, to the Marine National Bank, nor to the making of the note of October 13, 1914, as a renewal of the former instrument. This finding is likewise utterly immaterial, in the absence of any finding that there was a renewal, either with or without the knowledge and consent of the defendant, and in the face of the contrary finding that the new note and the cash payments paid and discharged the old obligation.

The only support in the findings for the conclusions and judgment of the lower court rests upon the finding that the note of April 28, 1914, was paid and discharged, which is contrary to the stipulated facts. The motion for a new trial should have been granted.

The judgment is reversed.

We concur: KNIGHT, Judge pro tem.; RICHARDS, J.

48 Cal. App. 122

CALIFORNIA NAT. SUPPLY CO. v. BLACK et al. (Civ. 3207.)

(District Court of Appeal, Second District, Division 2, California. June 9, 1920.)

1. Corporations ⊂=430—Agent may not represent both parties without their full knowledge and consent.

Where the agent of plaintiff corporation was at the same time agent and stockholder of a defunct corporation, whose stockholders are defendants, and his own interests were adverse to plaintiff's, his actions as to any dealings had with plaintiff are not binding on it, unless it had full knowledge of and consented to the agent representing both parties.

2. Corporations ⊂=422(1)—Representation of agent construed not to mean shares were fully paid up.

An agent's representation to plaintiff, his principal, that he also represented a corporation whose stockholders are defendants and incidentally himself, and that they had sold 300,000 $1 shares for $40,000, construed not to mean that the shares of stock had been fully paid up, or that creditors in good faith could not resort to the unpaid balance in an action against stockholders.

3. Corporations ⊂=428(1) — Knowledge of agent of two corporations held not chargeable to one of them.

Where a stockholder and officer of a defunct corporation, whose stockholders are being sued, was agent therefor as well as for plaintiff corporation, conditions *held* such that the fact that he knew all about a transaction on both sides was not sufficient, under the law, to charge the plaintiff with such knowledge.

4. Corporations ⊂=228—Stockholders liable to corporate creditors where stock not paid for in full.

The fact that defendants owned stock not paid for in full, as set forth in plaintiff's complaint, fixed their liability in an action by the corporation's creditor, so that the trust fund theory is applicable.

5. Corporations ⊂=228—Persons holding stock not fully paid up may not avoid liability to creditors.

Where stock of a corporation is issued without being fully paid up, the unpaid amount, so far as the corporation's creditors are concerned, is money due from the stockholders, and no subterfuge or device making it appear as fully paid up, when it is not, will enable the stockholders to avoid liability.

6. Mines and minerals ⊂=104—Stockholders of mining corporation liable on stock not fully paid.

The rule of law that stockholders are liable to a corporation's creditors for the amount not paid on stock issued applies to mining corporations as well as others.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by the California National Supply Company against George Black and others. Judgment for defendants, and plaintiff appeals. Reversed.

Flint & Jutten and H. S. MacKay, Jr., all of Los Angeles, and Wm. G. Griffith, of Santa Barbara, for appellant.

Charles U. Armstrong, of Santa Maria, and Canfield & Starbuck, of Santa Barbara, for respondents.

THOMAS, J. According to the complaint in this action, plaintiff secured a judgment in the sum of $4,777.88 for goods, wares, and merchandise sold and delivered by it to the Cat Canyon Oil Company, against that company, previous to the commencement of this action; that an execution was thereafter duly issued and returned by the sheriff satisfied to the extent of $1,937.65, and no more, leaving a balance of $2,869.93 thereon unpaid and unsatisfied at the time of the commencement of this action; and that on two occasions subsequently executions were issued, and the sheriff of Santa Barbara county attempted to levy on property of the Cat Canyon Oil Company for such latter amount, but that upon each occasion the execution was returned wholly unsatisfied.

It is alleged that the Cat Canyon Oil Company was incorporated and organized with a capital stock of $500,000 divided into 500,000 shares of the par value of $1 each. It also is alleged, "on information and belief," that prior to July 25, 1910, a certain lease of certain described land had been given by one M. J. McCroskey, as lessor, to L. M. McCroskey, as lessee, giving the latter the right to drill and to exploit the same for oils and minerals; that thereafter, and prior to July 25, 1910, this lease was assigned to one George Black, one of the defendants here; that on this latter date the value of the interest of the lessee in the lease was not to exceed the sum of $10,000; and that the directors of the Cat Canyon Oil Company knew this to be a fact at that time. It further is alleged, "on information and belief," that on July 25, 1910, the directors of the Cat Canyon Oil Company agreed with said Black that his interest in said lease should be transferred to that corporation, and in consideration therefor the latter would issue to N. B. Barker the remaining 499,975 shares of its said capital stock; 25 shares having previously been issued, 5 shares to each of the five directors of said corporation. This agreement was carried out. But it is alleged "that the value of all the consideration received by said corporation for the issuance of said 499,975 shares of its capital stock was not, at any time, in excess of the sum of $10,000; that as incidental to said issuance of said 499,975 shares of said capital stock by said corporation and the directors thereof said corporation and said directors

did assert, as a fact, that said 499,975 shares and all thereof were fully paid upon the issuance thereof as aforesaid;" that said directors knew said shares were not fully paid, inasmuch as the total consideration for the issuance thereof was property of a value not to exceed the total sum of $10,000; and that all of this was done fraudulently and with intent to defraud the public, and particularly the then and future creditors of the corporation.

The complaint further sets forth, on information and belief, that the defendants herein "have continuously been and now are the owners and holders in fact and according to the books and records of said Cat Canyon Oil Company, of the respective number of shares * * * set opposite their respective names, to wit, George Black, 9,500, L. B. Coblentz, 9,000, W. C. Oakley, 9,000, H. H. Jessee, 3,000, Frank Jessee, 3,000, Perry Jessee, 3,000, C. U. Armstrong, 9,000, and C. F. Black, 7,000"; and that the Cat Canyon Oil Company has at no time received, on account of said shares, any "thing of value or consideration other than $^{52500}/_{499975}$ of the sum of $10,000," which latter sum was the value of said lease.

Plaintiff asks the court to determine "the amount paid to the Cat Canyon Oil Company for the issuance from its treasury of each of the shares of its capital stock owned and held by the defendants herein, and that plaintiff have judgment against each of the defendants for the sum of $2,869.93, * * * but not to exceed the amount due from each defendant upon his subscription to the capital stock of said corporation."

A demurrer, general and special in terms, was interposed to the complaint, and by the court overruled. Defendants, except for the formal parts thereof, deny each and every material allegation of the complaint, and by way of separate and further defense allege: (1) That the cause of action set up in the complaint is barred by the provisions of subdivision 2 of section 337, subdivisions 1 and 4 of section 338, subdivision 1 of section 339, section 343, and section 359 of the Code of Civil Procedure of this state; (2) that of the sum prayed for there has been paid by Joseph P. McDonnell the sum of $664.02, and by Theodore R. Finley the sum of $562.23; (3) that there was, when this action was commenced, and now is, another action pending between this plaintiff and certain of these defendants for the same cause of action as herein set forth; (4) that for value received the said L. M. McCroskey assigned, etc., all his right, title, and interest in and to said lease and option to George Black, one of the defendants herein, which lease, together with the assignment thereof, was thereafter duly recorded, and, on July 25, 1910, was in full force and effect and of great value, to wit, "$100,000 or more"; (5) that the Cat Canyon Oil Company was an oil mining corporation, and organized for that purpose, that it had no land to operate or drill upon for oil, that with full knowledge of all the stockholders and directors thereof the said corporation duly and legally purchased said oil lease and option from said Black at the reasonable, actual, and agreed value of $100,000, and agreed to give and did issue and deliver to him and his associates in payment therefor 100,000 shares of the capital stock of said company, as fully paid, and no more, and that at the time said lease was sold to the Cat Canyon Oil Company the said corporation did not owe the plaintiff anything; and (6) that one Joseph McDonnell was a stockholder, director, and secretary of the Cat Canyon Oil Company at all times set forth in plaintiff's complaint, and at all times during its corporate existence, and at the time of the sale of the McCroskey oil lease to the Cat Canyon Oil Company the said McDonnell was also a sales agent and officer of the plaintiff herein, and knew of all the facts and details of said sale or exchange, as already set forth, that plaintiff well knew said facts to be as aforesaid at the time it extended credit to the Cat Canyon Oil Company, viz., that said stock was so issued to defendants and sold at par value and issued as fully paid up stock, and that plaintiff did not look to the said stock or the holders thereof, but to the corporation, the Cat Canyon Oil Company, and its property assets, in extending said credit.

Upon the issues thus presented, the cause went to trial to the court without a jury. After due deliberation thereon the court found in favor of defendants, and judgment, from which this appeal is taken, was entered accordingly.

The evidence shows, among other things, that the defendant George Black, on or about July 10, 1910, made an offer in writing by the terms of which, if accepted, he agreed to exchange, "in full payment for the entire capital stock" of the Cat Canyon Oil Company, "excepting the shares subscribed by the incorporators," a certain lease, with option to purchase, which he held, of certain lands described therein. If accepted, according to the offer so made by him, "the entire capital stock, except the shares subscribed, is to be issued as follows: 499,975 shares par value of $1 each to be issued to N. B. Barker, assistant secretary, N. B. Barker to issue said capital stock as follows: Geo. Black, 100,000 shares; T. R. Finley, 25,000 shares; Jos. McConnell, 25,000 shares; N. B. Barker, 349,975 shares. N. B. Barker then to issue to treasury account 200,000 shares; Hopkins, Moltman & Robbins, 50,000 shares; J. H. Robbins, trustee, 99,975 shares, which is to be reissued in connection with the sale of the treasury stock. * * *" This offer was duly and legally accepted by the Cat Canyon Oil Company "in full payment for all the unsubscribed shares of the capital stock of this corporation," the 499,975 shares of said stock were

issued in accordance with the directions of the offer, being evidenced by certificate of stock No. 6, and the reissue of the stock, as set forth in the offer, was made by the assistant secretary accordingly.

Appellant urges that originally the stock held by each of these defendants was a part and parcel of said certificate No. 6, and that "the issuance to N. B. Barker of the 499,975 shares, in consideration of the transfer of the lease, was a subterfuge or device to make it appear as though the entire capital stock of the corporation was fully paid, or, in other words, that the corporation had received money or money's worth to the full par value of the stock." In the absence of evidence showing that the plaintiff knew of these facts before the credit was extended, we think this argument is sound. Did the plaintiff, therefore, have such notice?

[1] The rule is that an agent may, with their full knowledge and consent, represent both parties to a contract, and his contract under such circumstances bind each within the scope of his employment. "But where an agent, without the full knowledge and consent of his principal, represents the adverse party in a transaction, his contracts relating thereto are voidable at the option of his principal." 2 C. J. 838. And for the same reason the agent cannot, except with his principal's full knowledge and consent, assume any duties or enter upon any transaction concerning the subject-matter of the agency in which he has individual interests, or represents interests, adverse to those of his principal. Brown v. Spencer, 163 Cal. 589, 126 Pac. 493; Smith v. Goethe, 147 Cal. 725, 82 Pac. 384. "He cannot, without the knowledge and consent of his principal, represent himself and the principal, where third interests conflict; he must not put himself into such a position that his interests become antagonistic to those of his principal." 2 C. J. 694. Public policy demands that this be so, that all temptation to neglect his principal's interests may be removed from the agent.

In the case at bar, the witness McDonnell was the agent of the plaintiff. He was at the same time the agent of the defunct corporation, having been its secretary during the life of that corporation. He was also a stockholder thereof. McDonnell was therefore attempting to represent the plaintiff here, the defunct corporation, and his own interests as a stockholder. The interests of the defunct corporation and his own were adverse to those of the plaintiff; and unless the record here brings him within the rule above enunciated, his actions in reference to any dealings had with this plaintiff may not be binding upon it.

[2] On August 5, 1910, without the authority of his principal, the plaintiff corporation, McDonnell sold and delivered to said defunct corporation, Cat Canyon Oil Company, supplies, etc., to the extent of $2,046.60. On the 13th of the same month the treasurer of the plaintiff corporation wrote to McDonnell, among other things, as follows:

"I have asked you twice for a report on this account now, and of course unless I get satisfactory information and know that the company is all right, financially, we will not take their business. So if you want their business, the quicker it is made satisfactory to the treasury department the better."

On the 17th of the same month McDonnell answered this letter, purporting to give the treasury department of the plaintiff corporation the information sought. So far as material here, we quote from such answer as follows:

"I own one-tenth interest in this company for getting them the property, and as I do not have to put up a dollar and as I am secretary, it is of double interest to me to see that I am protected. We sold 300,000 shares of stock for $40,000, to be paid for not less than $5,000 per month. Hopkins, Maltman & Robbins are very well thought of as brokers in San Francisco and throughout the country, and I am sure that with the payments started they will be kept up. At any rate they have got to be kept up, for as soon as they stop work stops."

[3] This is the only testimony, so far as we have been able to learn from the record, and we have read the whole of it, disclosing any information about the Cat Canyon Oil Company to the plaintiff. This letter reveals to the plaintiff corporation that its agent, McDonnell, was representing both parties, and incidentally himself, so far as his interests were concerned; but it shows nothing else. We do not think the reference to the sale of "300,000 shares of stock for $40,000" can be legitimately construed to mean "fully paid up," or that creditors in good faith could not resort to any unpaid balance on the stock issued for any unpaid balance thereon. The evidence, on the other hand, discloses without question that this same McDonnell knew all about the whole transaction before, at the time of, and ever since the incorporation of the Cat Canyon Oil Company, as well as the issuance of the 499,975 shares of stock in exchange for the lease. The par value of the shares so issued was $1 each, or a total of $499,975. There is evidence that the defendants, and each of them, believed that the property was worth "at least $100,000." Assuming that among themselves it was binding as "fully paid up," this is not the case as to creditors. "The question concerns creditors only. As to them the corporation is presumed to have sought credit based upon its supposed capital * * * actually paid in or due from its stockholders. Public policy requires that the fact whether a particular creditor did trust the corporation on that basis should not be inquired into." Vermont, etc., Co. v. Declez, etc., 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143.

The evidence discloses the duplicity of McDonnell, not only in his dealings with plaintiff, but with his associates and fellow stockholders in the defunct corporation. There is no doubt but that he deliberately kept the facts above recited from the plaintiff. As to his associates, we cite but one instance to show his attitude to them. In a letter written by him to the plaintiff he says, among other things:

"I would suggest that upon receipt of this letter you immediately write Mr. Finley, Santa Maria, telling him that you had heard from me regarding this account, and that it is absolutely certain that the account be paid by January 1st. Make the letter good and strong; that will make him get in the harness and get in the money. * * * Make the letter strong enough so there will be no doubt left as to your intentions."

Under these conditions we do not think the fact that McDonnell knew all about the transaction on both sides is sufficient, under the law, to charge plaintiff with such knowledge.

[4] There is no merit to the point urged by respondents that the trust fund theory does not apply to a person who has not subscribed to or purchased stock. The fact that defendants owned the stock set forth in plaintiff's complaint fixed their liability. Vermont, etc., Co. v. Declez, etc., Co., supra.

[5, 6] The evidence here, giving it such construction as will be the most favorable to respondents, shows that the stock was actually sold at much below its par value. And this, in reality, is the question upon which the case turns. The fact is, as disclosed by the record, that the stock owned by defendants is a part of the 499,975 shares transferred in accordance to Black's offer, by direction of T. R. Finley, to N. B. Barker. Where the stock of a corporation is issued without being fully paid up, "the amount remaining unpaid is, so far as its creditors are concerned, deemed to be money due from the stockholders. Such a creditor, if the corporation becomes insolvent, may apply, in equity, to have the fund so deemed to be due to the corporation collected and applied upon his debt. The fact that the stock is issued as fully paid up does not estop or bind the creditor, and in such a case, if it is not fully paid up, the creditor may prove the fact and recover enough of the portion that is unpaid to satisfy his debt. No subterfuge or device by which it is made to appear as fully paid up when it is not will enable the stockholder to avoid this liability." Herron Co. v. Shaw, 165 Cal. 668, 133 Pac. 488, Ann. Cas. 1915A, 1265. This is conceded by respondents to be a correct statement of the law; but in their opinion it does not apply to a mining corporation, nor to one who has not subscribed to or purchased stock. This is only another way of arguing that incorporators of mining companies should be permitted to violate the law, while conceding that all others should be held to strict accountability. We know of no law, and none is called to our attention, supporting the application of such double standard. As we have seen, the contention is untenable. In our opinion the reasoning of the Supreme Court in the case just cited is applicable on every phase of the case at bar. We think that case determinative of the points raised on this appeal.

No other point raised, under these considerations, needs discussion.

Judgment reversed.

We concur: FINLAYSON, P. J.; WELLER, J.

(48 Cal. App. 151)

GIFFEN et al. v. CHRIST'S CHURCH. (Civ. 3299.)

(District Court of Appeal, First District, Division 1, California. June 11, 1920.)

1. Specific performance ⟸36—Action lies against religious society failing to perform contract.

When a religious corporation neglects or refuses to carry out its contractual obligations by failing or refusing to do or perform certain acts which lie within its power, an action against it for specific performance may be successfully invoked.

2. Religious societies ⟸20—Cannot contract for sale of land without first obtaining court order.

A valid sale of real property by religious corporation may not be made until an order of court authorizing such sale is first had and obtained, under Civ. Code, § 598, although the provisions of the statute are not mandatory upon the court, but allow it sound discretion to deny the order.

3. Courts ⟸481—Specific performance cannot be decreed where inconsistent with a former order in force.

While an order of the superior court granted under Civ. Code, § 598, permitting a religious corporation to sell property to one other than plaintiff, exists, the order prayed for, compelling such society to specifically perform a contract to transfer the property to plaintiff, cannot be made.

4. Judgment ⟸512 — False testimony not ground for collateral attack.

A court order, under Civ. Code, § 598, permitting a religious corporation to transfer property to a certain party, cannot be annulled for fraud by a decree of specific performance of a contract to convey to another, since if the former was granted on false testimony that would not justify a collateral attack, in the absence of a showing of lack of jurisdiction.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

5. Appeal and error ⟸843(2)—Unnecessary questions need not be determined.

Where the court, under Civ. Code, § 598, granted an order directing a conveyance from a religious society to one other than plaintiff, the order was, in effect, a denial of the petition, so far as plaintiffs appellants are concerned, so that it is unnecessary on their appeal to determine the validity of the order.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Charles A. Giffen and another against Christ's Church, a religious corporation. Judgment for defendant, and plaintiffs appeal. Affirmed.

Milton K. Young, W. G. Van Pelt, and Bertin A. Weyl, all of Los Angeles, for appellants.

R. T. Quinn, T. A. Williams, Overton, Lyman & Plumb, and Wm. B. Himrod, all of Los Angeles, for respondent.

KNIGHT, Judge pro tem. This is an action to compel the specific performance of an agreement to convey real estate. At the commencement of the trial defendant objected to the introduction of any evidence upon the ground that the second amended complaint failed to state a cause of action. The objection was sustained, and, plaintiffs having declined to amend, judgment was rendered in favor of the defendant, from which plaintiffs appeal. The sufficiency of said complaint is therefore the only matter to be considered.

The following are substantially the facts upon which plaintiff's cause of action is based: On July 1, 1918, pursuant to a resolution of its board of directors, respondent, a religious corporation, entered into a written agreement with appellants, whereby it agreed to sell appellants certain real property for the sum of $5,000, subject to incumbrances amounting to $65,000. Thereafter, on July 1, 1918, respondent petitioned the superior court of Los Angeles county, in accordance with section 598 of the Civil Code, for leave to sell and convey said property. On July 12, 1918, after due notice, said petition came on regularly for hearing, and an order was granted by the court directing the sale to be made, but to a person other than appellants and for a consideration other than that stated in the petition. It is alleged in said complaint that at all times subsequent to the 1st day of July up to and including July 12, 1918, respondent, by and through its officers and agents, represented to appellants that said agreement would be carried out, but that said representations were false, and that between said 1st day of July, 1918, and the 12th day of July, 1918, with the intention of avoiding said agreement the officers of said respondent negotiated with another purchaser for the sale of said real property and fraudulently concealed from the court the existence of said written agreement between appellants and respondent, and fraudulently represented to said court that respondent was free to accept a bid from a proposed purchaser other than appellants. It is further alleged that the negotiations between the officers and agents of respondent and said other purchaser were concealed by them from the directors of respondent, and that said directors never authorized or directed the sale of said property to any purchaser other than appellants. It is further alleged that, unless otherwise decreed, said officers and agents will execute and deliver to said other purchaser a deed to said property. Said complaint also embodies the usual allegations necessary to be made in the statement of a cause of action for specific performance of an agreement to sell land, by alleging adequacy of consideration, the performance by appellants of all matters and things required of them to be performed, and their willingness and ability to complete the agreement.

The prayer of said complaint is:

"That a judgment and decree be made and entered in this case requiring defendant to apply to the court in which said petition to sell and convey said property is filed, for an order setting aside the order heretofore made, and the making and entry in said proceedings of an order granting leave to sell and convey said property in accordance with said petition and in pursuance of said contract between plaintiffs and defendant, and that said defendant be further required to fully carry out its said contract with the plaintiffs and to make and execute a grant deed conveying said property unto said plaintiffs," and for general relief and costs.

[1, 2] It is the contention of appellants, first, that the action is one for specific performance, and that under the facts alleged in said second amended complaint specific performance may be decreed; secondly, that the order to sell to another was obtained by fraud; and, thirdly, that the provisions of section 598 of the Civil Code limit the power of the court to either grant or deny the petition as filed, and do not authorize the court to direct a sale to a purchaser other than the one named in the petition, or for a different consideration.

It is doubtless the law, that when a religious corporation neglects or refuses to carry out its contractual obligations by failing or refusing to do or perform certain acts which lie within its power to perform, an action for specific performance against it may be successfully invoked. Bowen et al. v. Trustees of Irish Presbyterian Church, etc., 6 Bosw. (N. Y.) 245; Congregation Beth Elohim v. Central Presbyterian Church, 10 Abb. Prac. (N. S. N. Y.) 485; 34 Cyc. 1162; in

the Matter of the Reformed Dutch Church, 16 Barb. (N. Y.) 237. But we cannot agree with appellants' contention that under the facts stated in their complaint such a case is here presented, for the reason that under all of the authorities cited a valid sale may not be made by such religious corporation until an order of court authorizing such sale is first had and obtained. Dudley v. Congregation of Third Order of St. Francis, 138 N. Y. 451, 34 N. E. 281. Such are the plain provisions of section 598 of the Civil Code of this state, and such is the effect of the decisions of the other jurisdictions above cited, construing statutes of similar character. The provisions of the statutes upon which those cases are founded, as well as those of our own statute, are not mandatory upon the court, requiring that the court shall in all cases grant an order to sell. The court may, in the exercise of sound discretion, deny such order. Bowen et al. v. Trustees of Irish Presbyterian Church, supra; 34 Cyc. 1162, 1163.

[3] Appellants are, then, in the beginning, confronted with the order of the superior court of Los Angeles county, duly made upon proper petition and notice, directing that the property in question be conveyed by respondent to another purchaser. If the lower court thereafter, in the face of that order, decreed specific performance to appellants, it would have brought about the anomalous situation of having the superior court of Los Angeles county in one proceeding direct that respondent execute and deliver a deed to the property in question to one purchaser, and at the same time having the same court, although a different department thereof, direct that respondent execute and deliver a deed to said property to another purchaser. This, of course, the law will not permit, and it is quite obvious that while the order granted by the superior court in the proceeding instituted under section 598 of the Civil Code remains in force specific performance in this action cannot be decreed.

[4] Appellants seek to have such order annulled for fraud, but the manner in which said order is being attacked, that is, through the medium of a judgment sought to be obtained in this action for specific performance, is clearly collateral, and therefore unavailing. Baldwin v. Foster, 157 Cal. 643, 108 Pac. 714; Estate of Ryan, 177 Cal. 598, 171 Pac. 297. Neither does the fact that the order may have been granted on false testimony justify a collateral attack upon said order, in the absence of a showing of lack of jurisdiction. Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; Roundtree v. Montague, 30 Cal. App. 170, 157 Pac. 623; Bacon v. Bacon, 150 Cal. 477, 89 Pac. 317.

[5] It is not necessary to consider and determine the remaining contention urged by appellants, namely, that the provisions of section 598 of the Civil Code do not authorize the court to direct a sale of the property of a religious corporation to any other purchaser than the one named in the petition and in the resolution adopted by said religious corporation. We are here concerned only with the issues between appellants and respondent, and since the court in the special proceeding under said section 598 granted the order directing the conveyance to be made to a person other than these appellants, it was, in effect, a denial of the petition in so far as appellants are concerned (Estate of Bradley, 168 Cal. 655, 144 Pac. 136), and whether or not the order is valid in so far as it directs a conveyance to such other purchaser is not material here.

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

48 Cal. App. 103

GIANELLI et al. v. GLOBE GRAIN & MILLING CO. (Civ. 2167.)

(District Court of Appeal, Third District, California. June 8, 1920.)

1. Sales ⇐199—Title held to have passed to buyer.

A contract for the sale of hay, containing the words "hereby sell," but providing that seller should deliver whenever buyer should arrange time therefor, and for payment of three-quarters of the purchase price almost immediately, *held* an executed contract, so that the title passed to the buyer.

2. Evidence ⇐457—Parol evidence of circumstances admissible to show meaning of "f. o. b."

In an action for buyer's refusal to take a part of hay sold because of subsequent damage, parol evidence *held* proper to bring before the court all facts and circumstances characterizing the transaction culminating in the written agreement, not to alter or modify its terms, but to show what the characters "f. o. b." as used in the writing were intended by the parties to mean, and whether they were to control in determining whether the agreement was an executed or an executory sale.

3. Sales ⇐199—Purchaser's agreement to deliver not controlling as to passing of title.

The fact that the seller of goods or commodities agrees to deliver the same to the purchaser at some point is not necessarily controlling in determining whether the parties intended that an immediate transfer of title should be effected.

4. Sales ⇐218½—Evidence held to show sale of hay was executed, not executory.

Evidence *held* to show an absolute sale of hay so that the title passed to the buyer, the

contract being executed and not executory, in view of Civ. Code, § 1140.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by A. E. Gianelli and another against the Globe Grain & Milling Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Arthur L. Levinsky, of Stockton (Clarence E. Fleming, of Stockton, of counsel), for appellant.

Nutter, Hancock & Rutherford, of Stockton, for respondents.

HART, J. From a judgment in favor of plaintiffs for the sum of $1,590 defendant prosecutes this appeal.

Plaintiffs were the owners of a tract of land, situated near Stockton, upon which, in the season of 1918, they had grown and harvested a crop of hay amounting to 330 tons. The hay was baled, and was in one stack on the premises, each bale, with the exception of 80 tons, being tagged with the weight. On August 8, 1918, J. E. Morgan, of Stockton, and G. A. Morgan, of Los Angeles, representing the defendant, called upon the plaintiff, Barmann, and had a conversation with him regarding the securing of an option on the hay or the purchase thereof. Barmann informed the Morgans that he preferred to sell the hay rather than to give an option upon it and, after some conversation, the following contract was written and signed by the parties:

"Stockton, Aug. 8, '18. I hereby sell to the Globe Grain & Milling Co. three hundred and fifty ton (350) more or less No. 1 barley hay for twenty-three dollars ($23.00) f. o. b. cars or warehouse; same to be decided upon. The amount of seventy-five per cent. to be paid on or before the 12th of Aug.; the balance of twenty-five per cent. to be paid on completion of hauling and delivering, together with weight, on or before sixty days. Globe Grain & Milling Co., J. E. Morgan. Barmann & Gianelli, by H. W. Barmann. J. E. Morgan."

Six thousand dollars, approximately 75 per cent. of the purchase price, was paid to plaintiffs on August 14, 1918, and, at the same time plaintiffs assigned to defendant an insurance policy for $7,000 covering the hay. It appears that, on the night of the 11th of September, before the hay had been delivered, half an inch of rain fell, and in the next few days there were four inches of rain. The hay was badly damaged, and defendant refused to accept any damaged hay, but expressed its willingness to take the undamaged hay. Plaintiffs agreed to haul the undamaged hay if defendant would segregate what it considered damaged from the undamaged hay. This defendant refused to do, and plaintiffs commenced the action for the balance of the purchase price.

[1] The controversy herein arises over the question whether the transaction evidenced by the above instrument involved a sale of the hay or an executory contract for the sale of said property, the appellant's position being that, under the terms of said writing, the title to the hay was not to pass to the purchaser until the completion of delivery on board of cars or at a warehouse, to be later designated by defendant; and that, no such delivery having been made, although, as is the claim, notice of and demand for such delivery was duly given and made, the title to the hay remained in the vendors, and that therefore they must stand any loss or damage which occurred by reason of the rainstorm referred to. On the other hand, the plaintiffs contend that the transaction constituted an absolute sale of the hay, and that title to the property immediately passed to the defendant upon the execution of the writing above quoted herein.

We think the words of the writing evidencing the transaction involved herein clearly import an absolute sale of the hay, and that the legal effect of said writing, although signed by the defendant as well as the plaintiffs, is that of a bill of sale. The instrument sets forth definitely the property sold —that is, the kind and the number of tons of hay sold—and expressly states that the vendors "hereby sell," not "hereby agree to sell" the hay to the purchaser at a specified price. Moreover, the language of the writing, it will be noted, clearly implies that the hay, although thus purchased outright by the defendant, was to remain on the premises of the plaintiffs until such time as the defendant might itself determine whether the hay should be placed or stored in some warehouse designated by it or put on board of cars for shipment. This matter was solely to be determined by the defendant, and it is obvious that the hay could not be delivered until the defendant had made a decision as to which of the two different places provided for in the writing at which it should be delivered for it by the plaintiffs. Indeed, the plaintiffs were without any right or authority to deliver the hay except at one or the other of the places to be finally designated by the defendant, although the former could have compelled the latter to remove the hay from their premises if it had been permitted to remain there for a longer period than was consistent with the convenient use by the plaintiffs for their own purposes of the particular portion of the premises where the hay was allowed by them to remain after the transaction and pending its delivery to the place designated by the defendant.

There is still another consideration of potent significance in establishing that the transaction was intended by the parties to constitute an absolute sale, and that title to the hay should immediately vest in the de-

fendant, and that is in the fact that the writing above reproduced herein provided that a very large proportion of the purchase price—in fact, the larger proportion thereof—should be paid within four or five days after the execution of the instrument. It is not at all likely that, had the contract been intended or understood to be merely executory and its consummation dependent upon delivery of the hay by the sellers to the purchaser, the defendant would have bound itself to pay three-quarters of the purchase price within so short a time after the transaction and before (as we shall later see was true) the place of delivery was designated by the defendant. Referring to the circumstance of the payment down of a large amount of the purchase price of personal property as one shedding some light on the nature of the contract involving a transfer of such property—that is, upon the question whether the contract involves an absolute sale or is only executory, Williston, in his work on Sales (1909 Ed.) p. 368, says:

"If the buyer pays the price, or a large portion of it, it is evidence not so strong as delivery, but still entitled to great weight, that immediate transfer of the property is intended. The weight to be given such evidence will be diminished if the portion of the price paid is not large. It is to be observed that though payment of the price is important evidence of an intention to transfer the property immediately, nonpayment of the price is little, or no evidence, of an intent to retain the ownership."

[2] But if there be doubt as to the scope and effect of the writing or as to whether it was intended as an executed or only an executory contract, or one merely for the sale in the future of the hay, such doubt will be readily dissipated upon a consideration of the parol evidence allowed by the court, disclosing the facts and circumstances leading to, surrounding, and attending the execution of the writing. But in this connection, we may first well consider the contention of counsel for the defendant that evidence extrinsic to the writing itself is incompetent, and therefore inadmissible for the purpose of showing what the parties meant or intended by their agreement. This position is based upon the well-established rule that, where parties have reduced the terms of an agreement into which they have entered to writing, all their prior and contemporaneous oral negotiations appertaining to the agreement are to be ordinarily presumed to have been merged in the writing, and that the terms of the agreement cannot be varied or changed or modified or even explained by parol testimony.

The specific contention is that the characters "f. o. b.," as used in contracts for the sale of personal property, are in commercial circles always understood to mean that title to the thing which is the subject of such a contract does not pass until the thing or property is delivered by the seller to or on board the cars, or, as in this case, until so delivered either at a warehouse or on board the cars. In other words, it is the contention that those letters or characters as used in commercial contracts for the sale of goods or commodities have a definite, fixed, and well-understood meaning, that their signification as so used is as above given, and that therefore there cannot properly be admitted to prove the meaning of those characters or to show that, as used in a particular contract, they do not mean what they are in the law merchant commonly understood to mean when so employed, any testimony other than the agreement itself, but that the courts may and must take notice of their meaning or signification when so used. Some cases from other jurisdictions are cited as in support of this view. Without entering into an examination herein of the cases named by counsel, we affirm only an obvious proposition when we observe that words or characters having a definite and well-understood meaning when used in certain contracts may nevertheless be used in a contract in such manner or in such connection with other words or language therein employed as expressing the terms of the agreement of the parties thereto as to make such contract itself ambiguous or uncertain as to its meaning, scope, and effect, or, in other words, render the intent of the parties to such contract vague and uncertain; and, where the intention of the parties to a written contract is not made clear by the written instrument itself, or is so obscured by the language of the writing, even though phrased in words which themselves, or taken alone, bear a fixed, definite, certain, and a common and well-understood meaning, it is proper to receive evidence for the purpose of explaining what the parties meant by the language employed in such contract to express their agreement. In this case, the parties appear from the face of the writing itself to have "struck a bargain" by agreeing upon a sale of the hay and the terms of the payment therefor, but they, notwithstanding, inserted in their written agreement the characters "f. o. b," in a connection which might possibly have the effect of throwing a little—we think very little, if any—doubt upon what they really intended to effect by their agreement. It was proper, therefore, to allow parol evidence for the purpose of bringing before the court all of the facts and circumstances characterizing the transaction culminating in the agreement and the writing evidencing its terms, not for the purpose of altering or modifying the terms thereof, but only to show what the characters "f. o. b.," as therein used, were intended by the parties to mean, or whether they were to control in determining whether the agreement was an executed agreement of

sale or only an executory agreement for the sale of the hay.

[3] It has repeatedly been held in this state that the fact that the seller of goods or commodities of any character agrees to deliver the same to the purchaser at some point is not necessarily controlling in determining upon a construction of the contract for their sale, whether the parties intended by their agreement that an immediate transfer of title should or should not then be effected. In Bill v. Fuller, 146 Cal. 50, 79 Pac. 592, the agreement provided for payment for the oranges, which were the subject of the contract, "as soon and at the time of delivery." In that case the trial court allowed parol proof to show what the parties understood and intended that the nature of the contract should be; that is, whether it involved a present sale and transfer of title, or merely an agreement to sell, with the intention that title in the vendee should vest only upon delivery by the vendor. It was held that the trial court made no error in admitting the evidence thus referred to; and, furthermore, the court held, in the language following this, that the contract upon its face clearly indicated that an absolute sale was thereby effected:

"Nor do we wish to be understood as holding that the title to the crop did not pass as soon as the contract was executed. The agreement, in form, imports a present sale; the thing sold was in existence, and was identified and separated from other things. Under section 1141 [1140?] Civ. Code, it would seem that title passed at once, and that the oranges remained on the trees at the risk of the buyer."

In Fiddyment v. Johnson, 18 Cal. App. 339, 123 Pac. 342, the agreement involved the sale of hay, and the facts of the transaction therein are so near identical with those of the present case that it would be difficult to differentiate the two upon any logical line of demarcation. It was there held that the fact that the seller was required by the contract to deliver the hay was not controlling, citing Dyer v. Libby, 61 Me. 45, where the seller was to haul and deliver at a specified point, which was held not a controlling factor determinative of the question whether the contract involved an executed or present sale and transfer of title to the vendee or merely executory in its nature. See, also, Greenbaum v. Martinez, 86 Cal. 459, 25 Pac. 12.

It is held in all of the above cases that whatever may be the general trade meaning of the phrase "payable f. o. b." or other trade phrases peculiar to commercial contracts or the characters "f. o. b.," the fact remains that such trade or commercial signification or meaning is always controlled by the express contract of the parties, and that parol evidence may be received to show what effect such phrases or characters have on such contracts as in fixing the nature, scope, or effect thereof, or as in disclosing the intention of the parties as to such scope and effect.

It follows from the foregoing considerations that the action of the trial court in allowing parol evidence of the circumstances attending the making of the agreement involved herein was free from error; and, as before declared, a consideration of the evidence so admitted will readily demonstrate that the said agreement or contract involved an absolute sale of the hay, and that, therefore, the title to said property passed to the defendant eo instante upon the execution of said agreement. The testimony so referred to was (for the plaintiff) mainly that of H. W. Barmann, one of the plaintiffs, and is as follows, given synoptically, though somewhat extendedly:

"A. E. Gianelli, the other plaintiff, and myself own a tract of land situated about four miles west of Stockton on the lower division of Roberts Island. In the season of 1918 we grew and harvested a crop of hay on this land. This hay was harvested, baled, and stacked in one large stack on the premises adjoining the Jacobs or Holt road. Every bale was weighed as it came from the hay press on the field, and every bale, with the exception of 80 tons was tagged. On the 8th day of August, 1918, there were 330 tons of hay in the stack, less one-fifth of a ton. It was separated from everything else. On that day Mr. J. E. Morgan, of Stockton, and Mr. G. A. Morgan, of Los Angeles, called upon me in regard to selling my hay. We talked for about half an hour. No one else was present. Mr. Morgan's wife was in his automobile, but she did not enter into our conversation. Both of the Mr. Morgans and I looked at the hay; they examined it very carefully, asked me as to its quality and uniformity in the stack and so forth. They both seemed to be very much pleased with the quality of the hay. They told me that the United States government was opening bids for the purchase of a large quantity of hay, on the following Monday, I believe, and asked me if we would be willing to give them an option for the purchase of this hay. I told them that I didn't think so, that an option would not be satisfactory to me. I felt that the hay was to be sold outright to avoid any damage—any possible damage from rain or otherwise. We spoke of what the hay would bring. As we were speaking of the price, the point came up as to whether I could deliver the hay for them. I told them I didn't want to deliver the hay, because it was a lot of bother, and I wanted to sell it as it was, and not be bothered with it. They told me that they had no organization to look after such things as hauling hay, and so forth, and could not be bothered with the same. I consented, and said that in that event I could probably deliver the hay to them. It was agreed that the price to be paid for the hay was $23 a ton, which would net me practically $22 a ton, inasmuch as the hauling would cost $1 a ton. We then spoke of payments. We spoke as to how much money we would want, or I would demand at that time. I told them I would need most of the money at that time. They asked me if 75 per cent. would be suffi-

cient and meet our needs at that time, that being about the sum of $6,000. I said yes, I thought that would be satisfactory for the initial payment, and as to the other payment they asked me if 60 days from date would be all right for the second payment, in case they did not haul the hay before that time. Mr. Morgan asked me if they could leave the hay on the ranch for a period longer than 60 days in case they wished. I told them it made no difference to us, they could leave the hay there until next winter, and we would not charge them storage for the same, provided we didn't need the land or the space. That being agreed upon, Mr. Morgan from Los Angeles, instructed his brother to draw up a bill of sale for the hay."

[4] Thereupon the writing evidencing the agreement of the parties and above quoted herein was prepared by one of the Morgans, and signed by both the parties to the transaction. The witness (Barmann), continuing further, testified:

"The next time I saw Mr. Morgan was on the 14th of August. Inasmuch as the payment of 75 per cent. on the purchase price was due on the 12th of August by the terms of the bill of sale, I went to the office of Morgan & Miller on the 14th of August to get the 75 per cent. payment for the hay. Mr. Morgan at that time wrote out a check payable to our order for $6,000, and gave me the same. He also asked me to have the insurance assigned to them, inasmuch as they had bought the bay, which I told him I would do. The hay was insured for about $7,000. I then went to the Bank of Italy, and deposited our check for $6,000. I went to Mr. Wurster, and asked him for the policy. Mr. Wurster gave me this insurance policy, which we had had at the Bank of Italy. I took the insurance policy, and started over to Gianelli's office. I met Mr. Morgan on the sidewalk in front of the Bank of Italy, and told him it had been made out for about $7,000, and asked him if he wanted more insurance on the hay. He said no, that sum would be all right. I delivered the policy to Mr. Truett, and he in turn assigned the policy to the Globe Grain & Milling Company, and the policy was delivered to the Globe Grain & Milling Company. I saw Morgan & Miller once or twice before the 31st of August, and asked them if they had been successful in selling this hay to the government, and as to when they would want the hay hauled."

Barmann stated that on the 31st day of August he called on and saw Morgan, and said to him that, they (the plaintiffs) having finished hoeing their beans, they then had nothing to do, and would like very much to remove the hay from the ranch. Morgan replied that he was writing to Los Angeles, and hoped that "they could move it very soon." The next time the witness saw Morgan was on the 11th day of September, at about 5 o'clock in the afternoon at his (Morgan's) office, and at that time Morgan instructed the witness to deliver the hay to the Dickinson-Nelson Warehouse in Stockton, "and that we could start hauling." Morgan said to Barmann that one Hickey desired to secure the work of moving the hay, and both Morgan and the witness thereupon went together to the office of Hickey. The witness continued:

"I asked Mr. Hickey what he would charge to haul this hay to the warehouse in Stockton, and he told me it would cost $1 a ton to deliver the same. I wanted to see several other parties regarding the hauling, and went to Russell Bros. to see them. They had gone home, so I went to the office of Russells the next morning at 8 o'clock, and saw Mr. Russell. It was then raining. It had rained half an inch, on that night of the 11th of September. Russell told me he was very busy, and he would rather I would have Hickey haul it. I went to Hickey's office, and as he was not in I wrote a note, telling him to haul the hay as soon as possible. It then rained about four inches in the next few days. I saw Mr. Morgan on the morning of September 12th, and told him I had seen Mr. Hickey, and had told Hickey to haul the hay, and I told Morgan, in case he saw Hickey before I did, to tell Hickey to commence hauling the hay.

"I saw Mr. Morgan again on September 13th, and we talked over about the rain and so forth, and Mr. Morgan said it was not advisable to haul the hay until things dried off. On the following Monday, September 16th, I was out on the ranch and got on top of this stack of hay and examined it by taking a couple of bales from the top to see how far the moisture had penetrated the stack of hay. At that time the moisture had gone through at least two bales—the top two bales—two layers of hay were saturated with water. I telephoned Mr. Morgan, and told him that the hay was very wet, and told him that in case I owned the hay I would remove the two bales which were saturated with water to prevent the same from percolating through the whole stack. Mr. Morgan came out and looked at the hay, and told me to remove the top two bales of hay from the stack and pile the same to one side. That same evening, about 5 o'clock I went to Mr. Morgan's office in Stockton again, and told him that, inasmuch as he had instructed me to move the top bales off, and so forth, I told him I wanted him to give me a statement of that part, in writing. Mr. Morgan told me he could not give me anything in writing without taking the matter up with the Los Angeles office. I therefore went to the office of Mr. Morgan on the morning of September 17th, and asked him for the order. He told me he could not give me this in writing. Mr. Morgan instructed me to haul the good hay which had not been damaged. I therefore arranged with Mr. Hickey to have trucks down there at once to haul the hay which had not been damaged, and notified Mr. Morgan of the same. * * *

"On the 17th—I have this on September 17th—I have this memorandum in my handbook; 'Morgan instructs me to start hauling hay which is undamaged, but will not give order to remove wet hay from stack to find further damage!' * * *"

The testimony of Barmann was corroborated in all material particulars by that of J. E. Morgan, who, testifying for the defendant,

declared that the former first said they would let the defendant have an option on the hay at $23 per ton, to which proposition the brother of J. E. Morgan replied that it was not advisable to take an option, but that it would be better "to take the hay as long as we could get the time for storing or loading the hay out. We told Mr. Barmann," Morgan continued, "we would let him have what money he needed as an advancement on the hay. He spoke about getting about three-quarters of the approximate weight, which was about 350 tons, or, in other words, about $6,000 which was satisfactory."

That the foregoing testimony unmistakably shows that an absolute sale of the hay was effected by the transaction between the parties, and that the title to the hay then and there passed to and vested in the defendant, there is no reasonable ground for doubting. The parties agreed to a present transfer, and the property which was the subject of the agreement was itself identified, being separated from all other hay or "things." When those conditions arise and exist, a sale and the transfer of title to the thing sold are effected. Civ. Code, § 1140; Blackwood v. Cutting Packing Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199; Lassing v. James, 107 Cal. 348, 40 Pac. 534; Scribner v. Schenkel, 128 Cal. 255, 60 Pac. 860. "When the terms of sale are agreed on, and the bargain is struck, and everything that the seller has to do with the goods is complete, the contract of sale becomes absolute, without actual payment or delivery, and the property and risk of accident to the goods vest in the buyer." 2 Kent's Commentaries, p. 492; Browning v. McNear, 158 Cal. 525, 527, 528, 111 Pac. 541. Here, as we have seen, everything that the plaintiffs had to do with the hay after the transaction or before its execution was complete, except that, when called on to do so by the defendant, they were to deliver the hay to some place designated by the latter. The proportion of the purchase price as agreed upon and specified in the written contract was paid by the defendant to the plaintiff at the time designated in said contract, and before any of the hay was delivered. Furthermore, the plaintiffs, at the request of the defendant, assigned to the latter the policy of insurance previously issued to and taken out by plaintiffs to indemnify them against loss in case of the destruction of the hay.

The fact, manifestly, is that the contract here involved was, in a technical or strictly legal sense, a bargain and sale, as known to the common law; for, as we have pointed out, the evidence unquestionably shows that everything was done that the plaintiffs were required to do with the hay, except the delivery thereof, which act rested entirely with defendant. In other words, upon reaching an agreement as to the terms of the convention by the parties, a bargain having thus been struck, title to the hay necessarily and immediately passed to the defendants. It was, in brief, under the evidence and under the law (section 1140, Civ. Code) clearly an executed and not an executory agreement or contract. See Benjamin on Sales (4th Ed.) pp. 309, 310; Johnson v. Dixon Farms Co., 29 Cal. App. 52, 57, 155 Pac. 134, 136.

The conclusion from the foregoing views is necessarily that "the title and the risk of accident" to the hay vested in the defendant upon the completion of the transaction evidenced by the writing to which the parties subscribed, and which is above reproduced herein, and that the findings of the court are well supported, and that they likewise support the judgment.

The judgment is affirmed.

We concur: NICOL, Presiding Judge pro tem.; BURNETT, J.

48 Cal. App. 93

POTTER HUFFMAN LAND & LIVE STOCK CO. v. WITCHER. (Civ. 2121.)

(District Court of Appeal, Third District, California. June 7, 1920.)

1. Judgment ⊂⊃251(1)—Court may adjudge matter in issue, though not prayed for in complaint.

Under Code Civ. Proc. § 580, in default cases the demand limits plaintiff's recovery, but where the prayer of the complaint did not specifically ask judgment as to ownership of a water right, but there was an answer and contest raising such issue, it was proper for the court to adjudge the water right between the parties.

2. Waters and water courses ⊂⊃152(8)—Evidence held sufficient to show irrigation right to water from user.

In an action involving water rights, evidence *held* to show that plaintiff's predecessors in interest had acquired the right by using the natural flow of water from a canyon for irrigating a certain ranch during the irrigation season for over 40 years, during which time no one else had any claim thereto, or interfered with their use thereof.

3. Waters and water courses ⊂⊃152(8)—Evidence held to show that appropriator of water was acting as agent for another.

In an action involving water rights, evidence *held* to show that the party appropriating water for use on a particular ranch located the same in his own name as agent of the plaintiff company's predecessor in interest.

4. Waters and water courses ⊂⊃152(8)—Evidence held to show that purchaser had notice of water rights of another.

In an action involving water rights, evidence *held* sufficient to sustain the court's find-

ing that the defendant had full notice and knowledge of the rights of plaintiff's predecessor in and to a certain reservoir at the time he received the instrument of title from the party who had located the same as agent for plaintiff's predecessor.

5. Waters and water courses ⟸156(5)—Purchaser of water rights held to have had notice of adverse claim.

Where defendant was given sufficient information to place him on inquiry as to plaintiff's rights long before transfer of water rights to him, he was not an innocent purchaser without notice, in view of Civ. Code, § 19, since he had readily accessible means of acquiring knowledge which is equivalent to notice or knowledge of such rights.

Appeal from Superior Court, Modoc County; C. A. Raker, Judge.

Action by the Potter Huffman Land & Live Stock Company against W. V. Witcher. Judgment for plaintiff, and defendant appeals. Affirmed.

Jamison & Wylie and Daly B. Robnett, all of Alturas, for appellant.

Chas. W. Kitts, of San Francisco, for respondent.

NICOL, Presiding Judge pro tem. This is an appeal from a judgment of the superior court of Modoc county adjudging plaintiff to be the owner of a certain water right, reservoir site, and right of way described in the complaint, and also adjudging that a certain instrument in writing, executed by one Ed Ivory, Jr., to defendant and set out in the complaint, conveyed no right, title, or interest in said water right, reservoir site, and right of way.

The complaint alleges that the plaintiff is the owner and in possession of a certain tract of land described in the complaint as the "E" or Ivory ranch, in Clover Swale, Modoc county, together with the right to construct and maintain a reservoir on sections 2 and 11, township 43 north, range 10 east, M. D. M., and a right of way therefrom down what is known as Weller canyon to the said "E" ranch; that this reservoir site and right of way was located, appropriated, and secured for the purpose of impounding winter water draining from Antelope plains and delivering the same to and upon said "E" ranch, during the irrigating season to be there used for irrigating the crops thereon; and that at all times since the selection thereof they have been appurtenant to the said "E" ranch.

The said ranch for many years prior to October 8, 1915, was owned by the Ed Ivory Land & Live Stock Company (a corporation) and its predecessors in interest, and the plaintiff through certain mesne conveyances has succeeded to its title thereto, together with all water and reservoir rights, etc., connected therewith.

The complaint further alleges that for more than 20 years continuously, next preceding the year 1912, the said corporation had claimed, appropriated, taken, and used all the natural flow of water from sections 2 and 11 and surrounding lands known as Antelope plains, draining off through Weller canyon during the irrigating season of each year, to wit, from June 1st to October 15th for irrigating said "E" ranch.

This allegation of the complaint was specifically denied by the defendant, and in addition thereto the defendant avers the facts to be that the defendant is the owner of 160 acres of land that is riparian to the waters flowing from said Antelope plains, through said Weller canyon, and that for a period of 50 years prior to the commencement of this action the defendant and his grantors have irrigated the tillable portions of said lands from the waters flowing through said Weller canyon during the irrigating season of each and every year.

Upon the issue thus formed the court found: That for more than 20 years continuously next preceding 1912 the Ed Ivory Land & Live Stock Company and its predecessors in interest had claimed, appropriated, taken and used all the natural flow of water from sections 2 and 11, township 43 north, range 10 east, M. D. M., and surrounding lands known as Antelope plains draining through said canyon during the irrigating season for irrigating said ranch and ever since and including the year 1912 plaintiff and its predecessors have so taken and used all of the natural flow of said water, and for a period of more than 28 years preceding the commencement of this action the said waters and the whole thereof were and are necessary and indispensable to the proper irrigation of said lands.

The court further found:

"That the defendant is the owner of 160 acres of land known as the Redding Field which adjoins the said 'E' ranch on the south, through which the water course flowing through the said 'E' ranch continues and through which water course and over said land, the drainage from said 'E' ranch passes. That for a long period namely 40 years prior to the commencement of this action the water which drained upon said premises from said 'E' ranch had been used from time to time as desired in irrigating said lands. That at no time were the possessors and occupants of the 'E' ranch ever asked to or compelled or did they, during the irrigating season, allow any portion of the water of said Weller canyon which could be used in irrigating on said 'E' ranch, pass the boundaries thereof to said defendant's land. That the only water from said Weller canyon ever used on said Redding Field was such as was voluntarily permitted by the owners and

occupants of said 'E' ranch to flow onto said defendant's premises."

The appellant claims that the court erred in finding and decreeing that the plaintiff is the owner of all the natural flow of the water of Weller canyon. That this is an action to quiet the title of plaintiff as against defendant to the reservoir and the right of way described in the complaint. That there was no prayer in the complaint that the court should decree anything else to the plaintiff than the said reservoir and right of way, and that the said findings are not supported by the evidence.

[1] It is true that the prayer of the complaint in this action does not specifically ask for judgment as to the ownership of the water right, but it was not necessary that it should, in order to warrant the court in granting the relief that it did in that respect. Section 580 of the Code of Civil Procedure provides:

"The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue."

In default cases the demand limits plaintiff's recovery (Staacke v. Bell, 125 Cal. 309, 57 Pac. 1012; Brooks v. Forington, 117 Cal. 219, 48 Pac. 1073), but in contested cases the demand does not so limit the recovery, and the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue, although not specifically prayed for (Dennison v. Chapman, 105 Cal. 447, 39 Pac. 61; Zellerbach v. Allenberg, 99 Cal. 57, 33 Pac. 786; Hurlbutt v. N. W. Spaulding Saw Co., 93 Cal. 55, 28 Pac. 795; Cassinella v. Allen, 168 Cal. 677, 144 Pac. 746; Murphy v. Stelling, 8 Cal. App. 702, 97 Pac. 672; Fox v. Hall, 164 Cal. 287, 128 Pac. 749; Title Ins. & Trust Co. v. Ingersoll, 158 Cal. 474, 111 Pac. 360; Faulkner v. First National Bank, 130 Cal. 258, 62 Pac. 463; Poledori v. Newman, 116 Cal. 375, 48 Pac. 325). It was said by this court in Haight v. Stewart, 36 Cal. App. 514, 172 Pac. 769, that:

"It is * * * well settled in procedural law that a party is not only entitled to any and all relief which is appropriately within the scope of his pleading, but may be awarded such relief upon any substantial legal or equitable ground coming within the fair and reasonable import of the averments of his pleading."

The allegations of the complaint and the denials and averments of the answer, as above stated, clearly raised an issue as to the ownership of the water rights in Weller canyon, and it became necessary for the court to find the facts in reference to such rights and to adjudicate as to the ownership of the same.

[2] We are of the opinion that the evidence is ample and sufficient to sustain these findings of the trial court as to the ownership of the said water rights. It appears that the Ivory family settled on the "E" ranch in 1872, being 46 years before the trial of this action. In 1904 they organized the Ed Ivory Land & Live Stock Company. All the officers and shareholders of the company were members of the said family. Ed Ivory, Jr., became the general manager of the company at the time of its organization, and continued as such until it was dissolved, and during this time he generally attended to its business. From the date of the articles of incorporation to October 8, 1915, the said company occupied and claimed said ranch. As to the use of the water on the "E" ranch, Ed Ivory, Jr., testified as follows:

"Q. During this period was part of it irrigated? A. Yes, sir. Q. How long prior to 1904 had the lands there been irrigated? A. They had been irrigated as long as we owned it. Q. How long had your folks owned it? A. I do not know. Q. Were you born there? A. Yes, sir. Q. They were irrigated as long as you can remember? A. Yes, sir. Q. And always have been irrigated since you can remember? A. Yes, sir. Q. Where did they get the water to irrigate those lands with? A. There were springs in the canyon and in the spring of the year we got the overflow of Antelope plains. Q. Did you use the water that came down out of the canyon? A. Yes, sir. Q. Did you use it all? A. Yes, sir; we used it all, it ran over the ground. Q. How did you use that water; was it by permission of anybody or did you rent it from somebody? A. No, sir; we just used it. Q. Did you claim it as your own? A. I do not know as we claimed it could not get away from there. Q. You just took it and used it? A. Yes, sir. Q. For 40 years or more the Ivory family has used that water? A. Yes, sir. Q. And nobody else claimed it or used it, did they? A. No, sir. Q. You took it all, except in the winter season, did you not? A. Yes, sir. Q. Where did this water that came from the canyon come from? A. It comes off of the Antelope plains and the country surrounding that. Q. That canyon is Weller canyon, is it not? A. Yes, sir. Q. Weller canyon is the outlet of Antelope plains, where it runs out to the river, is that right? A. Yes, sir."

He further stated that the water of Weller canyon was a good stream in the early part of the season, but goes down later, and ceases to run in July or August. Mrs. Mary E. Ivory testified that she had resided on the "E" ranch for 46 years; that during that time the waters of Weller canyon were used for irrigating said ranch, and that no one ever interfered with them in the use of said water, nor made any claim thereto, until the defendant started trouble; that they claimed the water during all that time for the irrigation of the "E" ranch; that they used the water for the irrigation of crops raised there, which crops consisted of hay, grain, and a garden. Thomas H. Ivory testified

that the waters of Weller canyon that drain from Antelope plains were necessary for the lands of the "E" ranch; that he had irrigated the property a good many years, and found that the water would dry up too early to even make a thorough crop.

It appears from the foregoing evidence that the natural flow of the waters of Weller canyon were used by the Ivory family in irrigating the "E" ranch, during the irrigating season, for a period of over 40 years, and that during this time nobody else made any claim to the said waters, or interfered with them in their use of the same. This evidence as above stated, in our opinion, fully sustains the said findings of the trial court.

[3] As to the reservoir site and right of way described in the complaint, it appears from the record that in the year 1913 Ed Ivory, Jr., made application to the United States Land Department for the location of said reservoir site and right of way therefrom down Weller canyon to the "E" ranch which application was approved by the United States Commissioner on May 25, 1914. Prior to this, on October 15, 1912, the said Ed Ivory Jr., had appropriated for this reservoir 1,000 miners' inches of water, measured under a 4 inch pressure, flowing in Weller canyon during the period of melting snow; said water to be restrained by means of a dam, at the point at which this notice of appropriation was posted. On December 27, 1915, the said Ed Ivory, Jr., by an instrument in writing, set out in the complaint, conveyed all his title and interest in said reservoir and reservoir site to the defendant, for the stated consideration of $250, and on August 7, 1916, he filed with the United States Land Office his relinquishment of said reservoir. On the same day Mary E. Ivory, his mother, filed with the department an application "for a reservoir and canal identical with that theretofore granted to Ed Ivory, Jr." The Land Department refused to approve either of the applications, for the reason that prior to August 7, 1916, said Ed Ivory, Jr., had conveyed said reservoir to the defendant.

On this feature of the case two questions are presented: (1) Did Ed Ivory, Jr., act as trustee or agent for the Ed Ivory Land & Live Stock Company, in locating and securing the right to the reservoir site and right of way therefrom, described in the complaint; and (2) Did the defendant take the agreement of December 27, 1915, from Ed Ivory, Jr., with notice that the said reservoir and right of way had been located for the use and benefit of the Ed Ivory Land & Live Stock Company?

1. The court found that the plaintiff was the owner of the "E" ranch, together with the right to construct and maintain a reservoir and the right of way therefrom down Weller canyon to the said ranch; that the reservoir site, water right, and right of way described in the complaint were located, appropriated, selected, and secured for the purpose of impounding the winter water draining from Antelope plains and delivering the same upon the said "E" ranch during the irrigating season, to be used thereon for irrigating the crops thereof, and at all times since the selection thereof have been appurtenant to the said ranch; that Ed Ivory, Jr., located the said reservoir site, water right, and right of way as the manager of the said Ed Ivory Land & Live Stock Company, and that the costs, charges, and expenses of making said location, survey, and application were paid out of the funds of the said company; that he continued as a director and general manager of the said company until October 8, 1915, though he performed no duties as manager after April, 1913.

The foregoing finding is fully supported by the evidence. Ed Ivory, Jr., testified that he made the said water appropriation on October 15, 1912, to secure the water for irrigating the "E" ranch; that he located in his own name for the Ed Ivory Land & Live Stock Company and in the performance of all acts he was acting for the said company as its general manager; that he made the application for the reservoir site, and had a survey made for the benefit of the company, and all the costs and expenses of the same were paid out of the funds of the said company; that when he filed on the same he intended it for the said ranch. It is true that he did testify that the expenses were charged up against his salary. How they were so charged he does not state. The court, however, upon sufficient evidence, found that he did not pay any portion of said costs and expenses.

[4] 2. As to the defendant having notice at the time he took the agreement of December 27, 1915, the court found:

"That at the time of making and delivery of the instrument of December 27, 1915, and at the time of the payment of the consideration specified therein, the defendant knew that the said Ed Ivory, Jr., had made such location, survey, and application, and had secured the right from the United States to said water, water right, dam, reservoir site, and right of way, and then held the same as the general manager of, to, and for the use and benefit of the Ed Ivory Land & Live Stock Company, and that the company had paid all the expenses incurred in securing the same; and that Ed Ivory, Jr., had no right, title, or interest of his own therein."

The defendant was a neighbor and for over 30 years had an intimate acquaintance with the Ivory family and the "E" ranch. He was a witness at the trial of this action, and while on the witness stand he made the following admission:

"Q. Did you have any knowledge or notice at the time you contracted for this reservoir from Ed Ivory, Jr., that the Ed Ivory Land & Live

Stock Company had any rights in this reservoir? A. Well I was told by Mr. Ivory that he had filed on it first for the Land & Live Stock Company, but his father objected to his taking it for the company, and he then took it for himself individually."

Ed Ivory, Jr., stated as a witness that two years before the making of said agreement he told the defendant about this reservoir, and what a good thing it would be; that they went down to the reservoir site together, and he told the defendant that there was more water than the Ed Ivory Land & Live Stock Company needed for their ranches, and he told him that he had located for the "E" ranch. The said witness further stated that he knew of some work being done there by the defendant during 1915, and prior to the conveyance of December 27, 1915. "I talked to Mr. Witcher about it, and we were going to construct the dam; he was going to furnish the money, and I was to be superintendent of the work, and the water was to be divided between him and the Ed Ivory Land & Live Stock Company." Work was commenced, but was suspended by the defendant upon Mrs. Mary E. Ivory threatening to commence an injunction suit. The defendant admitted that in 1915, before he purchased, that he had two interviews with Ed Ivory, Sr., and Mrs. Mary E. Ivory about this reservoir; that in one of these interviews he offered to construct the reservoir, and they could take their own time to pay for their proportion of the cost at 6 per cent. interest, and they were to have a half interest in the reservoir.

There is other and additional evidence in the record bearing upon this question, but it is unnecessary to review the same, as we are of the opinion that the foregoing is ample and sufficient to sustain the finding of the court as to the defendant having full notice and knowledge as to the rights of the Ed Ivory Land & Live Stock Company in and to said reservoir at the time he received the instrument of December 27, 1915.

[5] The defendant was not an innocent purchaser without notice; he was given sufficient information to place him on inquiry long before the transfer of December 27, 1915, and was therefore chargeable with notice of all facts which he might have ascertained by inquiry. "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." Section 19, Civ. Code. A party having readily accessible means of acquiring knowledge of a fact, which he might have ascertained by inquiry, is equivalent to notice and knowledge of it. Montgomery v. Keppel, 75 Cal. 128, 19 Pac. 178, 7 Am. St. Rep. 125. The law inputes knowledge of facts to one who has sufficient means of knowledge to put him upon inquiry. San Diego, etc., Co. v. La Presa School District, 122 Cal. 98, 54 Pac. 528.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

183 Cal. 447

ROTH v. RECLAMATION DIST. NO. 1001.

(Sac. 2824.)

(Supreme Court of California. Aug. 3, 1920.)

1. Judgment ⊂⊃715(3) — On amendment of plans judgment annulling assessment was not conclusive on question of sufficiency of plans.

Where an assessment of benefits by a reclamation district had been annulled because the plans were incomplete and uncertain, an amendment of the plans to meet those objections before a reassessment of the benefits prevents the judgment of annulment of the first assessment from being conclusive on question of the sufficiency of the plans and specifications to sustain the reassessment.

2. Judgment ⊂⊃720—Annulling reclamation assessment for want of benefits conclusive after amendment of plans.

Where an assessment of benefits by reclamation district was annulled on the ground that the lands assessed received no benefits from the district the judgment was conclusive as to benefits in suit to contest reassessment of the same lands for the same improvements, even though the plans for the work had been made more detailed and specific before the reassessment.

3. Judgment ⊂⊃714(1)—Finding of want of benefits from reclamation district held not conclusive against reassessment.

A judgment, annulling assessment of benefits by a reclamation district was based on findings that the five tracts of land not benefited contained 116 acres, is not conclusive in suit to contest reassessment of benefits against the tracts which contained 181 acres, since the acreage not included in the first finding may have received benefits sufficient to sustain the reassessment.

4. Appeal and error ⊂⊃1011(1)—Findings on conflicting evidence not reviewed.

Findings based on conflicting evidence cannot be reviewed by the Supreme Court.

5. Drains ⊂⊃83 — Evidence held to sustain findings of benefit in suit to annul reassessment.

In a suit to annul reassessment of benefits by reclamation district, testimony by two owners of land in the vicinity as to the benefits the land in controversy derived from the improvements *held* sufficient to sustain a finding of benefits.

In Bank.

Appeal from Superior Court, Sutter County; G. W. Nicol, Judge.

Action by C. F. Roth against the Reclamation District No. 1001. Judgment for defendant, and plaintiff appeals. Affirmed.

A. H. Hewitt, of Yuba City, for appellant.

A. C. McLaughlin, of Yuba City, W. H. Carlin, of Marysville, and C. F. Metteer, of Sacramento, for respondent.

WILBUR, J. Plaintiff brought this action under section 3462, Political Code, to have an assessment made by the board of supervisors of Sutter county for and on behalf of reclamation district No. 1001 annulled on the grounds, among others, that the plans for the improvement contemplated by the reclamation district were insufficient, and that the lands of the plaintiff were not benefited thereby at all, or in proportion to the assessments made thereon. The assessment complained of is a reassessment, made by authority of section 3466½, Political Code, which authorizes such reassessment, in place of an invalid assessment, "for the purpose of charging said land with its proper proportion of the cost of reclamation." Plaintiff claims that, even if the reassessment was thus authorized, the questions involved in his attack upon such reassessment have been already adjudicated in his favor in the previous suit in which the assessment was annulled; that therefore the decision of the trial court holding this reassessment to be valid is against such conclusive evidence. Judgment having been rendered sustaining the reassessment, plaintiff appeals. The respondent, reclamation district No. 1001, was organized by an act of the Legislature in 1911 (Stats. 1911, p. 831). The plans for the reclamation were formulated and filed with the board of supervisors, and subsequently from time to time amendments to that plan were filed. Finally it was determined by the board that the expense of the reclamation would be $851,730, and an assessment therefor was levied and paid and the money expended. It was found that an additional assessment for $500,000 was necessary to complete the work of reclamation and provide for a deficit of $466,866.47, and more detailed plans for reclamation were adopted, and an assessment therefor levied upon the lands of the district. All said assessments were paid with the exception of that of the plaintiff and two others, who filed objections to the assessment with the board of supervisors, and upon such objections being overruled began an action in the superior court under section 3462, supra, to have said assessment annulled. Judgment was therein rendered, annulling the assessment of the plaintiffs therein. No appeal was taken and the district proceeded to secure a reassessment, under section 3466½, Political Code, which reassessment plaintiff now seeks to have annulled.

[1] Plaintiff relies upon the proposition that in his first contest of the assessment it was conclusively adjudged that the plans for the work were so incomplete and uncertain as to invalidate the assessment, and also that certain tracts of his land were found not to be benefited by the assessment. Respondent relies upon the point that subse-

quent to the annullment of the assessment, supplemental explanatory and more detailed plans and specifications were filed with the board of supervisors by which the matters, uncertain in the first plans and specifications, were made definite and certain, and that therefore the first decision is not res adjudicata; and that the decision of the trial court in this case in favor of the sufficiency of the new plans, being supported by the evidence, should be sustained, and, further, that the evidence in this case supports the finding of the court that the lands of the plaintiff were benefited to the amount of the assessment. The assessment, declared invalid in the first action, was identical in amount with the assessment now under consideration, upon each and every parcel of land owned by the plaintiff. The estimated expenditures proposed by the amended plans relied upon by the respondent are exactly the same to a cent upon every one of the numerous items contained in the original estimate upon which the $500,000 assessment was levied. There was no change whatever in the plan of improvement. The amendments, or supplements to the plans, filed with the supervisors, merely amplified the description of the work contemplated by the original plan and assessment for the purpose of making the same more definite. The nature of these changes can be illustrated by one or two instances. The original estimate contained the following items:

"Over cross canal: 561 ft. 20-foot trestle at $9 per ft., $5,049.00."

The supplemental report contained the following explanation thereof:

"Over cross canal: 561 feet 20-feet trestle, $5,049.00. The above item of trestle covers one-half of trestle over cross canal in the northwest corner of section 9, township 11 north, range 4 east, known as May bridge, also one-half of trestle known as Bennett bridge, all as shown on map filed April 8, 1914. The cost of the other half of these bridges to be borne by Reclamation District No. 1000."

The original estimate contained the following item:

"10 or more bridges over canal at $75.00 each (call it), $1,001."

The revised estimate contained the additional statement:

"The above bridges are structures 18 feet long, one to be placed over each tract of land cut in two by said interior drainage canal at a point to be selected by the owner."

—and refers to a map for more definite location. The amended specifications contained 12 different items in which similar indefinite statements in the original specifications upon which the original assessment was based were amplified and explained. A further difference may be illustrated by the description of the right of way of an interior drainage canal. In the original specifications the description is as follows:

"Right of Way—Interior Drainage Canals:—Right of way to be purchased after Sept. 1, 1914, north of Burns property and paralleling the Feather river practically 5 miles of right of way, 50 feet wide; 30.3 acres at $75. $2,270.00."

In the supplemental specifications this right of way is described as follows:

"Strip of land 50 feet wide beginning at the quarter corner between sections 10 and 11, township 11 north, range 3 east, Mount Diablo base and meridian, and extending thence northerly 5 miles, paralleling Feather river and as indicating on map showing amended plan of reclamation district No. 1001, filed with board of supervisors of Sutter county, April 8, 1914, containing 30.3 acres, at $75.00—$2,270.00."

The character of these items sufficiently illustrates the fact that on the trial of this action the court was dealing with a very different situation with relation to the certainty of the plans and specifications and the location of the work than was before the court upon the first contest, and that the decision upon the first trial that the plans were insufficient and indefinite in the description and location of the work proposed to be done is therefore not controlling in the present action. The decision of the trial court in the first case may have been based upon the very uncertainties thus corrected by the amended plan. We conclude, therefore, that the question as to the sufficiency of the plans and specifications was open for the adjudication of the trial court in this action.

[2] It is contended that the first adjudication is conclusive upon the question of benefits, and that therefore the reassessment must be held invalid. The judgment in the first case annulling the assessment is based entirely upon the insufficiency of the plans. It is there adjudged:

"That the plans of reclamation upon which the assessment referred to herein were based are illegal and invalid, and the said assessment in so far as it affects any of the land of plaintiff described in said complaint is hereby decreed invalid, and the said assessment is hereby annulled."

It was, however, found by the court:

"That a portion of plaintiff's land included in tracts Nos. 698, 703, 704, 705, and 706, as described on the last assessment list of the district, and containing about 116 acres, was not benefited in any manner or at all by the work done or provided to be done under said plans of reclamation; that since the construction of said cross canal by defendant, said tracts of land above described have been affected with underground seepage therefrom, which never before affected said lands, to such an extent as to render it impossible to raise any crop thereon."

The amount assessed upon these tracts in the original assessment and in the reassessment are as follows: Tract No. 698, $1,183; 703, $730.92; 704, $1,183; 705, $895.70; 706, $1,651.98. In the case at bar, however, the court found that—

"The amount charged and levied upon each and every tract of land in said district assessed was proportionate in every instance to the whole expense and to the benefit which would result from said work of reclamation; and the amount of the charge so levied upon said tracts of land belonging to the plaintiff was in every instance in proportion to the whole expense and to the benefits which would result from said works of reclamation. That the assessment levied upon the lands of plaintiff was proportionate to the whole expense and to the benefit which would result from said works of reclamation."

It was also found by the trial court that—

The "reassessment was based upon the report and plan under and upon which the assessment now under consideration, namely, said subsequent assessment, was based, and contains no items or item of work or expense that was not included in the former assessments of the lands of said district; and the plan and report under and upon which the assessment herein referred to, namely, said subsequent reassessment, was based, is not a different, but the same, plan and report upon and under which the other lands of said district were assessed," etc. "That, however, before making said subsequent reassessment, and after the 5th day of October, 1914, the plans used in making such general assessment of the lands of said district had been and were elaborated, and in many cases made more specific and certain in matters of detail. * * * That the plans * * * under which the said subsequent reassessment was made * * * were not different plans either as to the extent and location of certain works of reclamation or otherwise, in substance or in any way, except in said matter of more specific certainty and elaboration. * * * No tract of land owned by plaintiff * * * has been assessed for any sum greater than the benefits which will be derived from the works of reclamation and the amount or sum apportioned to each and every of said tracts is not in any instance in excess of the benefits which will accrue thereto."

The court also included in its findings an interpretation of the effect of the previous decree annulling plaintiff's assessments as follows:

"And said court by its decision found that the lands of the plaintiff herein, who was the plaintiff in said action, had been assessed on said assessment list dated the 11th day of February, 1915, in excess of the benefits derived to said land by the said works of reclamation, and that the said assessment had not been made upon any valid or sufficient plan of reclamation * * * and said assessment was by the judgment of said court * * * declared invalid. * * *"

While, as we have held above, it is obvious that the judgment based on findings that the plans of reclamation are invalid for uncertainty is not conclusive as to the effect of amended plans in which items are specified with greater certainty, it is equally obvious that a mere increase of certainty in plans which the court is able to say are, notwithstanding such charges, still the same plans, would not increase or alter the benefits to be received by the lands of the plaintiff. In other words, as the court found in the first instance that 116 acres of plaintiff's land was not only not benefited but was actually damaged by the improvement made and contemplated, a more perfect description of the contemplated work which damaged plaintiff's land would not be a basis for a conclusion that the land was benefited, particularly as the work had actually been completed before the first case was tried, and its effect on plaintiff's land already clearly ascertained and shown. The difference between the situation at the first trial and upon the trial of this action is not in a change of plan or of result, but merely in a description of the means by which the result was or is to be achieved.

[3-5] The difficulty in applying the doctrine of res adjudicata grows out of the form of the finding as to the matter of benefits. The five tracts of land, described in the findings as containing 116 acres which were not benefited at all, contained 181.59 acres. So far, then, as the finding is concerned, each one of these tracts may have contained an acreage which was benefited to the amount of the assessment, in which case it is well settled that the assessment would not be invalid. Reclamation Dist. v. Hershey, 160 Cal. 692, 694, 117 Pac. 904; Reclamation Dist. v. Birks, 159 Cal. 233, 240, 113 Pac. 170. The finding, therefore, cannot be considered as an express finding that any one of the five tracts of land described therein was not benefited at all. If we should divide the 116 acres equally among the five tracts of land, it would leave 15.12 acres in each tract benefited by the improvement. Nor would it follow that because certain portions of the land were affected by seepage that such land was not benefited by the improvement, for, as contended by the engineers in this case to be the fact, it might be possible to reclaim such flooded portions of the land by a small additional expenditure. For the foregoing reason the question of benefits was open for adjudication in the last case. The findings against the appellant, being based upon conflicting evidence, cannot be reviewed by us. There is ample testimony to sustain the conclusion of the trial court that such lands were assessed in proportion to benefits. Some of this testimony is pointed out by the District Court of Appeal, First District, and we quote from its opinion as follows:

"* * * It is quite plain, we think, that the direct testimony of witnesses called by respondent is abundantly sufficient to sustain the finding of the lower court. Mr. John Burns, who owns the adjoining place and has lived there for 60 years, testified strongly as to the enhancement of the value of the land due to its reclamation. It is true that he was a little indefinite as to the amount of increase to be apportioned to each particular tract of appellant's land, but as we understand his testimony, it is to the effect that 264 acres of the 379 acres were increased in value to the extent of $25,000, in round numbers, whereas the amount of both assessments on the whole tract was $27,356.44. In his estimates he excluded the timber lands, consisting of 114 acres or thereabouts. This portion of the land, however, was covered by the testimony of one J. R. Caldett, who owns a large farm in the neighborhood, and who has resided there for nearly 40 years. He testified that the timber land was worth about $20 an acre before reclamation and $150 an acre afterward. * * * Another witness, Mr. George B. Green, seems to have covered the whole tract of land. He testified that a portion of it was worth $5 to $10 per acre before reclamation and $100 afterward, another portion $35 to $40 before reclamation and $200 thereafter, and the balance of the land was increased from $100 or $150 to $250 or $300 per acre."

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J; LENNON, J.; OLNEY, J.; LAWLOR, J.

183 Cal. 524

In re ABBEY'S ESTATE. (L. A. 6418.)

(Supreme Court of California. Aug. 12, 1920.)

Wills ⇐118—Request to sign as "subscribing witness" is acknowledgment of signature.

Where testatrix had signed her will before the witnesses entered the room, her request to them to sign as subscribing witnesses, which they did immediately beneath her visible signature, was an acknowledgment of the signature on the will as her own, since they could not become subscribing witnesses unless she signed in their presence or acknowledged her signature.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Subscribing Witness.]

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

In the matter of the estate of Harriet S. Abbey, deceased. From an order revoking probate of will the proponents of the will appeal. Reversed.

A. L. Abrahams and P. B. D'Orr, both of Los Angeles, for appellants.

Bicksler, Smith & Parke, of Los Angeles, for respondents.

WILBUR, J. This is an appeal from an order revoking the probate of the will of Harriet S. Abbey, upon the finding that the testatrix did not sign the will in the presence of either of the subscribing witnesses and did not acknowledge her signature to them. The facts concerning the execution of the will are undisputed, and the sole question raised by the appeal is whether this finding is sustained by the evidence. The will was prepared by an attorney some months before it was signed. It is conceded for the purposes of the appeal that the will was not signed by the testatrix in the presence of either subscribing witness, although both subscribing witnesses signal the usual attestation clause, stating that the will was signed by the testatrix in their presence, and made affidavit to the same effect at the time of the probate of the will. The sole witness on the revocation of the will was the attorney who prepared it, assisted in its execution, and as executor thereof presented it for probate. He testified that on March 7, 1918, the testatrix sent for him to attend to having the will executed; that she produced the document and affixed her signature while only the two were present. The witnesses were then asked by the attorney to come into the room. "They came into the room, and I, as I remember it, held the will then, she having signed it, in my hand and said, 'Mrs. Abbey, this is your will, is it?' She said, 'Sure,' and I said, 'Do you wish these gentlemen to sign as subscribing witnesses?' She said, 'Sure, I do.' They turned right near the bedside there, and then they affixed their names in her presence and in the presence of each other." The signature of the testatrix is on the same page as that of the subscribing witnesses, and no doubt the signature was visible to the subscribing witnesses at the time each signed the will. The request that these persons sign the will as "subscribing witnesses" was in effect an acknowledgment of her signature to them for only by signing the will in their presence, or by acknowledging the same in their presence, could they become subscribing witnesses. The word "subscribing" in the request is therefore very significant, for the word assumes that the signature appended to the will is her signature, and hence amounts to an acknowledgment of such signature as her own. Under similar circumstances, as to one witness, the other having seen the testator sign the will, it was held by the Court of Appeals of New York that the declaration by the testator that the in-

strument was his will was a sufficient acknowledgment of his signature to the same, as well as a publication of the will. Baskin v. Baskin, 36 N. Y. 416. See, also, Matter of Will of Phillips, 98 N. Y. 267, and Matter of Hunt, 110 N. Y. 278, 18 N. E. 106; Matter of Akers, 173 N. Y. 620, 66 N. E. 1103; affirming 74 App. Div. 461, 77 N. Y. Supp. 643.

Decree reversed.

We concur: OLNEY, J.; LENNON, J.; SHAW, J.; LAWLOR, J.

183 Cal. 454

BRIMBERRY v. DUDFIELD LUMBER CO. et al. (S. F. 8968.)

(Supreme Court of California. Aug. 3, 1920. Rehearing Denied Sept. 2, 1920.)

1. Municipal corporations ⟸706(7)—Contributory negligence of motorcyclist held for jury.

In an action for injuries to a motorcycle in collision with an automobile, contributory negligence in driving at an excessive rate of speed and in driving on the wrong side of the street *held* for the jury.

2. Appeal and error ⟸1011(1)—Findings on conflicting evidence not disturbed.

Findings on conflicting evidence will not be disturbed.

3. Master and servant ⟸302(1)—Negligence of automobile driver held imputable to employer.

Where an employé, after having driven an automobile furnished him by employer to a customer for purpose of having check payable to employer countersigned as directed when he left employer's office for the day, drove back toward the office to procure his overcoat, instead of driving directly home, the employer was liable for his negligence while returning to the office, though his trip to obtain the signature was not in the line of his usual duties.

Shaw, J., dissenting.

In Bank.

Appeal from Superior Court, Santa Clara County; John L. Hudner, Judge.

Action by John H. Brimberry against the Dudfield Lumber Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

John G. Jury and Louis Oneal, both of San Jose, for appellants.

Norman E. Malcolm, of Palo Alto, for respondent.

LAWLOR, J. This is an appeal from a judgment for $1,200 against the defendants, Dudfield Lumber Company, a corporation, and Joseph A. Jury, and in favor of the plaintiff, John H. Brimberry, in an action to recover damages for injuries alleged to have been suffered by him as the result of negligence on the part of defendant Jury in the course of Jury's employment by the defendant corporation. The record before us is presented under the alternative method.

The following facts are undisputed: Jury was the secretary of the Dudfield Lumber Company, whose offices were in the city of Palo Alto. He testified that prior to December 11, 1917, the company had purchased an automobile, which was registered in his name and turned over to him for his use. On the last-mentioned day, about 4:30 p. m., Jury left the office of the company in the automobile, and drove to Camp Fremont to have a check countersigned at the office of the Lindgren Construction Company at the camp. He returned from the camp to Palo Alto via the state highway. On arriving at the intersection of the state highway with University avenue, at the entrance to Stanford University, he collided with a motorcycle, on which the plaintiff and one Leslie C. Kees, both sergeants in the United States army, were returning from Mayfield to Camp Fremont. By the force of the collision the plaintiff was thrown from the motorcycle and suffered the injuries for which he now seeks damages.

The cause was tried before the court without a jury. The court made findings of fact and conclusions of law, and rendered judgment in favor of the plaintiff and against both defendants in the sum of $1,200.

1. We shall first consider appellants' contention:

"That the decision is against law," in that "the evidence conclusively shows negligence on the part of the respondent, and that his said negligence was a proximate and contributing cause of the injuries sustained by him, and that therefore the court erred in giving judgment for the respondent herein."

In this connection we shall also consider the following four propositions advanced in appellants' opening brief:

(1) "The evidence is insufficient to justify the decision that the motorcycle driven by plaintiff and Leslie C. Kees was driven on the right side of the state highway, * * * or that 'the plaintiff or * * * Kees proceeded carefully or with due care to drive said motorcycle across said intersection.' "

(2) "The evidence is insufficient to justify the decision 'that the plaintiff and * * * Kees were not operating and driving said motorcycle * * * in a careless, negligent, and imprudent manner,' or 'that they were not going at a rate of speed greatly in excess of that which was reasonable and proper, having regard to the traffic and use of said highway.' "

(3) "The evidence is insufficient to justify the decision 'that said collision and all injuries and damage suffered by plaintiff as a result thereof were not wholly or in any way due to

want of ordinary care on the part of the plaintiff, or to plaintiff's own negligence, or to the negligence of his associate and companion, * * * Kees.'"

(4) "The evidence was insufficient to justify the decision 'that there was no want of care and no contributory or any negligence of the plaintiff whereby the injuries and damage suffered by the plaintiff were brought upon himself.'"

It is well to call attention to the fact that at the point where the collision occurred the state highway, about 60 feet wide, runs northwest and southeast; that at the intersection University avenue, about the same width, runs northeast and southwest; that, owing to the wide entrance to the University grounds and the curve of University avenue, the crossing or intersection presents an open road space about 200 feet in diameter; that about 30 feet west of the concrete curb along the eastern side of this open area, and running parallel to said curb, are the tracks of the Peninsular Railroad, which runs between Palo Alto and Mayfield, and at this point turns from University avenue into the state highway; that about 2 feet northeast of the property line on the northeast side of the highway, and 34 feet northwest of the property line on the northwest side of University avenue, is a "trolley pole"; and that between this pole and the intersection of the two roads is a rough, unpaved area, across which, it appears, it was customary for vehicles to pass when making the turn from University avenue to go north on the highway.

Kees, the driver of the motorcycle, testified that, as he was returning from Mayfield to Camp Fremont on the right-hand (east) side of the highway, he approached the intersection at a speed of about 25 miles an hour; that he noticed a Ford car coming toward the intersection along University avenue, and that he thereupon slowed down to a speed of not more than 12 miles an hour in order to allow the Ford car to pass in front of him, at the same time swerving "a little bit to the right"; that the Ford car passed across the highway in front of him and went "out into the University grounds"; that, after the Ford car had passed in front of him, he saw Jury's car coming down the highway, but that, inasmuch as Jury was looking "out University avenue as though he was going to turn in that direction and follow the Ford," he took no further notice of Jury and proceeded north on the east side of the highway; that, just as the witness "neared the corner of the property line of University avenue with the state highway," Jury made a sharp turn toward him, "cutting several feet from the center of the intersection," so that the witness, "not having time enough to turn to my left and give him the wrong side of the road," set his brakes, and "was compelled to swerve more to the right to avoid a head-on collision"; that immediately thereafter the car which Jury was driving struck the rear wheel of the witness' motorcycle on the left-hand side, throwing Sergeant Brimberry off, so that he rolled about 20 feet, to "within a few feet of the trolley pole"; and that he could not state how fast Jury was traveling at the time of the collision.

Miss Cornelia Kempff testified that at the time of the collision she was driving her automobile west on University avenue, intending to turn north into the highway, in order to return to her home in Atherton; that she was driving near the center line of University avenue, for the reason that "it was a little bit rough" near the trolley pole; that before she reached the intersection a Ford car, going in the same direction, passed her on her right and "started to crowd in ahead, so I swerved out a little bit to make my turn"; that she saw the plaintiff and Kees, just as another car passed in front of them; that they were traveling on the right-hand side of the highway—"in fact, they were a little too much to the right, if anything"; that at the time of the collision the front wheels of Jury's car were in the rough space near the trolley pole, and she thought the rear wheels were there also; that plaintiff was thrown from the motorcycle and "rolled two or three times before he stopped" near the trolley pole; and that she had told Jury he "was on the wrong side of the road."

Plaintiff corroborated the foregoing testimony. He declared that at the time of the collision Jury "was not going very fast or very slow, and we were not going very fast either," and that he did not see Jury's car until after the Ford car had passed in front of the motorcycle. On this point Jury testified that as he approached the scene of the collision traveling south on the west side of the highway, he noticed a Ford car coming out of University avenue across the highway, and that the driver of the Ford car "seemed to hesitate as to what way she was going"; that because of this seeming hesitation he "naturally slowed up and kept on to the extreme right until she passed out of my way"; that just as the Ford car passed across the highway the motorcycle on which plaintiff and Kees were riding at a speed of "about 35 miles an hour, I imagine, * * * shot around the back of the Ford"; that the plaintiff and Kees were traveling on the west side of the highway; and that he first saw the motorcycle when "it swept around in back of the Ford." On cross-examination he said that the reason he thought the plaintiff's speed was 35 miles an hour was because "they came around back of that machine at an angle of 35 degrees."

Mrs. Anabel Titchworth, a witness for the defense, testified that at the time of the collision she, with two other women, was driving a Ford car west on University avenue

at a speed of about 12 miles an hour; that as she reached the highway she saw the motorcycle "zigzagging all over the highway, and that frightened me"; that she thought the motorcycle was going "two or three times faster than I," and that it did not slow up on reaching the intersection; that she was "too frightened" to notice any other details of the collision; that the reason why she thought the motorcycle was traveling fast was that "it looked to me as if they were going to run into me"; and that she could not state what direction the motorcycle took after it passed behind her car. Mrs. Isabella Telmont and her daughter Irma, witnesses for the defense, who were in Mrs. Titchworth's car at the time of the collision, corroborated the latter's testimony.

Bruce Hight, a witness for the defendants, testified that just prior to the collision he was driving a delivery car west on University avenue at a speed of about 25 miles an hour; that he passed Miss Kempff's automobile on University avenue before he arrived at the intersection; that he was about 120 feet east of the intersection when he first saw plaintiff and Kees on the highway about 75 yards south of the center of the intersection traveling "not under 30 miles an hour, either on the center [of the highway] or over it—on the left"; that the motorcycle passed in front of him and just behind Mrs. Titchworth's car; that he turned south on the highway, and did not see, but heard the crash of, the collision; that he immediately turned around and drove back to the intersection; and that he saw the motorcycle about eight feet south of the trolley pole lying in a pool of gasoline. On cross-examination he admitted that he was not certain whether, at the time when plaintiff and Kees crossed the intersection, they were on the west side of the highway; that when he reached the intersection of the northwest property line of University avenue with the highway the plaintiff and Kees were "about the center of the paved part of the highway; * * * they had already started to swing out on account of the Ford—to their right"; and that he did not know at what rate of speed they were traveling when they crossed the intersection after they had passed in front of him.

[1, 2] From this summary of the testimony it is clear that, with respect to the points urged by appellants, including the speed at which the motorcycle was traveling at the time of the collision, the care or lack of care with which Kees was driving the motorcycle, and the side of the highway upon which plaintiff and Kees were traveling, the evidence is involved in substantial conflict. First, with regard to appellants' claim of contributory negligence: As to the speed and the manner in which he was driving the motorcycle, Kees stated that he was "going 10 or 12 miles an hour"; he having slowed down from 25 miles an hour. The plaintiff testified somewhat indefinitely that the motorcycle was "not going very fast, either." On the other hand, Jury stated that it was moving "about 35 miles an hour"; admitting, however, that he had not seen the motorcycle until it swept around in rear of Mrs. Titchworth's car. Mrs. Titchworth stated that the plaintiff and Kees were "zigzagging all over the road," and were going "two or three times faster than I was"; but she also testified that she was "too frightened," and thought that the motorcycle was going to run into her machine. Hight said he thought the speed of the motorcycle was about 30 miles an hour. As to the course of the motorcycle with reference to the center line of the highway, Kees said that he approached the intersection on the right-hand side, and later swerved "a little bit more to the right." He was corroborated on this point by Miss Kempff and the plaintiff. And Jury stated that at the time of the collision the motorcycle was on the west side of the road. Mrs. Titchworth said she could not state what direction was taken by the motorcycle after it passed in back of her car. Hight declared that the point at which he saw some gasoline spilled and at which he thought the collision took place was about "8 feet south of the telegraph pole," which would be on the east, or right-hand, side of the highway. Thus, on each of the questions involved in the issue of contributory negligence, there was a substantial conflict in the evidence. The findings, therefore, negativing contributory negligence, will not be disturbed.

2. Appellants' second contention is that—

"The evidence is insufficient to justify the decision 'that the wrongful and negligent acts of the defendants brought about said injuries and damage to the plaintiff,' or that * * * 'Jury operated * * * said automobile carelessly or negligently at said intersection,' * * * or that he 'did negligently drive said automobile far to the left of the center of said intersection, cutting the corner thereof short,' * * * or that by reason of any careless or negligent acts of said defendant said collision occurred."

It is not necessary again to review the evidence, in order to point out that each of these questions of fact is involved in conflict. We think this is abundantly clear, and that the findings are amply supported by the evidence.

3. Since we have reached the conclusion that the findings negativing contributory negligence and holding that the defendants were guilty of negligence which caused the injuries to plaintiff are supported by the evidence, it only remains to consider appellants' final contention:

"That, under the evidence, the judgment herein against the Dudfield Lumber Company, under the rule of respondeat superior, was, as a matter of law, clearly and wholly erroneous."

The court found:

"That at all times mentioned in the complaint the said Joseph A. Jury was engaged in the business of the Dudfield Lumber Company as an employé of said company, and said Jury, at the time of the infliction of the injuries on plaintiff herein mentioned, was riding in and driving the automobile and that said automobile was * * * owned by defendant Dudfield Lumber Company, * * * and was at the time of the infliction of these injuries in use by said Jury in and on the business of said company."

The defendant Jury was made a witness for the plaintiff. Regarding the events of December 11, he testified on direct examination:

"Q. What time did you leave the Dudfield Lumber Company's office that afternoon? A. That afternoon I left about 4:30. Q. Where did you go? A. I was on my way home. Q. Where do you live now? A. Mayfield. * * * In receiving a check from the Lindgren Company, Mr. Gowing neglected to countersign it, and the bookkeeper handed the check to me, and said: 'You might run around by Camp Fremont and have Mr. Gowing countersign this check and bring it to me in the morning.' Q. Did you do that? A. I did. Q. What was that check for? A. For material furnished. Q. Purchased from the Dudfield Lumber Company? A. Yes. Q. And then you had gone up to Camp Fremont to get this check countersigned? A. Yes, sir. Q. And were returning from Camp Fremont at the time of the collision? A. I was on my way home then. Q. You use this machine in going from your office to your home, do you not? A. Yes, sir. Q. Every day? A. Yes, sir. Q. And in the scope of your employment; that is a part of the way you get to and from your business, is it not, by the use of this machine? A. Yes."

Upon cross-examination the witness gave the following testimony:

"Q. When this check was signed were you through with your work for the day? A. I was; yes. Q. You were through with your work for the day at the time you left the Dudfield Lumber Company about 4:30, were you not? A. I was. Q. Except the getting of this signature on the check? A. Yes, sir. Q. Were you on the business of the Dudfield Lumber Company at the time of this collision? A. No, sir. Q. The Dudfield Lumber Company had nothing to do with it? A. Not a thing."

Jury was next called as a witness for the defense, and testified as follows on cross-examination by the plaintiff's attorney:

"Q. Where were you going? A. I was going into Palo Alto. * * * Q. Then you were not going on into Mayfield? A. I was on my way home. In going into Palo Alto I had forgotten my overcoat, was going in after my overcoat. Q. You intended to turn into University avenue to go to Palo Alto? A. Yes."

And on redirect examination he testified:

"Q. When you were going back to get your overcoat, Joe, you were not in the business of the Dudfield Lumber Company, were you? A. No, sir."

Kees, when asked, if, at the time of the accident, Jury was going to the office of the Lumber Company, answered, "He apparently was."

Shearman & Redfield on Negligence, vol. 1, § 147, lays down the rule that—

"Where a servant is allowed by his master to combine his own business with that of the master, or even to attend to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured by his negligence; but the master will be held responsible unless it clearly appears that the servant could not have been, directly or indirectly, serving his master in the act, the negligent performance of which caused the injury."

See, also, Patten v. Rea, 2 C. B. (N. S.) 606, 140 Eng. Rep. 554.

In Rahn v. Singer Mfg. Co. (C. C.) 26 Fed. 913, it was said:

"In order to fix the responsibility of the defendant, it is not necessary for the plaintiff to prove that the servant, for whose tort he seeks damages, was, at the time of the commission of the tort, engaged in executing specific commands of the defendant. It is enough for him to prove that the servant was acting within the general scope of his employment, but this much is necessary. If the usage of the parties, under the servant's contract of hiring, was of such a character that it allowed the servant to attend to his duties on such terms as suited his convenience, and at the time of the commission of the tort he was engaged in his own private business, but at the same time was pursuing the defendant's business in the service for which he was employed, the defendant would still be liable."

[3] In our opinion, the principle announced in these authorities is applicable to the facts of this case, and clearly the testimony of Jury himself that the automobile was purchased by the company, and was used by him both in the service of the company and on his own business, that his trip to Camp Fremont was for the purpose of having a check countersigned for the company, and that he intended to proceed to Palo Alto to get his overcoat, is sufficient to sustain the finding that at the time of the collision he was acting in the course of his employment.

Appellants contend further:

"That the having of the particular paper countersigned was not within his general employment. It was an isolated—a single—act, * * * a mere matter of convenience, a mere accommodation."

In Chamberlain v. Southern California Edison Co., 167 Cal. 500, 140 Pac. 25, the plaintiff had been injured through the negligence of one Rosso. It appeared that Rosso was the driver of an automobile truck for the defendant and was regularly engaged in distribut-

ing supplies, but that at the time of the injury he was, pursuant to the orders of defendant's storekeeper, towing an automobile belonging to a fellow employé. The court said:

"It makes no difference that Rosso's usual employment was the distribution of supplies. His business was to operate his motor truck under the orders of his superior, and that was exactly what he was doing at the moment when his carelessness caused the injury to plaintiff."

Here, too, the employé had undertaken the trip to Camp Fremont on business of his employer, although such business was not in the line of his usual duties.

This conclusion renders it unnecessary to discuss appellants' point that the evidence is insufficient to justify the finding that the automobile used by respondent was the property of the defendant corporation.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; LENNON, J.

WILBUR, J. I concur in the judgment against the Dudfield Lumber Company, for the reason that at the time plaintiff was injured Jury was returning to the office of the Dudfield Lumber Company from an errand for the defendant company on which he was sent by the bookkeeper. The court, having decided against the credibility of his testimony as to the manner in which the accident occurred, was therefore also justified in disregarding his statement that he merely turned aside to the office for his overcoat while returning to his own home, and in concluding that he was merely completing a journey to and from the office on the business of the company. As to the other points in the case, I concur with Justice LAWLOR'S conclusions.

SHAW, J. I dissent. In my opinion Jury was not in the service of the company and was not its agent for any purpose at the time of the accident. The fact that he had been in its service during the preceding part of that day does not compel the conclusion that he was in its service at that time. The fact that he was then driving an automobile belonging to the company did not, under the circumstances appearing, make him its servant or agent. He was not driving it for or on behalf of the company, nor in its work or service. He lived at Mayfield, and worked for the company as its secretary at its office in Palo Alto. He used the car after office hours in the evening and before office hours in the morning in going to and returning from his home in Mayfield. This was with the consent of the company, but not by its direction, nor in the transaction of its business. In contemplation of law he merely borrowed the car for his own use in so doing. He was not hired either to go to his home from the office in the afternoon, at the close of his work for the day, or to go from his home to the office in the morning to begin his work for the day, or to use the car in going or coming. That formed no part of his service; while so going and returning he was not in the service or under the employment of the company, and for his negligent acts in so doing the company was in nowise liable.

Ordinarily he ceased to be in the service of the company the moment he left its office for his home. On the day of the accident, as he was about to leave for home, he was directed to go to Camp Fremont, which was in the opposite direction from his home, and there get a check countersigned, which he was to keep and bring to the office the next morning. While on his way to Camp Fremont, and while engaged in getting the check countersigned, he was doubtless in the company's service. But when that task was completed his service for the company ceased for the day, so far as his goings and comings were concerned, and the company then ceased to be liable for his negligence in driving the car. It was no concern of the company how or by what route or means he got from Camp Fremont to his home, or whether he got there at all. It so happened that Camp Fremont was on the state highway a mile north of Palo Alto, while Mayfield was on said highway a mile or more south of Palo Alto. Consequently in going home from Camp Fremont on the highway he had to pass through Palo Alto. If he had been turning into Palo Alto for groceries to take home, it would be conceded that the company would not be liable. If he had been directed to take a check to Los Altos, and after doing so had gone to his home, without passing Palo Alto, the same result would follow.

Apparently, according to the majority opinion, the company's liability depended on the direction he had to go to get the signature. There is no evidence that he was intending to call at the office of the company on its business on his return from Camp Fremont. He had not been directed to do so, and as it was 5 o'clock in the afternoon, and he had already left the office for the day, no reasonable inference to that effect is deducible. It is said he was going there for his overcoat. The evidence shows merely that he was turning down University avenue toward "Palo Alto" in order to get his overcoat, which he had forgotten. It does not show that the overcoat was at the office. But it is immaterial where it was. The company did not engage him to look after his own clothes, and it was not liable for his negligent acts while he was doing it. The decision appears to be contrary to all authority. See 2 Mechem on Agency, §§ 1896 to 1909, where the exact question is extensively treated; also Mauchle v. Panama P. I. E. Co., 37 Cal. App. 715, 174 Pac. 400; Slater v.

Advance T. Co., 97 Minn. 305, 107 N. W. 133, 5 L. R. A. (N. S.) 598; 2 Cor. Jur. 853; 20 Am. & E. Ency. of Law, 178; 26 Cyc. 1536; 6 Labatt on M. & S. §§ 2274, 2283.

183 Cal. 472

ELLIOTT v. LOS ANGELES COUNTY. (L. A. 4979.)

(Supreme Court of California. Aug. 3, 1920.)

1. Eminent domain ⟸293(1)—Count alleging diversion of storm waters by county in connection with protection district held sufficient.

A count, alleging that county wrongfully and unlawfully, by certain concrete conduits and ditches constructed by the county in connection with a protection district, diverted storm waters from their previous course across plaintiff's land without plaintiff's consent, damaging the land, without alleging that the county was authorized to form such protection district under Act March 27, 1895 (St. 1895, p. 247), *held* to state a cause of action against the county; an allegation as to the right to form a district being unnecessary, since it is a matter of law that a county has such power.

2. Eminent domain ⟸293(1)—Count alleging overflow from negligent construction of conduit in protection district held to state cause of action.

Count alleging that county in connection with a protection district changed the course of storm drain so that the water came within 75 feet of plaintiff's land and so negligently constructed concrete conduit that it broke, causing overflow of and damage to plaintiff's land, *held* to state cause of action against county, without allegation that the county under Act March 27, 1895 (St. 1895, p. 247), was authorized to form such protection district, since the county has such power as a matter of law.

3. Counties ⟸146 — Municipal corporations ⟸745½—Not responsible for negligent acts of officers acting ministerially.

A county or municipal corporation is not responsible for the negligent acts of its officers, acting ministerially in pursuance of statutes imposing duties directly upon them, whereby injury is caused to persons or property; the right of action in such cases being solely against the officer whose negligence caused the damage.

4. Appeal and error ⟸1170(3) — Defect in complaint cured by findings.

In an action against county for diversion of water on breaking of negligently constructed conduit, failure of complaint to show clearly that the conduit was made for public purposes *held* cured by the findings and by Const. art. 6, § 4½.

5. Eminent domain ⟸285 — County is liable for damage from public works, where compensation has not been paid.

Where property has been damaged by works constructed by county for public purposes, and no compensation has been provided or paid in advance, as required by Const. art. 1, § 14, the county is liable for the damage, and under Pol. Code, § 4003, subd. 1, may be sued therefor.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Della B. Elliott against the County of Los Angeles. Judgment for plaintiff, and defendant appeals. Affirmed.

A. J. Hill, Co. Counsel, and Roy V. Reppy, Asst. Co. Counsel, both of Los Angeles, for appellant.

Charles H. Mattingly, of Los Angeles, for respondent.

SHAW, J. The defendant appeals from the judgment. The record on appeal consists of the judgment roll alone.

The first count of the complaint alleged that certain storm waters, prior to the injury complained of, had always flowed in a westerly direction, in a course a mile north of plaintiff's land, and not over, through, or across said land; that in February, 1914, the defendant wrongfully and unlawfully and without plaintiff's consent, by certain concrete conduits and ditches constructed by it in 1913, in connection with a protection district known as the San Fernando Protection District, diverted said storm waters from their previous course over, through, and across the plaintiff's land, whereby said land was damaged by reason of the ditches and gullies washed therein by said storm water, in the sum of $2,000. It also alleges the filing of a claim with the board of supervisors and the rejection thereof. The second count, in addition to the allegations aforesaid included in the first count, alleges that the alteration in the course of the storm drain, made in connection with the protection district, changed the course so that the storm water came within 75 feet of the plaintiff's land, and that, in constructing said artificial water course, defendant negligently failed to make it sufficient and adequate to carry the waters diverted into the same, and used inferior, defective, and inadequate materials, and that by reason of all these acts of the defendant the said concrete conduit broke at a point 75 feet from plaintiff's land, in consequence whereof the waters were diverted over, across, and through plaintiff's land to its damage as previously stated. The answer consisted solely of a denial of the material allegations of the complaint.

The findings state that prior to the alterations made by the defendant the course of the storm waters in question was not nearer than one mile from plaintiff's land; that in 1912, under and in pursuance of the act of March 27, 1895 (Stats. 1895, p. 247),

the defendant formed a protection district, called the San Fernando Protection District; that in carrying out the objects of the said protection district defendant, by means of a dam, headworks, tunnel, and concrete conduit constructed for that purpose, diverted said storm waters over, through, and across plaintiff's land, by reason whereof the same was damaged in the sum of $300; and that the said dam, headworks, concrete conduit and tunnel were erected under plans and specifications furnished by the defendant.

[1-4] Each count of the complaint states a cause of action against the defendant. It is true, as pointed out in Sievers v. San Francisco, 115 Cal. 648, 47 Pac. 687, 56 Am. St. Rep. 153, that a county or municipal corporation is not responsible for the negligent acts of its officers acting ministerially in pursuance of statutes imposing duties directly upon them, whereby injury is caused to persons or property, the right of action in such cases being solely against the officer whose negligence caused the damage. But the complaint alleges that the acts which caused the injury in the present case were the acts of the county itself. It alleges that it was done in connection with a certain protection district. The act of 1895 provides that the county may form protection districts and through that agency may construct works for the control of surface water and storm water to protect lands liable to injury therefrom. An allegation to that effect is not necessary, since it is a matter of law that the county has such power. The findings show more clearly than the pleading that the new conduit for the water was made for public purposes. If the complaint is defective in that respect the defect is cured by the findings and by section 4½, article 6, of the Constitution. Cutting P. Co. v. Canty, 141 Cal. 695, 75 Pac. 564; Vallejo, etc., Co. v. Reed, 169 Cal. 545, 147 Pac. 238.

[5] The case, therefore, is one wherein property has been damaged by works constructed for public purposes, and no compensation has been provided or paid in advance, as required by the Constitution. Article I, § 14. In such cases the rule is well established that if the property is not condemned by legal proceedings and the damage paid in advance before the construction of the works, the county is liable for the damage resulting therefrom, and an action will lie against it for the recovery thereof. Tyler v. Tehama, 109 Cal. 621, 42 Pac. 240; Reardon v. San Francisco, 66 Cal. 492, 6 Pac. 317, 56 Am. Rep. 109; Perkins v. Blauth, 163 Cal. 789, 127 Pac. 50; Sala v. Pasadena, 162 Cal. 717, 124 Pac. 539; Spangler v. San Francisco, 84 Cal. 12, 23 Pac. 1091, 18 Am. St. Rep. 158. An action may be maintained against a county for any damages arising from an injury for which such county is legally liable under this section of the Constitution. Pol. Code, § 4003, subd. 1.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; LENNON, J.; LAWLOR, J.; WILBUR, J.

183 Cal. 398

HEINE PIANO CO. v. BLOOMER et al.
(S. F. 8703.)

(Supreme Court of California. July 28, 1920. Rehearing Denied Aug. 26, 1920.)

1. Appeal and error ⟸2—Order refusing new trial not appealable, where notice filed after passage of act abolishing such appeals.

Where an appeal was prosecuted under the alternative method, notice being filed after the amendment of 1915 to Code Civ. Proc. § 963, the appeal from the order refusing new trial must be dismissed.

2. Justices of the peace ⟸133—Where justice refused to vacate satisfaction of judgment for want of jurisdiction, subsequent order vacating on merits invalid.

Where a justice of the peace declined to vacate the satisfaction of a judgment on the ground of want of jurisdiction, a subsequent order, denying the motion on the merits, is invalid, for the law does not authorize the correction of judicial errors under the guise of correcting clerical errors, and where a court determines it is without jurisdiction any further order is a nullity.

3. Justices of the peace ⟸133—Order denying motion to vacate satisfaction not a conclusive adjudication.

As Code Civ. Proc. § 1911. declares that only is deemed to have been adjudged in a former judgment which appears on its face to have been so adjudged or which was actually and necessarily included, a judgment of a justice, denying plaintiff's motion to vacate satisfaction of an earlier judgment on ground of want of jurisdiction, is not a conclusive adjudication against the right to vacate.

4. Judgment ⟸883(14)—Judgment denying right of set-off not a conclusive adjudication.

An order of justice court denying plaintiff's motion to offset a judgment in its favor, which had been indorsed as satisfied against a second judgment, *held* not a conclusive adjudication preventing subsequent action; it appearing that the order was based on the justice's want of jurisdiction to vacate the satisfaction of the earlier judgment.

5. Equity ⟸46—Equitable remedy lies where no adequate relief at law.

Where the law does not furnish adequate relief, equitable remedy may be invoked.

6. Justices of the peace ⟸133—Court of equity may vacate satisfaction of a judgment of justice.

Where a justice of the peace refused to vacate satisfaction of a judgment on the ground

of want of jurisdiction, a court of equity may grant relief, as the legal remedy is inadequate, the case being one where the court in which action was pending was unable, by reason of its jurisdiction, to grant the relief.

7. Justices of the peace ⟸133—Satisfaction of judgment vacated where property not subject to execution.

In view of Code Civ. Proc. § 708, declaring that, if a purchaser at a sheriff's sale fails to recover possession because the property was not subject to execution, the court having jurisdiction must revive the original judgment, satisfaction of a judgment of a justice should be canceled where execution was levied on land belonging to defendant, but which had recently been homesteaded; it not appearing that plaintiff was aware of that fact, and this is so regardless of any constructive notice.

8. Judgment ⟸883(11)—Defendant held plaintiff in another action, so first judgment might be offset against second.

Where plaintiff sought to offset a judgment of justice court in its favor against an adverse judgment, evidence *held* to show that the defendant in the first action was the real party plaintiff in the second, although the litigation was carried on in the name of another.

9. Judgment ⟸883(8)—Failure of plaintiff to counterclaim not laches preventing setting off one judgment against another.

Where plaintiff recovered in justice court a default judgment for over $300, and execution was levied against the homestead property of the debtors, *held* that, though Code Civ. Proc. § 855, authorizes counterclaim in justice court, the failure of plaintiff to plead his judgment against an action for the benefit of the defendants in the first was not laches which would prevent the offsetting of one judgment against the other, for satisfaction of the judgment would first have to be vacated, etc., and, for that matter, the amount exceeded the amount which a defendant may plead as counterclaim, etc., in justice court.

10. Justices of the peace ⟸133—Plaintiff not guilty of laches in sale of land on execution so as to preclude vacation of satisfaction.

As laches is a matter to be determined from all of the facts and circumstances of the case, plaintiff, who recovered a judgment in justice court and had execution levied on land belonging to the defendants, but as to which one of the defendants only shortly before filed a homestead declaration, will not be denied relief by way of vacating the satisfaction of the judgment on the theory that plaintiff's failure to discover the homestead declaration of which it had constructive knowledge was laches.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Suit by the Heine Piano Company against J. M. Bloomer and others. From a judgment for plaintiff, defendants Bloomer and certain others appeal. Affirmed.

G. C. Ringole, of San Francisco, and H. A. I. Wolch, of Turlock, for appellants.

Charles F. Hanlon, of San Francisco, for respondent.

LAWLOR, J. This is an appeal from a judgment entered in favor of the plaintiff, the Heine Piano Company, a corporation, and against the said defendants, G. C. Ringolsky, Frank T. Deasy, James G. Conlan, Robert W. Dennis, and Kohler & Chase, a corporation, in an action brought: (1) To vacate the satisfaction of a judgment rendered in favor of the present plaintiff and against defendants Charles and Laura Olson in an action—hereinafter referred to as action 76831—in the justices' court of the city and county of San Francisco, and to revive said judgment; (2) to have said judgment "offsetted * * * against the judgment in action 85133 [in said justices' court] to the extent that one judgment equals the other"; and (3) to restrain defendants from issuing execution in action 85133. Judgment was entered on November 8, 1917, granting the relief prayed and continuing the action for further proceedings as against defendants J. M. Bloomer, Charles and Laura Olson, John Doe, Richard Roe, Cornelius Coe, and Henry Hoe. Defendants Bloomer, Ringolsky, Deasy, Conlan, Dennis, and Kohler & Chase prosecute this appeal, the record of which is presented under the alternative method.

[1] These last-named defendants also appeal from the order denying their motion for a new trial, but, inasmuch as the notice of appeal was filed after the amendment of 1915 to section 963 of the Code of Civil Procedure, the appeal from the order refusing a new trial must be, and is hereby, dismissed. Roberts v. Colyear, 179 Cal. 669, 180 Pac. 937; Rockey v. Vieux, 179 Cal. 681, 178 Pac. 712; Marsh v. Lapp, 180 Pac. 533.

On May 25, 1915, plaintiff commenced action 76831 against the Olsons for the sum of $250, alleged to be owing at the time by them to the Heine Piano Company. On June 28, the Olsons having failed to appear, judgment by default was entered against them for $303.65, which sum included costs. On June 30, "without the consent or knowledge of or any notice other than constructive notice to the plaintiff," Laura Olson executed and recorded a declaration of homestead and a homestead lien on the land upon which they were residing on Rhode Island street in San Francisco. On November 29 a writ of execution was issued in action 76831 to the sheriff of the city and county of San Francisco, and, by virtue of that writ, on December 27, the sheriff sold said Rhode Island street property to one A. G. Mitchell, who is admitted

to have been plaintiff's agent in the transaction. On January 12, 1916, the writ of execution was returned, satisfied.

On March 17, 1916, action 85133 was commenced against the plaintiff in the justices' court of the city and county of San Francisco in the name of Miss J. M. Bloomer, who, it appears, was a stenographer in the office of G. C. Ringolsky. The plaintiff in that action, as assignee of the Olsons, alleged that the Heine Piano Company was indebted to Laura Olson in the sum of $250, "for goods, wares, and merchandise sold and delivered." The action went to trial, and on September 27 judgment was rendered in favor of Miss Bloomer and against the Heine Piano Company for $259.95. An appeal from that judgment was taken by plaintiff herein, but, an exception to the sureties having been filed and the said sureties having failed to justify within the time allowed by law, on December 22 the appeal was dismissed. A petition to the District Court of Appeal for a writ of review was denied.

On March 19, 1917, Mitchell having in the meantime transferred to G. O. Heine, plaintiff's president, all the right, title, and interest which he had acquired in or to the Rhode Island street property at the execution sale, said Heine, in behalf of the plaintiff, executed a deed conveying back to the Olsons all the right, title, and interest which either he or the corporation had in said real property.

On March 22 plaintiff moved in the justice's court, where the judgment in action 76831 had been rendered for an order vacating, canceling, and setting aside the satisfaction of said judgment, on the ground that the entry of satisfaction was a mistake, the execution having been levied upon real property which was exempt as a homestead, and on the further ground of ignorance on the part of the plaintiff of the existence of such a homestead at the time of the execution sale.

On March 27 Heine Piano Company moved in action 85133 for an order offsetting the judgment in that action against the judgment in action 76831 on the grounds that Miss Bloomer, in whose name the judgment in action 85133 stood, was not the real party in interest but was the Olsons' assignee for collection only, that the Olsons were the true owners of the Bloomer judgment, and therefore that their judgment, being less than that in action 76831, should be offset and canceled.

On April 3 defendant Deasy made an order denying plaintiff's motion to vacate the satisfaction of judgment in action 76831, the order reading in part:

"Thereupon defendants object to further hearing herein on the ground that the issues raised by said motion involve a decision on the title to real estate of which this court has no jurisdiction. * * * The court does now sustain said objection, and *on the ground of lack of jurisdiction* denies the plaintiff any further hearing on its said motion." (Italics ours.)

On April 4 defendant Conlan made a second order in action 76831, denying plaintiff's motion to vacate on the merits. This last order was entered on April 5. On April 4 defendant Conlan denied the motion made by plaintiff in action 85133 to offset that judgment against the one in action 76831. On the same day plaintiff commenced this action.

At the conclusion of the plaintiff's case defendants moved for a nonsuit, but the motion was denied. The contentions made by appellants in their opening brief are the same as the grounds urged for a nonsuit:

"(1) The matters in issue at bar were previously determined by courts of competent jurisdiction, and hence are to be treated as res judicata. (2) The complaint does not show any equity. (3) The plaintiff * * * was guilty of laches in asking for the relief prayed."

[2] 1. In support of their first contention appellants assert:

"That all of the matters and showing made in the justice's court and upon which the justice of the peace based his decision were the same as the facts alleged in this action."

First, as to the order denying the motion to vacate the satisfaction of judgment in action 76831. Even if the correctness of the statement just quoted be assumed for the purposes of this discussion, it is not decisive of this question, for appellant's position ignores the fact that the order denying the motion was not the order entered on April 5, which purported to deny the motion without stating the grounds, but was the order made and entered on April 3, in which the court refused to grant the motion because of lack of jurisdiction. In other words by the making of the order of April 3 the power of the court to rule on the motion to vacate became functus officio. As is said in Freeman on Judgments, section 70:

"The law does not authorize the correction of judicial errors under the pretense of correcting clerical errors. * * * It is certain that proceedings for the amendment of judgments ought never to be permitted to become revisory or appellate in their nature; ought never to be the means of modifying or enlarging the judgment or the judgment record, so that it shall express something which the court did not pronounce, even though the proposed amendment embraces matters which ought clearly to have been so pronounced."

See, also, Byrne v. Hoag, 116 Cal. 1, 47 Pac. 775; First National Bank v. Dusy, 110 Cal. 69, 42 Pac. 476; People v. Davis, 143 Cal. 673, 77 Pac. 651; Dunsmuir v. Coffey, 148 Cal. 137, 82 Pac. 682; Takekawa v. Hole, 170 Cal. 323, 149 Pac. 593; Suttman v. Superior Court, 174 Cal. 243, 162 Pac. 1032.

In Weimmer v. Sutherland, 74 Cal. 341, 15 Pac. 849; Sutherland had recovered judgment against Weimmer and his wife after a trial in the justice's court. Three weeks after such judgment was rendered the court, upon motion of the defendants Weimmer, entered an order "that said judgment is hereby set aside and vacated." It did not appear that plaintiff had notice of this motion or was present when it was heard. On a writ of review sued out by Sutherland in the superior court, the justice's order vacating the judgment was held void. On appeal it was said:

"Justices' courts have no power to review their own judgments, unless by some method expressly provided by law. * * * Section 925 of the Code of Civil Procedure is as follows: 'Justices' courts being courts of peculiar and limited jurisdiction, only those provisions of this Code which are in their nature applicable to the organization, powers, and course of proceedings in justices' courts, or which have been made applicable by special provisions in this title, are applicable to justices' courts and the proceedings therein.' It is therefore argued * * * that by virtue of said section 925 all the broad powers granted to courts of record by section 473 of the Code of Civil Procedure may be exercised by justices' courts. * * * It will be observed, however, that the section expressly preserves the notion of the 'peculiar and limited jurisdiction' of these courts, and, moreover, that its general character is negative rather than positive. The grant is somewhat in the shape of a parenthesis in a clause of limitation. If, therefore, that part of the Code which expressly deals with proceedings in justices' courts prescribes the powers of those courts in relation to a general subject about which the powers of courts of record are expressly prescribed in another part, then we think that the powers of the justices' courts with respect to that subject are to be looked for in the former and not in the latter provision. Now, the power in question here—i. e., the power to relieve from a judgment taken through surprise, excusable neglect, etc.—is expressly given to courts of record by section 473, and is expressly given to justices' courts by section 859. * * * But * * * section 859 confines the power in justices' courts to cases of a 'judgment by default.' * * * We think, therefore, that the latter section is determinative of the question here involved, and not section 473."

See, also, Heinlen v. Phillips, 88 Cal. 557, 26 Pac. 366; Simon v. Justices' Court, 127 Cal. 45, 59 Pac. 296. In our opinion the only effective action taken by the justices' court on plaintiff's motion to vacate the satisfaction of judgment in action 76831 was the order of April 3, and the order subsequently entered on April 5 was a nullity.

[3] As to the effect of this order as res judicata on the plaintiff's rights, section 1911 of the Code of Civil Procedure declares:

"That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

In Oakland v. Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277, it was held that where a suit was dismissed for want of jurisdiction or was disposed of on any ground not going to the merits of the action, the judgment rendered was not a bar to another suit. This rule finds support in 7 Encyc. Evid. 811:

"If it appears that a suit has been dismissed for want of jurisdiction, the judgment of dismissal will be no bar to another action brought in a court having jurisdiction of the subject-matter."

See, also, Reynolds v. Lincoln, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449; 23 Cyc. 1150; Laguna Drainage District v. Charles Martin Co., 5 Cal. App. 166, 172, 89 Pac. 993; Shively v. Eureka Tellurium, etc., Co., 5 Cal. App. 236, 243, 89 Pac. 1073. As already shown, the order of April 3 stated that the plaintiff's motion to vacate the satisfaction of judgment was denied by reason of want of jurisdiction. Inasmuch as this order—and not the order of April 5—represented the court's ruling on the motion to vacate, we think it clear that the question whether the plaintiff is entitled to have the satisfaction of judgment in action 76831 vacated is not res judicata.

[4] We now turn to a discussion of the effect of the order denying the motion to offset the judgment in action 85133 against that rendered in action 76831. That order reads in part:

"* * * It appearing to the court that the judgment in action 76831 * * * has been heretofore satisfied and discharged, and it further appearing to the court that the said J. M. Bloomer has no legal or equitable interest in or to said judgment, * * * the court hereby orders that the motion be, and the same is hereby, denied."

It is at once apparent that the basis of the court's ruling in this instance, as well as in the case of the motion to vacate, was lack of jurisdiction, for at the time the motion to offset was made the judgment in action 76831 had been marked "satisfied," and had not been revived, so that there was no existing judgment in action 76831 which could be offset against the judgment in action 85133. It must be held, therefore, under the rule already referred to, that neither the question whether the plaintiff is entitled to have the satisfaction of its judgment vacated, nor the question whether plaintiff is entitled to have that judgment offset against the one in action 85133, is res judicata.

[5, 6] 2. We shall next consider appellants' second contention that "the complaint does

not show any equity." The claim is made in their brief that—

"The court lacked jurisdiction to hear and determine the issues in this case. * * * A court of equity cannot assume the powers of appellate jurisdiction to review the errors of the lower court."

In stating the rule on this point we cannot do better than quote from Uhlfelder v. Levy, 9 Cal. 607, 614:

"The power of one district court to restrain proceedings in another, in cases where an adequate relief can be as well had in the court in which the proceedings are pending, is denied by the former decisions of this court. * * * The only case in which it will be allowed is where the court in which the action or proceeding is pending is unable, by reason of its jurisdiction, to afford the relief sought."

See, also, Anthony v. Dunlap, 8 Cal. 26; Rowley v. Howard, 23 Cal. 401; Crowley v. Davis, 37 Cal. 269; Kelley v. Kriess, 68 Cal. 211, 9 Pac. 129; Gregory v. Diggs, 113 Cal. 196, 199, 45 Pac. 261. And in Hager v. Shindler, 29 Cal. 48, the court said:

"Before the case can be considered as beyond the reach of a court of equity, it must be made to appear that the legal remedy would be adequate and complete."

And in Merriman v. Walton, 105 Cal. 403, 38 Pac. 1108, 30 L. R. A. 786, 45 Am. St. Rep. 50:

"The rule under which a court of equity declines to interfere until after the application for relief has been made to the court in which the judgment was rendered has no application when relief has been sought and denied in that court. The denial of that court to grant that relief gives to the court of equity the same authority to interfere as if the other court were powerless to render aid."

In the case at bar the plaintiff moved in action 76831 to vacate the satisfaction of judgment, but that motion was denied, as we have seen, because of lack of jurisdiction. Plaintiff also moved in action 85133 to offset the two judgments, but this motion was also denied. Under the authorities we have cited, the plaintiff having exhausted his remedy at law, the superior court, as a court of equity, had jurisdiction to hear and determine the issues raised in the complaint.

[7] We shall next consider the question whether the plaintiff was entitled to the relief granted, and in this connection we shall first inquire whether he was entitled to a decree vacating the satisfaction of judgment in action 76831. The rule is thus stated in the note to Sturdivant v. Ward (Ark.) 134 Am. St. Rep. 36:

"We cannot suggest a better solution [of this question] than the general adoption of some such declaration of the law as has been enacted in California. Code Civ. Proc. sec. 708. * * * 'If the purchaser of property at sheriff's sale * * * fail to recover possession * * * because the property sold was not subject to execution and sale, the court having jurisdiction thereof must * * * revive the original judgment.' * * * The section has been construed and applied in the well-known case of Cross v. Zane, 47 Cal. 602, and followed in Hitchcock v. Carruthers, 100 Cal. 100, 34 Pac. 627, and Merguire v. O'Donnell, 139 Cal. 6, 96 Am. St. Rep. 91, 72 Pac. 337. In those cases it was held that, as the section was remedial in its character, it was to be liberally construed, and that, if the property sold was not the property of the defendant in the execution, it amounted to a sale of property not subject to execution and sale within the intent of the statute, and the purchaser was entitled to the remedies afforded by the act."

And in Scherr v. Himmelmann, 53 Cal. 312, it was held:

"Where a party causes an execution to be issued on a judgment, and it is levied on property which turns out not to have belonged to the judgment debtor, such party is entitled to bring an action in equity for the purpose of reviving the original judgment."

The facts in the instant case clearly fall within this principle. It is conceded that the sale of the Rhode Island street property, as a result of which the judgment in action 76831 was marked "satisfied," was void because it had already been homesteaded. Waggle v. Worthy, 74 Cal. 266, 15 Pac. 831, 5 Am. St. Rep. 440; Sanders v. Russell, 86 Cal. 119, 24 Pac. 852, 21 Am. St. Rep. 26; City Store v. Cofer, 111 Cal. 482, 44 Pac. 168; Powell v. Patison, 100 Cal. 236, 34 Pac. 677; Gleason v. Spray, 81 Cal. 217, 22 Pac. 551, 15 Am. St. Rep. 47. But it is contended by appellants that at the time of the sale the plaintiff had either actual or constructive notice that the Olsons had declared a homestead upon the property, and, therefore, that it is not entitled to have the satisfaction vacated. This same contention was made in Cross v. Zane, 47 Cal. 602, referred to in Sturdivant v. Ward, supra, where the judgment creditor had caused execution to be levied upon an interest which he believed the judgment debtor had in certain real property. He subsequently ascertained that said debtor had no interest in the property, and petitioned to have his judgment revived in accordance with section 708. The defendant argued:

"That the plaintiff, being fully informed of what he was buying, made a mistake of law, against which he was not entitled to relief in a court of equity after so long a delay."

The court, nevertheless, held, as we have seen, that the statute was to receive a liberal construction, and the plaintiff was entitled to the relief sought. In view of these authorities, we are not disposed to hold, even if the plaintiff here is to be charged with notice of the recordation of the homestead

declaration at the time of the execution sale, that it is not entitled to the remedies afforded by the statute. Under the ruling in Scherr v. Himmelmann, supra, the plaintiff is plainly entitled to the aid of equity in order that the judgment may be revived.

[8] Now, as to whether plaintiff was entitled to have that judgment offset against the one in action 85133. Appellants claim "that Kohler & Chase, the assignor of Bloomer, has been and still is the real and beneficial owner of the Bloomer judgment," and that the court's finding that the Olsons were the owners thereof is without support in the evidence. Upon this point Mrs. Olson testified that she had purchased a piano from Kohler & Chase on the installment plan, and that she had assigned her cause of action against the plaintiff to Kohler & Chase upon the understanding that if anything was recovered upon said cause of action "that money would go off the piano." She did not claim that she was to be given unconditional credit for the sum alleged to be due and owing from the Heine Piano Company, but only for such amount as Kohler & Chase might recover. In our opinion the court was justified in finding that the Olsons, and not Kohler & Chase, were "the real and beneficial owners" of the claim, the latter merely having the legal title for the purposes of suit.

3. Appellants insist that plaintiff was guilty of laches:

[9] (1) "In its defense in action 85133. * * * In the answer nothing was alleged by way of defense or counterclaim setting forth the judgment in action 76831." There are two answers to this contention. Section 855 of the Code of Civil Procedure provides that the answer to a complaint in a justice's court may contain a denial, "and also a statement * * * of any other facts constituting a defense or counterclaim, *upon which an action might be brought* by the defendant against the plaintiff, or his assignor, *in a justice's court.*" (Italics ours.) At the time of the commencement of action 85133 plaintiff's claim against the Olsons was a "satisfied" judgment, and, until that "satisfaction" was vacated, plaintiff had no counterclaim "upon which action might be brought." And, too, as heretofore noted, the amount of the judgment in action 76831 was $303.65, a sum in excess of the jurisdiction of the justice's court. Malson v. Vaughn, 23 Cal. 61. It is clear that the plaintiff was not guilty of laches in action 85133 in not pleading his claim against the Olsons.

[10] (2) Appellants claim that plaintiff was negligent in not consulting the records of the county recorder "to learn whether or not the real property of the Olsons was homesteaded before they proceeded to sell the same." Laches is a matter to be determined from all the circumstances of the case. As already pointed out, appellants have admitted that "plaintiff had no knowledge of the fact that any such declaration was recorded." We cannot hold that plaintiff was guilty of laches in not earlier seeking to vacate the satisfaction of the judgment.

Since the matters here in issue are not res judicata, and equity will relieve the plaintiff from the "satisfaction," it follows that the judgment should be affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; WILBUR, J.; LENNON, J.

(183 Cal. 497)

WOODS LUMBER CO. v. MOORE.
(L. A. 6055.)

(Supreme Court of California. Aug. 10, 1920.)

1. Corporations ⊜447—Have implied power to make contracts reasonably tending to advance authorized business.

Under Civ. Code, § 354, subd. 8, empowering corporations to make contracts essential to the successful prosecution of their business, a corporation has implied power to make all contracts reasonably expected to advance its business or which can directly promote its business.

2. Corporations ⊜484(3)—Whether contract of guaranty will advance corporate business is generally for officers, not courts.

The question whether a contract of guaranty is one which will advance the business of a corporation is primarily for the officers of the corporation and the courts will hold such contracts executed by the officers ultra vires only when they clearly appear to be so as a matter of law.

3. Corporations ⊜484(3)—Authority to guaranty contract of another to whom corporation was selling goods is implied.

A corporation engaged in the business of supplying costumes for theatrical productions has implied power to guarantee a contract by a motion picture producing company for lumber necessary to produce a film, for which the first corporation had contracted to furnish the costumes.

4. Corporations ⊜484(3) — Furnishing material in reliance on guaranty is sufficient consideration.

The furnishing of material to another corporation in reliance on the guaranty of defendant that the material would be paid for is sufficient consideration for the guaranty, if any is necessary to make it binding.

5. Corporations ⊜416—Liable for contract of guaranty authorized by managing officer.

A corporation is liable on a contract of guaranty executed by its secretary under instructions from its president, who was the general manager of its business, and held out by it as authorized to transact its business though it had passed no resolution authorizing the contract.

Department 1.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by the Woods Lumber Company against the Goldstein Company, in which W. H. Moore, Jr., as trustee in bankruptcy of the Goldstein Company, was substituted as defendant. Judgment for the plaintiff, and defendant appeals. Affirmed.

Adams, Adams & Binford, G. Harold Janeway, Hunsaker & Britt, Le Roy M. Edwards, and Samuel Poorman, Jr., all of Los Angeles, for appellant.

R. W. Clapp, of Los Angeles, for respondent.

SHAW, J. The defendant appeals from the judgment. The plaintiff sued to recover of Goldstein Company, as guarantor, the sum of $2,845.55 owing to plaintiff from Continental Producing Company for building materials and merchandise bought of plaintiff by said Continental Company. The guaranty contract alleged to have been executed by Goldstein Company is as follows:

"Jan. 6, 1917.

"Woods Lumber Company, Beverly Hills, Calif.—Gentlemen: This is to confirm conversation Mr. Woods had with R. Goldstein on the afternoon of the 4th inst., guaranteeing the payment of all bills which you have or will have against the Continental Producing Co., 650 S. Broadway St., city.

"Yours very truly,

"Goldstein Company, Los Angeles, Inc.,

"By L. C. Armbrust, Secretary."

Goldstein Company was the original defendant, but during the pendency of the action it was adjudged a bankrupt and the defendant, Moore, was appointed trustee in bankruptcy and substituted as defendant.

The answer alleged that the guaranty contract above set forth was given without consideration and for accommodation only; that the officer of defendant corporation that executed the same had no authority to do so, and that the guaranty of said Continental Producing Company's debts was not within the scope of the Goldstein Company's business. The court below made findings to the effect that the guaranty contract was given for a valuable consideration; that the officer who executed it was duly authorized to do so, and that the making of said guaranty contract was within the scope of the said Goldstein Company's corporate powers.

The appellant claims that the evidence shows: (1) That the contract of guaranty was not within the scope of the powers of the corporation as set forth in its articles, nor in direct furtherance of its business, and consequently that it is ultra vires; (2) that the said Goldstein Company received no benefit from the making of said guaranty, and is therefore not estopped to assert that it was ultra vires; (3) that the officers who executed the contract had no authority to bind the corporation thereby.

The articles of incorporation of Goldstein Company stated that—

It was incorporated "to manufacture, * * * buy, sell, lease, or otherwise acquire, and generally deal in all kinds of goods, wares, merchandise, and property of every class and description; to construct, purchase, lease or otherwise acquire, * * * operate, maintain and conduct theaters, concert halls, and amusement places of all kinds and descriptions; to manage theatrical, concert hall and vaudeville companies of all kinds; * * * and to purchase, own, produce and present theatrical plays, operas and exhibitions of all kinds."

The principal business in which the Goldstein Company was engaged at and before the making of this guaranty was the selling and renting of costumes to persons engaged in the operation of theaters or shows and to persons engaged in the manufacture of films for moving picture shows. The Continental Producing Company was engaged in manufacturing films for the production by moving pictures of a play entitled "the Spirit of '76." On May 31, 1916, the Goldstein Company and the Continental Producing Company entered into a contract whereby the Goldstein Company agreed to sell and furnish to the Continental Company the costumes and other similar articles necessary for the production of this film. The contract price the Goldstein, Company was to receive therefor amounted to $8,300. In producing the film it was necessary for the Continental Company to buy a large amount of lumber and building materials for the erection of structures to be shown in the pictures. The Woods Lumber Company had arranged to furnish such materials to the Continental Company, as required. Robert Goldstein was president of the Goldstein Company and the principal stockholder therein. L. C. Armbrust was the secretary. Goldstein was also a stockholder in the Continental Company. Although the evidence is conflicting on the subject, it is sufficient to show that Goldstein was at that time acting as the manager of both companies, and was actively superintending the work of the Continental Company in producing the films, and was also controlling the operations of Goldstein Company. Woods Lumber Company began furnishing building materials to the Continental Company in September, 1916. Payments were made from time to time, but in the latter part of December the Continental Company was delinquent in payments. Thereupon W. E. Woods, manager of the Woods Lumber Company, informed Goldstein that the Woods Lumber Company would give the Continental Company no further credit, and would furnish it no more materials, unless Goldstein Company would guarantee the payment of the bills of the Continental Company for materials to be furnished to it by Woods Lumber

Company. Goldstein Company was at that time financially interested in the success of the proposed moving picture then being made by the Continental Company, by reason of the fact that if the Continental Company was unable to go on with that enterprise, it would not order any more costumes from the Goldstein Company under the contract aforesaid. This, at least, was a fair inference from the evidence. Goldstein, in reply to the statement by Woods, said his company would execute such guaranty. In pursuance of this promise and by order of Goldstein to Armbrust, the secretary, the guaranty contract above quoted was executed by the secretary and delivered to Mr. Woods for the Woods Lumber Company. The evidence is in conflict on these points, but there is substantial evidence to the effect stated. Thereafter the Woods Lumber Company, on the faith of this guaranty, furnished materials to the Continental Company to the amount herein sued for, and the indebtedness thereby created was not paid.

1. The articles of incorporation of Goldstein Company gave it power to make films for moving picture plays, and to exhibit them to the public and also to build structures for the purpose of making such films. This fact, however, did not empower it to guarantee the obligations of other persons or corporations engaged in such business. It was not authorized to make contracts of guaranty as an independent business. It had no express power to make such contracts. The guaranty in question can be upheld as binding upon it only upon the theory that under the circumstances existing at the time it was within its implied powers.

[1] A corporation engaged in carrying on a business which it is authorized to do by its articles and the law under which it is organized has implied power to make all contracts which are "essential to the successful prosecution of the business" (Civ. Code, § 354, subd. 8; Bates v. Coronado B. Co., 109 Cal. 163, 41 Pac. 855; Mercantile Trust Co. v. Kiser, 91 Ga. 636, 18 S. E. 358) or the making of which is an appropriate means by which it may be "reasonably expected that the business in which the corporation is engaged will be advanced" (Depot R. Synd. v. Enterprise Brewing Co., 87 Or. 560, 170 Pac. 294; 171 Pac. 223, L. R. A. 1918C, 1001) or which are "necessary and helpful to the conduct of its authorized business" (Timm v. Grand Rapids Br. Co., 160 Mich. 371, 125 N. W. 357, 27 L. R. A. [N. S.] 186), or which tends directly to promote the business authorized by its articles, and which it is doing (Kraft v. Brewery Co., 219 Ill. 205, 76 N. E. 372; Central L. Co. v. Kelter, 201 Ill. 503, 66 N. E. 543; Blue Island Br. Co. v. Fraatz, 123 Ill. App. 26; Horst v. Lewis, 71 Neb. 365, 98 N. W. 1046; 103 N. W. 460).

[2] The question whether or not a contract of guaranty comes within the reasons above mentioned is one which is to be primarily "determined by the corporation, or those to whom the management of its affairs is intrusted." Bates v. Coronado B. Co., supra. The court cannot determine that it is beyond the powers of the corporation, unless it clearly appears to be so as a matter of law. With respect to the means which the corporation may adopt to further its objects and promote its business its managers "are not limited in law to the use of such means as are usual or necessary to the objects contemplated by their organization, but, where not restricted by law, may choose such means as are convenient and adapted to the end, though they be neither the usual means, nor absolutely necessary" for the purpose intended. Winterfield v. Cream City Brewing Co., 96 Wis. 239, 71 N. W. 101.

For illustration: A sawmill corporation may guarantee bonds of an auxiliary railway corporation formed to build a railroad penetrating the country from which the sawmill company expected to obtain its timber. Mercantile Trust Co. v. Kiser, supra. A brewing company can lawfully guarantee the payment of rent of a saloon keeper who has agreed to sell the beer of the brewing company exclusively, or the rent of a hotel which was one of the brewing company's customers, or the bond required by the state law of a liquor dealer who was one of its customers, or notes of a saloon keeper to obtain money from a third person for the erection of a saloon building in which he had agreed to sell exclusively the beer of the guarantor, or when by such contract the brewing company creates for itself a new customer and an additional outlet for its product. Depot R. Synd. v. Enterprise Brewing Co., supra; Winterfield v. Cream City Br. Co., supra; Timm v. Grand Rapids Br. Co., supra; Kraft v. Brewery Co., supra; Blue Island Br. Co. v. Fraatz, supra; Holm v. Lipsius Br. Co., 21 App. Div. 204, 47 N. Y. Supp. 518; Koehler v. Reinheimer, 26 App. Div. 1, 41 N. Y. Supp. 755; Horst v. Lewis, supra; Miller v. Northern Br. Co. (D. C.) 242 Fed. 164; McQuaide v. Enterprise Br. Co., 14 Cal. App. 315, 111 Pac. 927. A lumber company may become surety on the bond of a building contractor to induce him to purchase of the lumber company the lumber used in such building. Central L. Co. v. Kelter, 201 Ill. 503, 66 N. E. 543.

There is a seeming conflict of authority on this subject, but, except for a few cases, it is more apparent than real. In the following cases the guaranty was not shown to be directly connected with or beneficial to the authorized business carried on by the company, and the question of implied power was not discussed. Elevator Co. v. Memphis R. R. Co., 85 Tenn. 703, 5 S. W. 52, 4 Am. St. Rep. 798; Lucas v. White Line Tr. Co., 70 Iowa, 541, 30 N. W. 771, 59 Am. Rep. 449; Norton v. Bank, 61 N. H. 589, 60 Am. Rep. 334;

Wheeler v. Home Sav. Bank, 188 Ill. 34, 58 N. E. 598, 80 Am. St. Rep. 161; Bank v. Winchester, 119 Ala. 168, 24 South. 351, 72 Am. St. Rep. 904; Morgan v. Missouri, etc., Co., 50 Tex. Civ. App. 420, 110 S. W. 978. There are other "border line cases," where it was held that benefit from the guaranty was too remote or too indirect to justify the conclusion that it was within the implied powers. The following are of this class: The fact that the operation of a railroad and a street car line would each tend to increase the population of the city and the business over each road did not authorize either company to guarantee the bonds of the other. Northside R. Co. v. Worthington, 88 Tex. 562, 30 S. W. 1055, 53 Am. St. Rep. 778. A railroad company cannot make a guaranty to enable a hotel company to build a summer hotel on its line merely because the guests of the hotel would probably travel on the railroad and increase its business and profits. Western, etc., Co. v. Blue Ridge Co., 102 Md. 321, 62 Atl. 351, 2 L. R. A. (N. S.) 887, 111 Am. St. Rep. 362. A brewing company could not erect a building for a boarding house and saloon for rent, in order that the saloon keeper might buy its beer. U. S. Br. Co. v. Dolese, 259 Ill. 274, 102 N. E. 753, 47 L. R. A. (N. S.) 898. A few cases are directly contrary to the weight of authority. Twiss v. Guaranty L. Ass'n, 87 Iowa, 730, 55 N. W. 8, 43 Am. St. Rep. 418; Anheuser-Busch v. Heistand, 177 Fed. 197, 101 C. C. A. 367; Davis v. Old Colony Co., 131 Mass. 258, 41 Am. Rep. 221. In each of the other cases the doctrine of implied powers was recognized. In Best Br. Co. v. Klassen, 185 Ill. 37, 57 N. E. 20, 50 L. R. A. 765, 76 Am. St. Rep. 26, where the benefit to the corporate business was held to be too remote, the court said that the question as to such contract being within the implied powers was one to "be determined according to the facts of each case," and that such guaranty must be a means tending directly to promote the corporate business, "and not amounting to a separate unauthorized business." The doctrine we are following was thus recognized.

[3] The case presented by the record comes clearly within the principle of the first-mentioned cases. The Goldstein Company was in the business of selling theatrical costumes, and had a pending contract with the Continental Company for the sale of a large amount of such costumes, presumably for a good profit. It was directly interested in the continuance of the business by the Continental Company, and in the success of the enterprise of producing the proposed play. The circumstances are such as to create the inference, which the court might reasonably have drawn, that the payment of the expenses of the Continental Company in producing the film for the play, including the price of the costumes aforesaid, was very largely dependent upon its completion and its successful production. The expressed purpose of the lumber company to refuse further credit to the Continental Company threatened to stop the entire enterprise, both that of the Continental Company in manufacturing the film and that of the Goldstein Company in selling the costumes therefor. The manager of the company reasonably concluded that this could only be prevented by making the guaranty in question. In a business view the guaranty appeared to be essential to enable the Goldstein Company to obtain payments upon its contract with the Continental Company. It was to be reasonably expected that the making of the guaranty would advance the business of the Goldstein Company, and would secure to it the payment of the debt that would be due to it from its customer, the Continental Company. It was a thing helpful to the conduct of its business, and tended directly to promote the same. All of these things are held in the foregoing cases to be sufficient to bring the contract of guaranty within the scope of the implied powers of a corporation. We are of the opinion that the guaranty was a valid contract of the Goldstein Company.

[4] 2. It is apparent from what we have said that the Goldstein Company had what it deemed to be good reason to expect a substantial benefit from the making of the guaranty. As we have held that it had implied power to do so, under the circumstances, it is not necessary to consider the question whether or not the benefit was sufficient to create an estoppel to prevent it from asserting that it was ultra vires. If any consideration was necessary to make the guaranty binding, the selling of more lumber by the plaintiff to the Continental Company, in reliance thereon was sufficient for that purpose. Civ. Code, secs. 1605, 1606, 2792.

[5] 3. Under the circumstances shown by the evidence, it was not necessary for the plaintiff to prove that the guaranty contract was directly authorized by the board of directors of Goldstein Company, or that it was ratified by them. It was signed by the secretary by the direction of R. Goldstein, the president and business manager of the corporation; the man who, apparently, had the power to direct and control, and who did direct and control, its affairs and business. Woods knew this, and relied upon it in accepting the guaranty and furnishing the lumber in reliance upon it. The authority of an officer or agent of a corporation to make contracts in its behalf may be shown by proof of conduct, and without resort to the minutes of its board of directors, or even where the minutes do not speak on the subject. "It may be shown by evidence that the person does business for the corporation and on its behalf, as agent, with the knowledge and acquiescence of its directors. * * * The company, in such a case, is bound by his acts * * * within the scope

of the business intrusted to him." Venice v. Short Line, etc., Co. (App.) 181 Pac. 658. "If a corporation allows its officers to conduct its business and third persons act upon the apparent authority thus shown, it cannot defeat the rights of such persons arising from transactions done and completed under such ostensible authority by failing to enter upon its minutes any order giving its officers authority to act." Fowler Gas Co. v. Weber, 181 Pac. 663, citing Fresno, etc., Co. v. S. P. Co., 135 Cal. 202, 67 Pac. 773; Blood v. La Serena L. Co., 134 Cal. 370, 66 Pac. 317; Crowley v. Genesee M. Co., 55 Cal. 276. We find no error in the record.

The judgment is affirmed.

We concur: OLNEY, J.; LAWLOR, J.

183 Cal. 566

In re MINTABERRY'S ESTATE.

BICKMORE v. GRIFFIN.

(Sac. 3030.)

(Supreme Court of California. Aug. 13, 1920.)

1. Executors and administrators ⊂⊃32(2)—Relative can name nominee only when such relative is personally competent to qualify.

Code Civ. Proc. § 1383, providing that, when letters of administration have been granted to any other person than the surviving husband or wife, child, mother, brother, or sister of intestate, any one of them who is competent, or any competent person at the written request of any one of them, may obtain the revocation of the letters and be entitled to the administration, only authorizes any of the relatives named to act through a nominee when such relative is personally competent to qualify as administrator.

2. Executors and administrators ⊂⊃32(2)—That person appointing nominee is surviving wife is immaterial, if she is not personally competent.

The mere fact that an administration of a decedent's estate involves the right of a surviving wife, claiming a superior right of nomination by virtue of Code Civ. Proc. § 1365, subd. 1, does not entitle her nominee to apply for revocation of letters granted to one not in the preferred class, when such wife is not personally competent to act as administratrix.

In Bank.

Appeal from Superior Court, Merced County; E. M. Rector, Judge.

Petition by Edward Bickmore for the revocation of letters of administration issued to W. M. Griffin, public administrator in the matter of the estate of Juan Mintaberry, deceased. From a denial of the petition, petitioner appeals. Affirmed.

William T. Hawkins, of Sacramento, for appellant.

J. J. Griffin and Hugh K. Landram, both of Merced, for respondent.

SLOANE, J. This is an appeal from an order denying the petition of Edward Bickmore for revocation of letters of administration issued to W. M. Griffin, public administrator of Merced county, in the matter of the estate of Juan Mintaberry, deceased, and praying for issuance of letters to himself.

The petitioner is the nominee of the widow of the decedent, who is a resident of the state of Nevada and therefore personally disqualified. The application for such change of administrators was made under section 1383 of the Code of Civil Procedure, which provides as follows:

"When letters of administration have been granted to any other person than the surviving husband or wife, child, father, mother, brother, or sister of the intestate, any one of them who is competent, or any competent person at the written request of any one of them, may obtain the revocation of the letters, and be entitled to the administration, by presenting to the court a petition praying the revocation, and that letters of administration may be issued to him."

[1] The trial court in denying the prayer of the petitioner held that this Code provision only authorizes any of the relatives named to act through a nominee, when such relative is personally competent to qualify as administrator. Such must be held to be the proper construction of the statute in view of the decision of this court in Estate of Martin, 163 Cal. 440, 125 Pac. 1055. In the Martin Case revocation was sought by the nominee of a nonresident brother. The court there says:

"The right to obtain such revocation is solely for the benefit of the relative. It is limited by express terms in the first instance to such of the designated relatives as are themselves competent, and the words 'at the written request of any one of them' may well be construed as referring solely to those described in the last preceding clause, viz.: 'Any one of them who is competent,' thus giving the competent relative the right to act either directly or through a nominee."

So construing the section, this court denied the right of the nominee of the nonresident brother to petition for revocation of letters and to succeed to the administration, under the terms of this section of the Code.

[2] Appellant seeks to avoid the application of the construction adopted in Estate of Martin, supra, for the reason that the present case involves the right of a surviving wife, claiming a superior right of nomination by virtue of the preference given by subdivision 1 of section 1365, Code of Civil Procedure. This cannot be done without doing violence

to the plain language of section 1383. Standing by itself, section 1383 clearly places the surviving husband or wife upon the same footing as the child, father, mother, brother, or sister in the matter of petitioning for revocation, and there is no such relation between the two Code sections cited as to justify reading into the latter an exception in favor of a husband or wife which cannot apply to the other relatives therein named. Obviously, either all or none are required by section 1383 to be qualified in person to act as administrator before naming a substitute.

As suggested by counsel for appellant it may be an unreasonable rule which permits the nonresident husband or wife to nominate a representative on an original application for letters of administration, but denies such privilege in the matter of revocation, where a stranger to the estate or a public administrator may have taken advantage of the nonresidence of the husband or wife to slip into the office unobserved; but the whole matter of representation of the estate is one of statutory regulation, and the Legislature has a wide discretion in determining the conditions to be imposed. It would perhaps be equally inconsistent to permit a nonresident brother or sister, father or mother, of decedent to compel a revocation of letters through a nominee when not permitted to act through such nominee on an original application for letters. We are compelled to accept one or the other horn of the dilemma.

On the authority of the Estate of Martin, supra, the judgment is therefore affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

(183 Cal. 486)

SINCLAIR v. JORDAN, Secretary of State. (S. F. 9554.)

(Supreme Court of California. Aug. 5, 1920.)

1. Elections ⇐126(1)—Statute requiring affidavit of candidate at primary election mandatory.

Direct Primary Law, § 5, subd. 4, and section 6, requiring candidate for Congress to file affidavit at office of the secretary of state specified period before day of primary election, is mandatory, and, on a candidate's failure to file affidavit within required time, secretary of state was without power to certify his name as a candidate, under section 10.

2. Mandamus ⇐74(3)—Court cannot by writ of mandate relieve primary election candidate from default as to affidavit.

Where candidate for nomination failed to file affidavit within required time, the court was not empowered to grant relief from his default, under Direct Primary Law, § 27, by writ of mandate requiring secretary of state to file affidavit and certify petitioner's name to be printed on ballot; such section having reference only to errors or omissions of those charged under the law with duties relative to the matter of primary election, and not to the failure of the candidate or those proposing him as a candidate to comply with mandatory requirements of the statute.

In Bank.

Mandamus by Bentley W. Sinclair against Frank C. Jordan, as Secretary of State. Proceeding dismissed.

Wright & McKee, Eugene Daney and Heskett, Sample & Harden, all of San Diego, and Walter H. Linforth, of San Francisco, for petitioner.

U. S. Webb and Robert W. Harrison, both of San Francisco, for respondent.

PER CURIAM. Petitioner seeks a writ of mandate requiring the secretary of state to receive and file the affidavit made by him for the purpose of conforming to the requirements of subdivision 4 of section 5 of the Direct Primary Law (St. 1911, p. 773) as a candidate for the Republican nomination for representative in Congress from the Eleventh congressional district, and to certify his name to the county clerks of the counties of the congressional district to be printed on the ballot to be used at the primary election to be held on August 31, 1920, as a candidate for said nomination.

[1] It is conceded, as it must be upon the admitted facts, that the petitioner failed to conform to a mandatory requirement of such law with relation to such affidavit, in that he failed to present such affidavit at the office of the secretary of state for filing "on or before the thirty-fifth day prior to" the day of the primary election. Subdivision 4, § 5 and section 6 of the Direct Primary Law. In view of the provisions of the law, the secretary of state could not properly receive the affidavit, which was not tendered to him for filing until after the latest date for filing had passed, and unless such an affidavit be on file the secretary of state cannot certify the name of petitioner as a candidate. Section 10, Direct Primary Law.

[2] Conceding the failure of petitioner to conform to this mandatory requirement of the law, relief from his default is sought by him at the hands of this court. We are forced to the conclusion that the courts have no power to grant relief in such a matter. Section 27 of the Direct Primary Law, the only provision authorizing any review by a court, is, to our minds, reasonably susceptible of no other construction than that it is inapplicable to any failure of the candidate or those proposing him as a candidate for nomination to comply with mandatory requirements of the law essential to his candidacy. It has to do solely with errors or omissions

of others charged under the law with duties relative to the matter of the primary election, and the relief expressly provided for therein is an order requiring "the officer or person charged with such error, wrong or neglect to forthwith correct the error, desist from the wrongful act or perform the duty."

The order to show cause is discharged, and the proceeding dismissed.

ANGELLOTTI, C. J., and SHAW, WILBUR, LAWLOR, LENNON, and OLNEY, JJ., concur.

183 Cal. 506

DAVENPORT v. SUPERIOR COURT OF CALIFORNIA IN AND FOR IMPERIAL COUNTY. (L. A. 6361.)

(Supreme Court of California. Aug. 11, 1920. Rehearing Denied Sept. 10, 1920.)

1. Corporations ⟸668(15)—Service on officer of foreign corporation which does not do business within the state is invalid.

In order that service of a foreign corporation made on an officer within the state be valid under Code Civ. Proc. § 411, the corporation must transact within the state some substantial part of its ordinary business by its officers or agents appointed for that purpose.

2. Appearance ⟸9(5)—Securing an order extending time to plead held not "general appearance."

The securing by defendant's attorneys of an order extending the time for defendants to plead is not, under Code Civ. Proc. § 1014, a "general appearance" which submits defendants to the jurisdiction of the court notwithstanding failure to secure legal service upon them.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, General Appearance.]

3. Appearance ⟸9(1)—Act manifesting intention to submit to jurisdiction of court is "general appearance."

An act of defendant by which he intentionally submits himself to the jurisdiction of the court in action to obtain a ruling or order going to the merits of the case is a general appearance, which waives objection to the services of process, though such act is not a demurrer, answer, or written notice of appearance, which are specified means of appearance under Code Civ. Proc. § 1014.

In Bank.

Petition for mandamus by Don Davenport against the Superior Court of the State of California in and for the County of Imperial. Writ denied.

M. C. Atchison, of Calexico, and Hocker & Austin, of Los Angeles, for petitioner.

Conkling & Brown, of El Centro, for respondent.

SHAW, J. This is a proceeding in mandamus to compel the superior court of Imperial county to order the clerk of said court to enter the default of each of two corporations, namely, Franco-American Vineyard & Wine Company and El Progresso Inter-California Canning Company, defendants in an action in said court wherein Don Davenport is the plaintiff.

The claim of the plaintiff is that each of said defendants has been duly served with the summons issued in said action, and has also entered a general appearance therein; that the time for answering or demurring has expired; that no answer or demurrer has been filed; and that notwithstanding these facts the court refuses to direct the clerk to enter either default.

[1] 1. The complaint in the action was filed and the summons was issued on February 19, 1919. On February 20, 1919, an attempted service of said summons was made on one Peter Barnes, as president of said Franco-American Vineyard & Wine Company and as secretary of said El Progresso Inter-California Canning Company, at Calexico, in Imperial county, near the Mexican line, by delivering to him there the proper papers for that purpose. At that time the said Peter Barnes held said offices in said respective corporations. No other service was ever made or attempted upon either defendant. Both of said corporations were foreign corporations, the first named being an Arizona corporation, and the second a corporation organized under the laws of Mexico. Neither of them has ever at any time done business within this state, or anywhere else except Mexico, and neither of them was at that time doing any business in this state.

In order to justify a finding that a foreign corporation is so far engaged in business in this state that a valid service of summons upon it in an action in this state, under section 411 of the Code of Civil Procedure, may be made upon its agent within this state, "the corporation must transact within the state some substantial part of its ordinary business by its officers or agents appointed and selected for that purpose." "Legal service of process upon a corporation, which will give a court jurisdiction over it, can be made only in the state where it resides by the law of its creation, or in a state in which it is actually doing business at the time of service, in the manner prescribed by the statutes of that state or of the United States." Doe v. Springfield, etc., Co., 104 Fed. 687, 44 C. C. A. 128; Jameson v. Simonds Saw Co., 2 Cal. App. 585, 84 Pac. 289. It follows, therefore, that the attempted service upon the two corporations by service upon Barnes as president and secretary, respectively, of said corporations, was ineffectual for any purpose.

2. The proposition that said defendant cor-

porations had entered a general appearance in said action so as to waive the service of summons upon them is not sustained by the record. On March 1, 1919, after the attempted service aforesaid, Messrs. Conkling and Brown obtained from the judge of the said court an order that the defendants have 20 days' additional time in which to plead to the plaintiff's complaint. Notice of this order was served on the plaintiff's attorneys on March 2, 1919. Thereafter, on March 11, 1919, the said attorneys for defendants served upon plaintiff's attorneys a notice that on March 14, 1919, the time being shortened to 2 days for that purpose, the defendants would move the court for an order to quash and set aside the pretended service of summons theretofore made in the action as aforesaid, and that said motion would be made upon the grounds above stated, that both defendants were foreign corporations, and that neither of them had ever done any business within this state. Thereafter, on March 22, 1919, the motion was regularly heard, and the court thereupon made an order setting aside and quashing the said service of summons upon said defendants.

Thereafter the plaintiff filed with the clerk an order from plaintiff to him to enter the default of said defendants upon the ground that their time for answering the complaint had expired, and in pursuance of said order the clerk, on March 31, 1919, made an entry of the default of said two corporation defendants. Thereafter, on April 25, 1919, the said attorneys for said defendants, upon notice duly given, moved the court to set aside the said default so entered by the clerk, upon the ground that the said defaults were entered by inadvertence and mistake of the clerk, that no summons had ever been served upon defendants, and that there was no authority or warrant for entering such defaults. The court sustained the motion and made an order setting aside said defaults. Afterwards, on October 17, 1919, pursuant to notice to the defendants' attorneys, plaintiff moved the court to enter the defaults of said defendants, based upon the claim that defendants had entered a general appearance in the action, which motion the court denied. Upon this order the present proceeding for a mandamus is based.

[2] The order given by the judge to the defendants' attorneys extending the time within which the defendants might plead to the complaint in the action therein did not, under the circumstances of this case, have the effect of a general appearance in the action and did not authorize the court to proceed to enter default against said defendants. "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." Code Civ. Proc. § 1014. Section 525 of the old Practice Act was identical with the above-quoted passage of section 1014. In Steinbach v. Leese, 27 Cal. 299, the court said on this point:

"We have no doubt that the written notice of appearance provided for in the section is a document to be drawn up especially for that purpose."

The point decided in that case was that the service of a notice of appeal by the attorney who represented some of the defendants, but did not represent Jones, the party concerned, although the notice purported also to be in his behalf, did not operate as a general appearance in the action. In Powers v. Braly, 75 Cal. 238, 17 Pac. 197, after two stipulations extending the time to answer had been made between the attorneys for the plaintiff and defendant, a motion by special appearance to strike out the complaint and dismiss the action was presented and an order extending time to plead was obtained. The court held, referring to section 1014, Code of Civil Procedure, that there was no general appearance. In Vrooman v. Li Po Tai, 113 Cal. 305, 45 Pac. 471, referring to this question, the court said:

"Section 1014 of the Code of Civil Procedure defines what shall constitute an appearance. A defendant appears in an action when he answers, demurs, or gives written notice of his appearance, or when an attorney gives notice of an appearance for him, and he can appear in no other way. This statute was intended to settle all disputes upon the subject. There can be no chance for argument about equivocal acts. * * * The occasion for a rule was to dispose of questions upon which there might be dispute."

In Anderson v. Nawa, 25 Cal. App. 153, 143 Pac. 555, the giving of a notice to dismiss the action because of delay in serving the summons was declared not to constitute a general appearance. See, also, Waters v. Central T. Co., 126 Fed. 469, 62 C. C. A. 45, Benedict v. Arnoux (Sup.), 38 N. Y. Supp. 882, Bell v. Good (City Ct.), 19 N. Y. Supp. 695, and Paine L. Co. v. Galbraith, 38 App. Div. 68, 55 N. Y. Supp. 971, each holding that the obtaining of an order extending the time to plead is not a general appearance under a similar provision of the New York Code.

The cases cited to the contrary are Roth v. Superior Court, 147 Cal. 604, 82 Pac. 246, Cooper v. Gordon, 125 Cal. 296, 57 Pac. 1006, and California, etc., Co. v. Superior Court, 13 Cal. App. 65, 108 Pac. 882. In the Roth Case a stipulation between the respective attorneys, made the day after the service of summons, extending defendant's time to plead, was held to be a "virtual appearance" and sufficient to prevent a dismissal of the action, under section 581, subd. 7, of the Code as amended in 1897 (St. 1897, p. 98), after the lapse of three years. In Cooper v. Gordon two stipulations, each granting plaintiff the right to have judgment entered in his favor at any time and providing for a stay of execution thereon

upon certain conditions, were held to estop the defendant from moving to dismiss the action, and to be, in effect, an answer admitting the truth of the complaint. In California, etc., Co. v. Superior Court, a letter of defendant's attorney to plaintiff's attorneys, asking a stipulation for further time to answer, in order to avoid the filing of a demurrer, and the making of a stipulation giving time to answer as requested, followed by an application to the court, based on an affidavit showing cause, for a further extension, which the court granted, were held to amount to a general appearance. In each of these cases the court was considering the effect of stipulations between the attorneys for the respective parties, and it was, in effect, determined that the stipulations under consideration, under the circumstances there appearing, showed an intent to appear generally and not specially. The construction of section 1014 in Vrooman v. Li Po Tai, supra, was directly recognized as correct in the Roth Case.

[3] The statement in the above-quoted passage from the Vrooman Case, that a defendant "can appear in no other way" than by demurrer, answer, or formal written notice, is doubtless too broad. An act of a defendant by which he intentionally submits himself to the jurisdiction of the court in that action for the purpose of obtaining any ruling or order of the court going to the merits of the case, as, for example, a motion to strike out part of the complaint, or the making of stipulations, as in the cases above mentioned, which may reasonably be construed to imply that the court has in that action acquired jurisdiction of the person of the defendant, will be equivalent to an appearance, although not strictly in accordance with the terms of section 1014. But the securing of the order extending time to plead was not an act of that character, and the rule of section 1014 should be applied to this case.

Under all these circumstances we are of the opinion that the defendants did not enter an appearance to the action, and that the application for an entry of the default based on the supposed appearance was properly denied by the court below.

The application for a writ of mandamus is denied.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; LENNON, J.; WILBUR, J.; LAWLOR, J.

183 Cal. 466

ROLLAND v. PORTERFIELD. (L. A. 6064.)

(Supreme Court of California. Aug. 3, 1920.)

1. Appeal and error ⟹1011(1)—Findings on conflicting evidence conclusive.

Trial court's findings on conflicting evidence are conclusive.

2. Appeal and error ⟹931(1) — Reasonable inferences to be indulged in support of findings.

All reasonable inferences are to be indulged in support of findings.

3. Evidence ⟹570, 574—Expert and nonexpert testimony, of equal weight and conflict, must be determined by jury.

There is no distinction between expert testimony and evidence of other character as regards the weight to be given the testimony in a particular case, and, where there is a conflict between scientific testimony and testimony as to the facts, the jury or trial court must determine the relative weight thereof.

4. Witnesses ⟹317(1)—Trial court may disregard testimony of witnesses as incredible.

Under Code Civ. Proc. § 2061, subd. 3, it was within the province of the court to determine to what extent the falsity of certain testimony, which the evidence was sufficient to satisfy the court was false, affected the credibility of other statements of same witnesses concerning contemporaneous occurrences.

5. Bills and notes ⟹517—Evidence held to justify finding that note was forged.

In an action on note involving issue of whether note had been forged, evidence *held* to justify finding for defendant.

6. Executors and administrators ⟹221(6)—Evidence held insufficient to prove loan.

In an action against an executrix, evidence that plaintiff had made certain payment to testator *held* not sufficient to prove a loan; the presumption, under Code Civ. Proc. § 1963, subd. 7, being that the money was due testator.

Department 2.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by Lordy Rolland against Pearl Morgan Porterfield, executrix of the estate of Alfred E. Blake, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

E. E. Rogers and Richard Kittrelle, both of Los Angeles, for appellant.

John G. Harrah and Rush M. Blodget, both of Los Angeles, for respondent.

LENNON, J. This action was brought by plaintiff against the executrix of the estate of Alfred E. Blake, deceased, to recover the sum of $5,500. The complaint contains two counts. The first count is based upon a promissory note for $5,000 alleged to have been "made, executed, and delivered" by decedent. The second count seeks to recover the sum of $500, alleged to have been loaned to decedent by plaintiff. The trial court rendered judgment in favor of the defendant and against the plaintiff on both counts of the complaint, and plaintiff appeals upon the ground that the findings and judgment of the trial court

are not supported by the evidence. The position of appellant is predicated upon the proposition that there is no conflict whatever in the evidence, and that all of the evidence supports the allegations of the complaint.

The promissory note for $5,000 is written on the back of an old photograph of the mother of decedent, and is in the following words:

July 13, 1917.

"*I, Alfred E. Blake*, do hereby acknowledge a debt for loans and very kind services from Lordy Rolland to me, the debt I owe is $5,000 thousand dollars gold American coin to be paid at my death. *Alfred E. Blake.*"

It is an admitted fact in the case that the words above italicized are in a different handwriting from that of the rest of the note. In support of the allegations of the execution and delivery of this note, two witnesses testified that the following events occurred in their presence: On the evening of July 13, 1917, the date of the note, the witnesses were, together with decedent, at the home of plaintiff. Decedent requested a piece of paper, pen, and ink, which were brought. Instead of using these, however, he took up the photograph of his mother which was standing on the table, removed it from its frame, and, after erasing, with a moistened handkerchief, some writing on the back of the photograph, handed it to plaintiff with directions to write on the back thereof at his dictation. When plaintiff had finished writing, decedent signed his name on the back of the photograph, returning it to plaintiff with instructions to keep it. It was also stated that decedent did not request plaintiff to do the writing until he had himself started to write and found there was insufficient ink in his fountain pen, thus accounting for the first few words of the note in decedent's handwriting. One of these witnesses, Clinton Marr, a boy employed to wheel decedent about in a wheel chair, testified that about a month later plaintiff gave him the same picture, which had in the meantime been replaced in its frame, and told him to take it to decedent. According to the further testimony of this witness, decedent, upon receiving the photograph, called plaintiff on the telephone, telling her that she should have kept the picture, because it was her only protection, and that she must come over and get it. The picture remained at the home of decedent until his death, October 31, 1917. Thereafter it was given by defendant to plaintiff upon the latter's request. Three other witnesses testified that decedent had told them, at different times, that he had borrowed quite a sum of money from plaintiff and that he had given her a note therefor. One of these witnesses stated that plaintiff was worried about some loans she had made to decedent, and, at her suggestion, he mentioned the matter to decedent. During the ensuing conversation, so the witness stated, decedent said that he had borrowed $5,000 from plaintiff, but that she was protected by a note. In response to an inquiry from the witness as to why decedent had borrowed money from the plaintiff when he had property of his own, the answer of decedent was, as quoted by the witness:

"Well, you borrow it from the bank; something happens to me if this gangrene sets in on me again; they will take my property and everything away from me; that is the reason. Why should I go to the bank and borrow money when I have friends to help me out of my difficulty?"

The above testimony in favor of plaintiff may be resolved into the three following fundamental factors, namely: (1) That two witnesses saw plaintiff write on the back of the photograph on July 13, 1917, in the presence of decedent and at his dictation; (2) that thereafter the same witnesses saw decedent sign his name on the back of the photograph and deliver the same to plaintiff; (3) that decedent made statements to certain persons that plaintiff had loaned him $5,000, and that she was protected by a note from him.

[1, 2] As stated in Hoppe v. Robb, 1 Cal. 373, and repeated in nearly every subsequent volume of the California Reports, the findings of the trial court upon conflicting evidence are conclusive, and all reasonable inferences are to be indulged to support the findings. It therefore remains to be determined whether there was any conflicting evidence on these salient points to support the finding of the trial court that:

"It is not true that within the county of Los Angeles, state of California, on the 13th day of July, 1917, or at any other place, or at any other time, or at all, that the said decedent, Alfred E. Blake, made, executed, and delivered, or made, executed, or delivered, his promissory note in words and figures as set out in paragraph II of plaintiff's complaint in this action."

[3] In behalf of defendant a handwriting expert testified, giving in full the reasons upon which his opinion was based, that the words above italicized could not have been written on July 13, 1917, and that they had, in his opinion, been written approximately ten years ago. In derogation of this testimony appellant cites the statement in Grigsby v. Clear Lake Water Co., 40 Cal. 405, to the effect that expert witnesses "are generally but adroit advocates of the theory upon which the party calling them relies, rather than impartial experts, upon whose superior judgment and learning the jury can safely rely." Whatever the individual opinion as to the value of expert testimony, it has been clearly settled in this state that, as regards the preference or weight to be given the testimony in any particular case, the law makes no distinction between expert testimony and evidence of other character, and that, when

there is a conflict between scientific testimony and testimony as to the facts, the jury, or trial court, must determine the relative weight of the evidence. Estate of Blake, 136 Cal. 306, 68 Pac. 827, 89 Am. St. Rep. 135; Watson v. Watson, 58 Mich. 507, 25 N. W. 497. Moreover, the note itself, which was offered and received in evidence, affords, by reason of the relative position and condition of its parts, intrinsic evidence amply sufficient to warrant a person, even in the absence of any scientific testimony on the question, in concluding, from ordinary observation, that the name of decedent and the words "July 13" were written on the back of the photograph before the rest of the writing was placed there.

[4] Appellant contends that, in view of the fact that there is no dispute that the signature appearing on the back of the photograph is the signature of decedent, and in view of the direct testimony that decedent delivered the note to plaintiff in the presence of two witnesses after the plaintiff had written thereon, the note must be held binding upon the estate of decedent, and the time when the signature was placed on the back of the photograph is immaterial. This assumes that the testimony as to the delivery of the note under the above-mentioned conditions is uncontradicted and entirely trustworthy, which is not the case. If the evidence adduced by defendant as to the relative date of the signature of decedent was sufficient, in the mind of the trial judge, to disprove the direct and positive statements of the two witnesses in behalf of plaintiff that they saw decedent sign his name on the back of the photograph under the described circumstances, it was exclusively within the province of the same judge to determine to what extent the falsity of this part of the testimony of the two witnesses affected the credibility of the other statements of the same witnesses concerning contemporaneous occurrences, namely, the writing by plaintiff at decedent's direction and the delivery of the note to plaintiff by decedent. Code Civ. Proc. § 2061, subd. 3; Robinson v. Robinson, 159 Cal. 203, 113 Pac. 155. Furthermore, the testimony of plaintiff's witnesses on this phase of the case is not entirely uncontradicted by defendant's witnesses; for a witness for defendant testified that, four nights before decedent's death, she examined this particular photograph, among others on decedent's desk, and, although she had the picture out of its frame and looked at the back of it, she noticed no dark writing, such as that claimed to have been written by plaintiff, but only light writing, such as the name of decedent. She also testified that all of the other pictures of decedent which she saw at that time bore his name on the back, and that her attention would have been attracted by any heavy writing such as that now appearing on this photograph. Counsel for appellant observe that this testimony is indefinite and unsatisfactory, in that this witness did not testify that there was, in fact, no writing on the back of the photograph other than the name of decedent. It may be pointed out in reply that the testimony in behalf of plaintiff in identification of the handwriting other than decedent's was equally indefinite and uncertain; for there was no testimony that the words claimed to have been written by plaintiff and now appearing on the back of the photograph were the ones which were written at decedent's dictation. On the other hand, both of plaintiff's witnesses who claim to have seen the delivery of the note testified that they did not hear what decedent dictated to plaintiff and that they never saw what was written by plaintiff. One of these witnesses stated that she did not know whether or not the writing which is now on the back of the photograph is the same writing that was there when she saw decedent sign his name. The testimony of the other witness is silent on this point. There must also be taken into consideration the testimony of defendant that her attention was not called to the writing on the back of the photograph at the time that plaintiff asked defendant for the picture, but that, subsequent to decedent's death and a few days after she had given the photograph to plaintiff, the latter for the first time showed her the writing on the back thereof, and, upon being told by defendant that it was not in decedent's handwriting, said:

"I know it is not, I have just written that. * * * It is just a copy of what was on there."

In contradiction of the testimony of witnesses as to statements made by decedent that he had given a note to plaintiff for money borrowed by him, there stands the testimony of defendant that decedent had stated to her that he did not owe any one a cent and that there were no debts against his estate.

[5] From the foregoing analysis of the evidence adduced upon the whole case it is evident that the finding of the trial court, if not unavoidable, was at least justifiable.

[6] Upon the issue of the loan of $500 there was simply the testimony of the boy, Clinton Marr, that, when plaintiff told him to take the photograph to decedent, she also gave him a handkerchief which, plaintiff stated to witness, contained $500. When this was delivered to decedent, he remarked that he had not seen so much money for a long time. There is an entire absence of testimony as to the purpose for which this money was sent to decedent. It is a presumption "that money paid by one to another was due to the latter," and such a presumption is satisfactory if uncontradicted. Code Civ. Proc. § 1963, subd. 7; Fox v. Monahan, 8 Cal. App. 707, 97 Pac. 765. The testimony of witnesses as to

decedent's statements that he had borrowed money from plaintiff cannot be considered as relating to the $500 loan; for they all include the statement that decedent had given plaintiff a note for the money borrowed, whereas the $500 loan is claimed to have been unsecured by note. Obviously these statements were introduced in support of the action on the $5,000 note. Even if this evidence could be considered as relating to the $500 loan, it is contradicted by the testimony of defendant above referred to, namely, that decedent told her he owed nothing.

The evidence supports the findings, which, in turn support the judgment.

The judgment is affirmed.

We concur: WILBUR, J.; SLOANE, J.

183 Cal. 576

CROUCH et al. v. WILSON et al.
(L. A. 5338.)

(Supreme Court of California. Aug. 19, 1920.)

1. Fraud ⟸45—Cross-complaint held not defective in failing to state knowledge of falsity.

In an action on a note given for purchase price of a stallion, a cross-complaint for fraud, alleging that every one of the representations made by plaintiff was wholly false, and were personally known to the plaintiff to be untrue, *held* not open to the objection that there was no direct allegation that the representations were actually known by the plaintiffs to be untrue.

2. Fraud ⟸45—Cross-complaint held not defective, as not showing in what respect representations were false.

In an action on notes given for the purchase price of a stallion, wherein defendants interposed fraud and claimed damages for false representations, cross-complaint *held* not defective as failing to allege in what respect the representations were false or fraudulent.

3. Sales ⟸52(7)—Evidence in action for price of stallion held to sustain findings of fraud.

In an action on a note given for the purchase price of a stallion, wherein the defense of false representations as to the value and history of the stallion was interposed, evidence *held* sufficient to sustain finding of fraud in that the stallion delivered was not the stallion in fact purchased.

4. Sales ⟸120—Purchaser of stallion under guaranty held entitled to rescind without suing on guaranty.

In an action on a note given for the purchase price of a stallion, wherein the defense of fraud was interposed, that the sales agreement provided for rescission by the purchaser by a return of the stallion did not make it necessary for defendants to bring action on the guaranty; the claim of fraud going to the very inception of the guaranty contract.

5. Sales ⟸124—Offer to rescind, failing to expressly offer to return property purchased, held insufficient.

Where note was given for the purchase price of a stallion, an offer to rescind *held* insufficient, where it did not appear that the defendants offered to return the stallion to the plaintiff.

Department 1.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by J. Crouch and another, copartners doing business under the firm name and style of J. Crouch & Sons, against John T. Wilson and others, with cross-complaint by defendants. From a judgment that neither plaintiff nor defendants take anything by the action, plaintiffs appeal. Reversed, with directions to enter judgment for plaintiffs.

Jones & Weller, and Simms & Fulwider, all of Los Angeles, for appellants.

Haas & Dunnigan, of Los Angeles, for respondents.

LAWLOR, J. This is an appeal by the plaintiffs and cross-defendants J. Crouch and G. R. Crouch, copartners, doing business under the firm name and style of J. Crouch & Son, from a judgment in favor of the defendants and cross-complainants, John T. Wilson, J. O. Jennifer, F. L. Troxel, B. F. Ermel, and P. L. Lopez, in an action to recover upon certain promissory notes executed and delivered by the said defendants, in which action they filed a cross-complaint, alleging that the notes had been given as the price of a stallion purchased from the plaintiffs, and that said sale had been procured by fraudulent representations, and praying the rescission of the contract, the cancellation of the notes and damages in the sum of $1,950. The record on appeal is presented under the alternative method.

Plaintiffs were engaged in the business of importing Percheron horses from France and selling them in this country. Their principal place of business was in the state of Indiana, but they maintained branches in various states for the purpose of the delivery to their agents and sale of the animals. In 1911 the California branch was located at Sacramento, and was in charge of J. F. Campbell. Harry Kenah was the local agent of the plaintiffs at Santa Ana. After some negotiations between Kenah and the defendants, the latter formed a syndicate or association under the name of the San Fernando Horse Breeders' Association. On January 8, 1912, defendants agreed to purchase from plaintiffs a Percheron stallion named "Epinal" for the sum of $4,000, and the defendants jointly executed three promissory notes aggregating that amount, which notes are those upon which

plaintiffs have brought this action. On the same day plaintiffs executed this guaranty:

"We have this day sold the imported Percheron stallion Epinal No. 65631 to the San Fernando Horse Breeders' Association, * * * and we guarantee the said stallion to be a satisfactory, sure breeder, provided the said stallion keeps in as sound and healthy condition as he now is and has proper care and exercise. If the said stallion should fail to be a satisfactory, sure breeder with the above treatment, we agree to take the said stallion back, and the said horse company agrees to accept another imported draft stallion of equal value in his place, the said stallion * * * to be returned to us at Sacramento, California, in as sound and healthy condition as he is now by April 1, 1913."

Defendants admitted the execution, delivery, and nonpayment of the notes, and filed a cross-complaint, alleging that the plaintiffs represented to them that the stallion was valuable for breeding purposes; that he was a thoroughbred Percheron stallion, registered and bred in France and known as "Epinal"; that to the personal knowledge of plaintiffs he had been stood and proven to be a sure "foal-getter" in France; that he had never been stood in the United States; and that he had just been imported and brought "practically direct" to California. The cross-complaint further alleged that such representations were made to induce defendants to purchase the stallion; that the defendants relied solely on these statements, and were induced thereby to purchase him; that each of the representations was false, and was known to the plaintiffs to be false; that defendants did not discover the stallion was not a sure breeder until July, 1912, and did not discover he had been stood in this country and proven worthless, or that he had been in this country for two years prior to the sale, until December, 1912, and that in July, 1912, and continuously thereafter until February, 1913, defendants repeatedly requested plaintiffs to rescind the contract and to accept the return of the stallion. The cause was tried by the court without a jury. The court found that each of the alleged misrepresentations had been made by Kenah as agent for the plaintiffs; that all of the representations were known by Kenah to be false, and were made for the purpose of inducing defendants to purchase the stallion; that in fact the stallion had been in the United States for more than two years; that he had been tried as a "foal-getter," and had been proven to be totally barren and worthless for such purposes; that defendants "had repeatedly requested the plaintiffs to rescind said contract and to accept the return of said stallion"; that "plaintiffs at all times refused to rescind said transaction or to accept the return of said stallion"; and that the horse was not worth the sum of $4,000, or any sum in excess of $200. The judgment was that neither the plaintiffs nor the defendants take anything by the action. It is from this judgment that the plaintiffs appeal.

Appellants contend: (1) That the cross-complaint lacks certain necessary averments to state a cause of action for rescission; (2) that the cross-complaint is insufficient, in that the defendants, having elected to rescind the contract, "are bound by their election, * * * and cannot now stand upon any claim for damages"; (3) that "the evidence was wholly insufficient to support the findings of the court as to fraud at the inception of the contract"; (4) that, inasmuch as the guaranty provided, in the event Epinal should not prove to "live up" to the terms of the guaranty, that plaintiffs should exchange the stallion for another, "the defendants * * * must abide by its terms and be bound by the remedy which it provides for a breach"; and (5) that "there is in the correspondence [between the parties] * * * no expression of intention * * * to rescind the contract of sale, no offer to return the horse."

[1] 1. As to the alleged defects in the cross-complaint. The transcript on appeal was prepared in typewriting, as provided in sections 953a, 953b, and 953c of the Code of Civil Procedure. Appellants did not print in their opening brief any portion of the pleadings. Section 953c. Respondents called attention to this omission, and now claim that the sufficiency of the cross-complaint should not be considered. Their brief was filed subsequently to the amendment of section 953c (Stats. 1919, p. 261), of which no notice was taken, and the appellants have not replied. We have, however, examined the transcript. The position of appellants is: First, that "primarily there is no direct allegation that the representations were actually known by the plaintiffs to be untrue." Paragraph 6 of the amended answer and cross-complaint alleges "that each and every one of the representations so made * * * by the said J. Crouch & Son * * * was wholly and entirely false and untrue, and were * * * personally known by the said plaintiffs * * * to be untrue." The cross-complaint is not open to the objection urged.

[2] Appellants also claim:

"Nor is there any allegation in the cross-complaint showing in what respect such representations were false or fraudulent."

But paragraph 6, after asserting the falsity of the representations and the scienter of the plaintiffs, also alleges:

"That in truth and fact the said stallion had been in the United States for more than two years, and that the said fact was then and there well known to the said plaintiffs, and that in truth and fact the said stallion had prior thereto been stood and tried as a 'colt-getter' or breeding stallion in the United States, and had been proven and demonstrated by actual

experience that he was totally barren and utterly worthless for said purposes."

It plainly appears from these allegations wherein the representations made by Kenah on behalf of appellants were false.

2. Appellants' contention that defendants "cannot now stand upon any claim for damages" is disposed of on the ground that the judgment appealed from is that neither party take anything by the action. No judgment for damages was rendered.

3. We now turn to a discussion of appellants' claim that the findings of fraud are not supported by the evidence. At the trial respondents undertook to prove that appellants did not deliver to them the registered Percheron stallion Epinal, but that instead appellants delivered to them a grey Percheron stallion registered under the name of "Francinette," which had been formerly owned by McLaughlin Bros., a firm in Oakland and competitors of appellants, and which had, several years before, been stood in Los Angeles and found worthless for breeding purposes. On this point respondent Wilson testified:

"He [the stallion] has turned whiter; as he grows older he turns white. He is not quite as fleshy as he was a couple of months ago; he weighs a couple of hundred or one hundred and fifty pounds less. * * * When we purchased him he was a dapple grey horse, and he has faded out considerably now, and has turned grey. * * * Q. What is the difference between the appearance of that quarter crack [in the hoof of the stallion] as it now exists compared with when you first saw the horse? A. It is practically the same. * * * Q. Was there any evidence of his having suffered a recent injury at the time you bought the horse? A. No, sir. * * * I regarded it as an injury the colt had sustained when it was very young."

W. S. Magill, a veterinary surgeon, testified that he had known the stallion which was delivered to respondents for four years; that when he first saw him he was a

"dark, dapple grey. He is now grey, not a white, but a grey, changing to white. The process has been gradual. * * * The deformity was a depression in the left front hoof caused by a crush received in some manner when he was very young, a colt or a foal, perhaps. * * * It was not a wire cut or a quarter crack. * * * A groove in the hoof. It come from an injury from a crush. * * * And the other deformity in the hind leg, that would come from colthood too, from being foaled. * * * Both of these were that way when he was foaled."

W. J. Crouch admitted that he had not noticed any quarter crack or depression in the hoof of the stallion, Epinal; that no such deformity existed in the horse appellants had purchased in France.

George W. McElroy testified that he was engaged in farming in Illinois; that in 1908 he had purchased from appellants a grey Percheron stallion named Epinal; that he kept the horse three years; that during that time "Epinal was a satisfactory and sure colt-getter"; and that he had no quarter crack or groove in his hoof.

L. Goodin testified that he lived in Los Angeles and had been breeding stallions in California for more than 30 years; that he had examined the stallion delivered to respondents; that he had seen him in 1911 and had had charge of him at that time; that this stallion was then known as "Francinette"; that he was positive this was the same horse; that Francinette had been stood repeatedly, but had failed to beget any colts; and that in September or October, 1911, he had been returned to McLaughlin Bros. of Oakland.

L. A. Lanning, one of the owners of the stallion, Francinette, testified that the stallion in possession of the respondents was the same horse that he had bought under the name of Francinette on April 29, 1911, and had kept about five or six months; that "he was a horse when we bought him in the neighborhood of 2,140 pounds, but he is much whiter now than he was then, and he is much thinner than he was then. * * * He has a quarter crack on his left front forefoot, had when we had him. * * * He is a kind of a peculiar horse in his going, in his travel; when we shipped him to Oakland, I led him down behind the wagon to the depot, and he is a horse that you cannot walk him, he is a horse that will trot, and I led him yesterday from my place to Dr. Connolly's, and it is the same horse, exactly."

Guy Goodin and L. E. Wood corroborated the testimony of L. A. Lanning.

[3] Appellants introduced evidence tending to show that the Percheron stallion Epinal was purchased in France and shipped by them to Indiana; that he was subsequently sold and delivered in 1908 to McElroy, who stood him and bred him satisfactorily for three years; that, upon McElroy's trading him back to appellants, he was shipped to California in the latter part of 1911 and sold to respondents in 1912. It is unnecessary to refer to the remainder of the evidence introduced by appellants further than to say that it created a conflict. It clearly appears that the evidence is sufficient to sustain the findings.

4. We shall next consider appellants' contention that the respondents did not rescind in accordance with the terms of the contract. In this connection appellants take the position that—

"The representations being in regard to matters relating to his previous record and ability, they could not be held to change or modify the express contract which followed, and which contained a more positive assertion of his present capacity."

Union Investment Co. v. Rosenzweig, 79 Wash. 112, 139 Pac. 874, as a similar action. We quote from the opinion:

"On the delivery of each of the horses the vendors sent to the vendees a writing guaranteeing that the stallion described therein 'would get sixty per cent. of the producing mares with foal, with proper care and handling,' and, if he did not do so, that they would replace him with another stallion of the same breed and price. The writing also contained the further provision to the effect that the foregoing was the only contract, guaranty, or representation made by the vendees. * * * The appellant contends that the remedy of the respondents was confined to the terms of this bill of sale or guaranty, and that they cannot be heard to urge any defense to the note itself. But the defense to the note was fraud in its inception, and, because of the fraud a want of consideration for the note, and clearly under this defense the respondents were entitled to show the worthless character of the horses for the purpose for which they were purchased, notwithstanding the terms of the guaranty may have included another remedy. In other words, the guaranty was accepted on the theory that the vendors of the horses were acting honestly and in good faith, and, when the respondents discovered otherwise they could lawfully repudiate the transaction."

[4] We think that the discussion in that case is plainly applicable to the facts herein. The guaranty was part of the contract which the respondents here seek to rescind. To say that they must comply with the terms of the guaranty in order to have their remedy for the alleged fraud, is, in effect, to take the position that the respondents are bound by the very contract which they seek to avoid. Such position cannot be upheld. Appellants cite on this point the case of First National Bank v. Hughes, 5 Cal. Unrep. 454, 46 Pac. 272. But in that case the ground of the attempted rescission was the breach of a warranty, and it was held, in accordance with section 1786 of the Civil Code, that the breach of a warranty did not entitle the buyer to rescind an executed sale. There was no allegation or proof of fraud in that case. Here, the ground of rescission is the fraudulent representations of the appellants. As we have seen, the court found that the whole transaction was fraudulent. The misrepresentations were made to induce the respondents to enter into the contract and to accept the guaranty. The guaranty must therefore be regarded as part of the scheme to defraud and deceive respondents. The object of reducing contracts to writing is to prevent, not to promote or protect, fraud.

5. We shall next consider appellants' fifth contention. The court found, as above shown, that the respondents offered to return the stallion, but that appellants had refused to accept it. This presents the question whether this finding is supported by the evidence. The correspondence to which appellants refer consists of three letters. On June 28, 1912, respondent Ermel wrote to Campbell:

"We regret to advise you that we have learned that the grey stallion Epinal No. 63631 is not as he was represented to us. We have discovered that he is a barren horse and must ask that you come down here at your earliest convenience and straighten the matter out."

Campbell replied on July 9, stating that, as far as he knew, the horse was "just as he was represented to be," and asking Ermel "to take the matter up with J. Crouch & Son." Accordingly, Ermel wrote to appellants under date of July 13, inclosing a copy of Campbell's letter, "the horse is entirely unsatisfactory and not as represented, and we would like to have the matter adjusted at once." To this appellants replied on July 17 that they were prepared "to live up to the guaranty to the letter"; that they were "much surprised that he [the horse] has not proven satisfactory." On August 7 Joseph P. Keogh, respondents' attorney, wrote to Campbell that—

Respondents had been led to believe that the stallion delivered to them by appellants was not Epinal, but "a horse that was sold to some other people in this section of the country, and was returned by them * * * to McLaughlin Bros., * * * as a barren horse and utterly worthless for the purpose for which it was sold. * * * Will you kindly advise me by return mail whether or not you will adjust this matter with my clients and return to them the notes they signed? If this matter is not adjusted satisfactorily by the 19th day of this month, I shall advise my clients to institute suit to rescind the contract, on the ground of fraud and to recover the damages which they have sustained to date."

[5] No other evidence was received to prove an offer to return the stallion. It is true that at the trial it was stipulated by appellants that Ermel, who could not be present in court, "would testify that he * * * personally offered to return to the plaintiffs the said stallion; * * * and that the said plaintiffs refused to accept said return." But it appears that the "offer" to which Ermel "would testify" was contained in his letters to Campbell and to the appellants, which we have just quoted. Acording to the findings the stallion was not worth "any sum in excess of $200." This amounts to a finding that the horse had a value of $200. It was incumbent upon the respondents, seeking rescission of their contract of purchase, to allege and prove that they had returned, or offered to return, to appellants everything of value which they had received under the contract. Section 1691, Civ. Code; Gifford v. Carvill, 29 Cal. 589, 593; Gamble v. Tripp, 99 Cal. 223, 226, 33 Pac. 851; Kelley v. Owens, 120 Cal. 502, 47 Pac. 369; 52 Pac. 797. This was not done. There is in the letters from Ermel to appellants and their agent

no offer to return the stallion, but only an expression of dissatisfaction with the procreative qualities of the horse, a statement that respondents believed fraud had been perpetrated upon them, and a request for an "adjustment" of the matter. In our opinion appellants' contention that the evidence does not support the finding that respondents offered to return the stallion must be sustained. It follows that respondents have failed to prove one of the essentials of rescission, and, on that theory of the case, the judgment that plaintiffs take nothing cannot be upheld. It is alleged, however, in paragraph 1 of the answer that the notes sued upon herein were given "wholly and entirely without consideration." The findings of fraud, already set forth, and the particular finding as to the value of the stallion, show that there was a failure of consideration for the notes, except to the extent of $200.

The judgment is reversed, with directions to the court below to enter judgment on the findings in favor of the plaintiffs for $200, without costs, and that defendants take nothing by the action. It is further ordered that respondents recover of appellants their costs of appeal.

We concur: SHAW, J.; OLNEY, J.

183 Cal. 548

COUGHLIN v. GREAT WESTERN POWER CO. (S. F. 8723.)

(Supreme Court of California. Aug. 13, 1920. Rehearing Denied Sept. 10, 1920.)

1. Evidence ⟸9—Judicial knowledge that electric current would jump 1 inch, to grounded metal, rather than 21 inches, to defendant's hand.

It is a scientific fact, of which we take judicial notice, that if a 22,000-volt wire had been surcharged with a sufficient voltage to jump for the distance of 1 inch, such additional voltage would have been discharged into the ground wire at that distance, rather than to ground through the hand of plaintiff at 21 inches, and, moreover, where there were iron beams in a substation 12 inches from the wire, which were connected with the corrugated iron surface connected with the ground, this would receive the charge, before it would have jumped 21 inches to plaintiff.

2. Master and servant ⟸278(11)—Evidence held insufficient to establish gross negligence as to operator of electric substation.

In an action based on gross personal negligence, within the Roseberry Act, brought by an electric substation operator, alleging injury by a current of electricity which jumped to his hand from a live 22,000-volt uninsulated wire, while he was cleaning a dead wire with a rag, evidence *held* insufficient to support a finding of gross negligence of defendant in failure to furnish a safe place to work.

Lennon and Lawlor, JJ., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by William E. Coughlin against the Great Western Power Company. Judgment for plaintiff, and defendant appeals. Reversed.

Guy C. Earl and W. H. Spaulding, both of San Francisco, for appellant.

O'Gara & De Martini, of San Francisco, for respondent.

WILBUR, J. Plaintiff recovered judgment in the lower court for damages sustained by him November 3, 1913, by the short-circuiting of a 22,000-volt current through his body while he was engaged in the work of cleaning certain bushings and wires in an electric substation operated by the defendant, his employer. Defendant appeals.

[1, 2] At the time of the injury the Roseberry Act (Stats. 1911, p. 796) was in force, and both plaintiff and defendant had elected to be bound by the provisions thereof. Plaintiff, however, ignored the compensatory provisions of that statute as therein authorized, in cases of gross personal negligence, and brought this action, in which the jury found as a fact by necessary implication that the defendant was guilty of such gross personal negligence. Unless such negligence has been proved, the plaintiff cannot recover. The claim of negligence is based upon the failure of the employer to furnish a safe place to work. Briefly stated, the admitted facts are as follows:

In the substation were three stationary transformers, by which electricity entering at 100,000 volts was transformed by induction into a current of 22,000 volts. To prevent the grounding of the high-voltage current, insulators, called bushings, extended 4 feet 6 inches above the upper surface of the transformers, which surface was 11 feet 5¼ inches above the floor of the substation. In order to prevent the current from leaking over the surface of these bushings, it is necessary to clean the surface thereof of dust and other accumulations about once a month, and for this purpose the current was shut off from the 100,000-volt circuit. Plaintiff was engaged in cleaning this surface and the uninsulated copper wire leading therefrom at the time of his injury, and for that purpose the current had been shut off from the high-voltage circuit. The injury resulted from the short-circuiting through his body of the 22,000-volt current coming from a sta-

tion bus distant from the wire being cleaned, at its closest point, between 28¼ and 31 inches. It was unnecessary to clean the surface of the copper wire, as the purpose of the cleaning was to avoid the danger of short-circuiting the current over the surface of the bushing. The plaintiff had been working in the substation a month, and knew the voltages carried by the respective wires, and believed that the arcking distance from the 22,000-volt wire was only three-eighths of an inch. He had arranged the switches at the substation to shut off the current on the 100,000-volt wire and retain the current on the 22,000-volt wire, and at the time he was engaged in cleaning the former the 22,000-volt wires were "hot." The arcking distance of a 22,000-volt current to ground under the most favorable conditions is 1.2 inches.

Assuming that it was properly a part of the duty of the employé, not only to clean the bushing, but the copper wire arising therefrom, the question at issue resolves itself into this: Was it negligence to so arrange the substation that a man was required to clean the wire distant 28¼ inches from an uninsulated wire carrying a current of 22,000 volts? It must be obvious that such a wire could be cleaned by wiping it with a rag, without bringing any part of the body sufficiently near the station bus to produce an arc. If this was a usual place in which a workman was required to perform duties which would distract his attention from the perils involved in working in proximity to an uninsulated high-voltage wire, and there was a possibility of contact by reason of unconscious or involuntary action, it might readily be concluded that a finding of gross negligence by the jury was sustained by the evidence. But this was not a place where workmen were usually required to work. At most but once a month were they called upon to perform this service, and then under conditions which necessitated their careful attention to the condition of the various wires in the substation. To have come in contact with the 100,000-volt wire, or within arcking distance thereof (10¼ inches), meant instant death. It is evident that a man, engaged in the occasional task which occupied the plaintiff, would naturally be alert to the peril of his position.

At this point it is well to give the plaintiff's statement as to the conditions attending his injury. He testified that the current jumped across a space of 21 inches to the back of his hand. If this were a contestable fact, we would have to assume the correctness of this testimony in determining the question of defendant's negligence. But it is a scientific impossibility for a current of that voltage to jump through the air for that distance, and it is shown that a lightning arrester with a perfect ground reached within one inch of the wire. It is a scientific fact, of which we take judicial notice, that if a 22,000-volt wire had been surcharged with a sufficient voltage to jump for a distance of one inch, such additional voltage would have discharged into this ground wire at 1 inch, rather than to ground through the hand of the plaintiff at 21 inches. Moreover, the iron beams of the substation were within 12 inches of the 22,000-volt wire, and connected with the corrugated iron surface of the substation so as to form a perfect ground, and this would receive the discharge before plaintiff could have been injured as he states. Plaintiff testified that the rag in his hand was moist and dirty; that he had been flipping the rag about in an endeavor to clean the 100,000-volt wire at a point higher than he could reach, and for the purpose, also, of shaking the dust out of it.

It is defendant's contention that his injury resulted from the rag coming in contact with the 22,000-volt wire, and thus forming an arc which, once formed, may extend a distance of 2 or 3 feet. If the injury thus resulted, it is evident that it was occasioned by the carelessness of the plaintiff rather than the gross negligence of the defendant. In determining the credibility of the plaintiff's testimony, we may freely concede that he testified with the utmost good faith. It is doubtful if any one who has survived a stroke of lightning or a short-circuit from a high-voltage wire could either observe, or, if he did, could remember, the circumstances. But if we assume that his testimony is absolutely true, and that the current did leap over this intervening space of 21 inches, without short-circuiting into the lightning arrester or any of the nearer metal conductors in the building, it would at once follow that this extraordinary violation of all known rules of the conduct of electricity of that voltage was such as no human being could anticipate, and the failure to anticipate it could not be considered negligence. The defendant, in arranging its substation, was only bound to make provision for those laws of nature of which one of ordinary prudence engaged in a like enterprise would be required to take notice. Whether, therefore, we regard the circumstances detailed by the plaintiff as an inherent impossibility, or as an extraordinary and unprecedented electrical phenomena, the defendant cannot be held guilty of gross negligence in the arrangement of its electrical devices in the substation.

A good deal is said in the evidence and in the briefs concerning the distance which should be maintained between wires carrying a 22,000-volt current and those carrying 100,000-volt current. This testimony has no significance in this action, for the reason that such testimony is directed to a condition where both wires are charged with the current they are designed to carry, and has

no relevancy to a situation where the 100,000-volt wire is "dead." We have therefore directed our attention to that situation. It is proper to say that the testimony of an expert witness to the effect that it was customary and desirable that a partition should be placed between wires carrying these voltages, and that such partitions would have made the place a safe one in which to work, has no significance, other than to point out the fact that, if there had been a partition between the plaintiff and the 22,000-volt wire, he would not have been injured. This, of course, is a self-evident fact. Mr. Van Norden, an electrical engineer, was asked his opinion as to what precautions could be made which would make the situation perfectly safe to a man working where plaintiff worked. He replied:

"The only safe method of construction in a point of that kind, and I think it is general practice, would be to have a barrier or cell wall outside of the 100,000-volt line to protect the 100,000-volt line from any possible circuit that might be near it. In other words, there should have been a barrier between the 100,000-volt line and the 22,000-volt line."

He further testified that the ordinary form of barrier is a thin reinforced concrete wall, and that the practice was to place each 100,000-volt transformer in a separate cell, or the three in a single cell; that is, a room closed at both ends, at the back and top, and open in front. It developed, however, that the reason this witness considered the place where plaintiff was working dangerous was because:

"It is always dangerous to work within reaching distance of a 22,000-volt line, because a man might unconsciously put his hand out, or his coat might fly out, or in this case the rag that was in the man's hand, the point of the rag might fly out, as he moved around unconsciously, and either come very close to the wire, or actually strike it, in which case there is no question but he would get a short-circuit falling down into his hand, and hence over his body—as it probably was in this case, because, if it had gone through his body, it probably would have killed him—down through his shoes, and into the transformer, and to the ground.

"Q. Then, as I understand it, it is because the man might come close to the 22,000-volt wire? A. He might; if he was constantly keeping his presence of mind, he might work up there every day for years, and not actually come close enough to get a shock off of that wire. Then, again, in an unconscious moment, he might do it. It does not seem to me that there is any particular question of negligence; it might be unconscious."

In response to a question of a juror, this witness also testified that the accident would have been impossible if such a barrier had been erected between the two wires. The arcking distance of a 22,000-volt current having been established by expert testimony, the question as to whether or not plaintiff was working in a safe place was not a question for an expert witness, and although the evidence came in, in the first instance, without objection, motion was made to strike it out. It is sufficient, however, to say that the witness do no more than to call the attention of the court and jury to the obvious fact that a man working within 31 inches of a live wire might carelessly or thoughtlessly come in contact with it. Whether or not this constituted either negligence or gross negligence was a question of law and fact. Where, as here, all the facts are either shown without dispute, or by scientific principles of which the court takes judicial notice, the question of whether or not the evidence was sufficient to support a finding of gross negligence is a matter of law for the court.

In the view we take of the case it becomes unnecessary to determine whether the plaintiff was guilty of negligence, or that the defendant was guilty of lack of ordinary care; for we hold, as a matter of law, that the plaintiff failed to establish that gross negligence upon which his cause of action was predicated. For the same reason it is unnecessary to determine whether such negligence is personal, within the meaning of the Roseberry Act, supra, and it is unnecessary to pass upon the question of whether the defenses of contributory negligence or assumption of risk are available under the Roseberry Act, in cases based upon the gross personal negligence of the employer.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SHAW, J.

LENNON, J. I dissent. In this action for damages for personal injuries sustained by the plaintiff while in the employment of the defendant, a corporation engaged in the business of generating, transmitting, and distributing electricity for lighting, heating, and power purposes, the prevailing opinion reversed the judgment in favor of the plaintiff upon the theory that the evidence adduced upon the whole case did not support the finding of the jury, implied from their verdict, that the defendant was guilty of gross negligence in the maintenance and operation of that part of its power plant where the plaintiff was injured during the course of his employment. The prevailing opinion holds that defendant corporation was not guilty of gross negligence. I cannot concur in this conclusion. The facts of the case, as I find them from a perusal of the record, are these:

Along defendant's main transmission line, which carries electricity at 100,000 volts from its generating plant or power house in Butte county to San Francisco Bay, are sev-

eral substations. These substations are installed for the purpose of reducing the voltage carried by the main transmission line for distribution from the substations for commercial use in the surrounding districts. At the time plaintiff was injured he was employed as an operator at one of the substations of defendant located at Isleton, Cal. It is the duty of an operator in such a substation to watch the apparatus and keep it in proper working condition. In this substation, where plaintiff was employed, were three transformers, standing in a row, north and south. They were 11 feet in height, 6 or 7 feet in diameter, and consisted of coils of copper wire in a metal casing, into which the electricity was carried at 100,000 volts by means of wires connected with the main transmission line. After being reduced in voltage, the electricity was carried from the transformers at 22,000 volts by wires issuing from the covers of the transformers. The covers of the transformers, which were of boiler iron, were rounded, sloping from the center toward the edges, the only flat portion of the surface being a manhole cover about 18 inches wide and 2 feet long. Upon the top of each transformer, projecting at an angle therefrom, and close to the edge of the transformer shell, were two bushings, 4½ feet in height and about 10 inches in diameter at the bottom, tapering toward the top. The purpose of these bushings, which were made of fiber rings alternating with fiber discs, was to insulate the 100,000-volt wires so as to prevent the electricity running to ground over the metal shell of the transformer. There were also two smaller bushings, for the purpose of insulating the 22,000-volt wires issuing from the tops of the transformers; but they are of no importance for the purposes of this case. In addition to the connection with the main transmission line, the several substations were also electrically connected between themselves, so that, in case of a shutdown at any one substation, electricity could be fed to the district thus affected from other substations.

It was the custom to shut down the substations once a month in order to clean the apparatus of the substations, and this was ordinarily done after midnight, when the demands for electricity were at a minimum. There were three operators at defendant's substation at Isleton—Dorman, the chief operator, Post, and the plaintiff. It was arranged to have a general cleaning of this substation after midnight, November 3, 1913, and plaintiff, in compliance with a direction from Dorman, opened the switches for the purpose of shutting off the current from the wires leading into and out of the substation. All of the wires and apparatus in the substation were thus entirely freed from electricity, with the exception of the station bus, which consisted of three parallel wires near the roof and about 20 feet from the ground, running east and west (at right angles to the row of transformers) across the south end of the building, and feeders dropping therefrom into oil switches set on the shelf against the south end of the building. This station bus was fed from other substations and carried electricity at 22,000 volts. No cleaning was to be done on the station bus, and it was left charged in order to furnish electricity to the neighboring towns and light for the substation while the high-tension bank was shut down during the cleaning process. After the substation was thus shut down, the three operators went upon the roof of the building to clean some of the apparatus. They then began to work inside the building, and Dorman told plaintiff to "take No. 3," meaning thereby to clean the bushings and wires on the top of the transformer furthest toward the south, known as "No. 3." Plaintiff, standing on the top of the transformer, cleaned its north bushing, and then proceeded to work on the south bushing. After cleaning the south bushing, he began to dust the wire above the bushing. He had a cotton rag, about 2 feet square, and with this rag reached up as high as he could to clean the upper part of the wire, and then, holding the greater part of the rag in his hand, wiped down the wire. Just as he was dropping his hand to his side, the back of the hand was struck by a flash from a live 22,000-volt wire of the station bus, which was just to the south of the transformer upon which plaintiff was standing. The electricity severely burned the back of his right hand and right forearm, and passed through his body, burning the sole of each foot. The shock threw him off the transformer to the floor beneath.

On the night in question there was "a very heavy fog, everything was just wringing wet," and this condition prevailed inside as well as outside the substation, owing to the doors of the substation being left open for ventilating purposes. At the time he was injured plaintiff was 21 years of age, and had been working at Isleton about a month. Although he had worked in electricity to some extent before coming to Isleton, he had no experience with high voltage, other than one month's work as an operator at defendant's substation at Cowell. The jury rendered a general verdict in favor of plaintiff for damages in the sum of $6,735.83. On defendant's motion for a new trial, the court made an order granting the new trial unless plaintiff stipulated to deduct from the damages awarded the sum of $1,735.83. This was consented to by plaintiff, and the motion for a new trial was thereupon denied, whereupon the defendant appealed from the judgment.

It is contended by appellant, and the prevailing opinion holds, that gross negligence

has not been proven. The distance between the dead 100,000-volt wires, which plaintiff was cleaning, and the nearest point of the live 22,000-volt wires of the station bus, was 28¼ inches, according to appellant's measurements; 31 inches, according to the estimates of witnesses for respondent. Plaintiff's hand, owing to the thickness of the rag he held and the movement in dropping his hand to his side, was about 21 inches from the nearest live wire at the time it was struck. It is pointed out by appellant that it was testified to at the trial by the expert witnesses, including those who testified for plaintiff, as well as those called by the defendant, that the arcking distance of 22,000 volts of electricity is, under no conditions, more than 1.2 inches; that is to say, the air space across which a current of electricity will jump in its effort to reach the ground is ordinarily less than 1 inch, and, under any circumstances, never greater than 1.2 inches. Opposed to this expert testimony is the testimony of the plaintiff that the current "jumped right over through the air, and it caught me on the back of the hand." It is further pointed out that, since electricity seeks the path of least resistance, and there were other conductors nearer the wire than plaintiff's hand, had the electricity jumped from the wire, it would have done so, not a distance of 21 inches to plaintiff's hand, but to the conductor, the shortest space from the wire, such as the lightning arrester outside the substation.

The theory is advanced by appellant, in support of the contention that the evidence fails to show any negligence on the part of the company, that, since plaintiff's hand was admittedly 21 inches away from the live wire at the time it was struck, plaintiff must have carelessly brought his rag, by shaking or otherwise, or some other conductor, within an inch of the live wire, and thus drawn an arc. It is further argued that, if the 22,000 volts did arc 21 inches directly to the back of plaintiff's hand, the occurrence was so unheard of and opposed to every known principle of electricity that it was purely an accident, and not a danger which appellant was required to guard against in providing for the safety of its employés. However that may be, and assuming that 22,000 volts could not jump 21 inches, there is no reason thus presented for disturbing the verdict in this case. There were no special findings, simply a general verdict in favor of plaintiff. "It is, of course, the duty of this court to treat all of the facts brought, out by the evidence which are necessary to support the verdict as having been found to be true by the jury" (Clark v. Tulare Dredging Co., 14 Cal. App. 414, 429, 112 Pac. 564, 570), and, conversely, the verdict of the jury cannot be assumed to be based on inherently improbable testimony, if there is other testimony sufficient to support the verdict.

Plaintiff's action was based upon the alleged personal gross negligence of defendant in maintaining a live 22,000-volt wire in too close proximity to the place where plaintiff was required to work, because of which plaintiff was injured by a current of electricity which "jumped and passed" from the said live wire "and came against and in contact with plaintiff's right hand and arm." Consistently with these allegations of the complaint, plaintiff might have drawn an arc by a close approach to the live wire with his rag, and the arc having once been formed, it could, according to the testimony of the expert witnesses, be extended for 2 or 3 feet. The jury was entitled to infer, from the evidence adduced upon the whole case, that this was the manner in which the current "jumped and passed" to plaintiff's hand, despite plaintiff's general statement that the spark jumped directly to the back of his hand. Follmer v. Rohrer, 158 Cal. 755, 112 Pac. 544; Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 Pac. 1157; Lynch v. Lynch, 22 Cal. App. 653, 135 Pac. 1101; Turner v. Bush (App.) 185 Pac. 190. It is not, therefore, essential to the general verdict in favor of plaintiff to assume that the jury found that the electricity jumped directly through the air and, without the aid of any intervening substance, the entire 21 inches to the back of plaintiff's hand.

Moreover, there was, in my opinion, evidence tending to show the existence of gross negligence, irrespective of the question of the arcking distance of the 22,000 volts of electricity. While the employer is not an insurer of the safety of his employés, he must furnish a place to work in which is "reasonably safe, having regard to the character of the work itself." Spivok v. Independent Sash & Door Co., 173 Cal. 438, 440, 160 Pac. 565, 566. The jury, when arriving at a general verdict, were warranted in taking into account the dangerous nature of electricity, the high voltage which the wires carried, the youth of plaintiff, his inexperience in high-voltage work, and the fact that he had never before performed the particular duties upon which he was engaged at the time of his injuries. It further appears that at least one expert witness, a consulting engineer, testified that, although 22,000 volts could not arc over 1.2 inches, the place in which plaintiff was working was not a safe working distance from the live wires, and that, under the circumstances, 28¼ inches, or even 31 inches, was in dangerous proximity to the 22,000-volt wire, because of the likelihood that a person working in that position would come sufficiently close to the live wire to produce a short circuit. It was stated by this witness, and others, that the only safe method of construction in a sit-

uation of that kind was the erection of a concrete barrier in the form of a concrete wall about the transformers; that this was the general practice; that the wires were thus property protected in other substations belonging to the defendant; and that this "barrier should be there for a twofold purpose—one for operating purposes, and the other for the safety of anybody working in the cell." There was testimony, and it is conceded, that if the barrier had been erected in this case the occurrence now under consideration could not have happened. The evidence also shows that the standard distance between 100,000 and 22,000 volt wires is between 36 and 42 inches; but in one or two cases, where there were building difficulties, as at Isleton, this distance was cut down. There is also evidence that, by installing a switch at a cost of less than $100, it would have been possible to render the substation entirely free from current by shutting off the current from the station bus and obtaining light for the substation from a small transformer house outside the substation.

While most of the evidence above set forth was by no means uncontradicted, the weight of the testimony was, of course, to be determined by the jury. Viewing the record as a whole, and irrespective of any conclusion this court might reach from the same evidence, it cannot be said that the jury was unwarranted in concluding that, even assuming that the electricity could not directly arc a distance greater than 1.2 inches, defendant failed to exercise the required degree of care for the safety of its employé in requiring him, under the above-described conditions and in an inconvenient location such as that presented by the transformer cover, to work within 28¼, or 31, inches of a live 22,000-volt wire and unprotected therefrom.

This, I take it, must be so in keeping with the rule generally accepted and uniformly invoked in the admeasurement of the degree of care required of electric companies for the safety of their employés, and which is to the effect that, while such companies are not required to operate their plants to the point of perfection in so far as concerns the material construction of the plant or the character of the apparatus and appliances, for the reason that they are not insurers of their employés against accident, nevertheless they are obligated to use reasonable care; that is to say, such care as, under all the circumstances, would obviously be required in a given situation in the construction, maintenance, and operation of their plants. Falling short of this, they will generally be held responsible for resultant injuries to employés. It is a reasonable corollary of this rule that the degree of care to be employed by electrical companies in the maintenance and operation of their plants varies with the degree of danger dependent upon a particular situation, for obviously a prudent person, individual or corporate, must augment the character and quantity of the care according to the contingencies of differing and varying situations. Thus, if the danger of injury to an employé is but slight, as, for instance, in a situation involving the likelihood of contact with transmission wires carrying merely a harmless current of electricity, as do ordinary telephone and telegraph wires, ordinary care only will be demanded of the company in the maintenance and operation of such wires. On the other hand, where the transmission wires are heavily loaded with high voltage, a very high degree of care—indeed, the highest degree of care commensurate with human prudence and caution and consistent with the practical conduct of business—is required to guard against accident or death which inevitably follow contact with such high-voltage wires. Crosswell on Electricity, § 234; Curtis on Electricity, § 405. The rule is, perhaps, better stated in the case of Uggla v. West End Street Ry. Co., 160 Mass. 351, 35 N. E. 1126, 39 Am. St. Rep. 481, where it is said:

"The vigilance and attention required must conform to the nature of the emergency and the danger to which others may be exposed, and is always to be judged of according to the subject-matter, the danger and force of the material under the defendant's charge."

This being so, then the question of whether or no the required care has been used, is, in the majority of cases, necessarily one for the jury, except when the court can say positively that no reasonable man would have acted in the manner complained of, or that a reasonable man must have acted in the manner complained of. Lee v. Electric Light Co., 140 Pa. 618, 21 Atl. 405; Southwestern Tel. & Tel. Co. v. Woughter, 56 Ark. 206, 19 S. W. 575.

With this rule in mind, and having in mind, also, the facts above referred to, namely, the high voltage, the insecure footing afforded by the cover of the transformer, the youth and inexperience of plaintiff, among other circumstances, I cannot concur in the conclusion of the prevailing opinion that the corporation defendant was not guilty of negligence in the maintenance of its plant, or that part of its plant in which the plaintiff was injured while at work for the defendant. And surely, if in keeping with that rule it can be fairly said, as I think it can be so said, that the corporation defendant was, under all of the circumstances of the shown situation, negligent in not making a known highly dangerous place rea-

sonably safe to work in with the means at hand to do so, then in view of the further fact that the expenditure of the paltry sum of $100 by the corporation defendant was all that stood between the plaintiff and reasonable safety from serious injury, it is not difficult to see and rightly say that the corporation defendant was indeed negligent out of all measure and beyond all allowance; in a word, that it was guilty of gross negligence.

I would find no difficulty in demonstrating that such gross negligence was the personal negligence of the corporation itself. But, in view of the fact that the prevailing opinion rests a reversal of the judgment solely upon the ground that the evidence shows no gross negligence on the part of the defendant, it would be an idle act to discuss the question of personal negligence or any of the several other questions involved upon the appeal.

LAWLOR, J. I dissent. I am in accord with the opinion of Mr. Justice LENNON, and shall confine myself to some additional observations. The main opinion rests upon a negative answer to the question:

"Was it negligence so to arrange the substation that a man was required to clean the wire distant 28¼ inches from an uninsulated wire carrying a current of 22,000 volts?"

This conclusion is arrived at by a line of reasoning that we will take judicial notice that it is a "scientific impossibility" for a current of 22,000 volts to "jump" a distance of 21 inches; that this was not the place where the plaintiff was usually required to work, and that the known proximity of the wires made it imperative for him to "be alert to the perils of his position"; that, inasmuch as he admitted "flipping" the cleaning rag about in order to reach higher on the wire which he was wiping, and also to shake the rag free from dust, "it is evident" that the injury was occasioned by his carelessness rather than by any negligence of the defendant; that, moreover, in view of the "scientific impossibility" already referred to, it cannot be considered negligence for the defendant to fail to provide against such an extraordinary violation of all known rules of the conduct of electricity as the "jumping" of the current over a space of 21 inches; and, finally, again calling attention to the "scientific principle" that electricity will not "jump" a distance of 21 inches, it is declared that the evidence does not sustain the implied finding that defendant was guilty of negligence in failing to provide a safe place for the plaintiff to work.

May we take judicial notice that a 22,000-volt current will not "jump" 21 inches? The general rule as to when a court will take judicial notice is stated in Dunphy v. St. Joseph Stockyards Co., 118 Mo. App. 506, 523, 95 S. W. 301, 306:

"Courts should observe the utmost caution to avoid assuming knowledge of natural facts and laws that are beyond the scope of *common positive knowledge.*" (Italics mine. See, also, 124 Am. St. Rep. 21, note.)

This rule is thus expressed in 15 R. C. L. 1127:

"Judicial notice will be taken of scientific facts which are universally known, * * * but they must be of such universal notoriety *and so generally understood* that they may be regarded as forming part of the common knowledge of every person. * * * Cognizance may not be taken of scientific matters of uncertainty or dispute or of insufficient notoriety." (Italics mine.)

And in Curtis, The Law of Electricity, p. 3, it is said:

"So dangerous a force as electricity must legally be considered in the same class as high explosives and other treacherous and destructive agents. * * * The power and manifestations of which are fully comprehended only by experts."

See, also, Brown v. Consol. Light, etc., Co., 137 Mo. App. 718, 109 S. W. 1032; Campbell v. United Ry., 243 Mo. 141, 147 S. W. 788.

Several witnesses did testify that they had never known a current of 22,000 volts to "arc" more than 1.2 inches, but Reuben D. Bennett, an electrician, stated:

"Electricity is an unknown quantity. They presume that it will 'jump' so far. It never acts the same twice; there is no knowing how far it will go."

I do not think that the "arcking" distance of 22,000 volts has been proved to be so invariable as to attain the certainty of a scientific fact, or that it is a matter of such common knowledge, or so generally understood, as to entitle it to recognition under the theory of judicial notice.

The majority opinion, in discussing the plaintiff's duties in the cleaning of the transformer, states that—

"It was unnecessary to clean the surface of the copper wire, as the purpose of the cleaning was to avoid the danger of short-circuiting the current over the surface of the bushing."

The evidence was in conflict on this point. There was some testimony that it was unnecessary to clean the wires, but the chief operator at the substation testified that it was the practice to wipe the wire, as well as the bushing, and the plaintiff stated that such was the practice, and that on the occasion in question he had been ordered by the

chief operator to clean the wire. It seems to me, from this state of the evidence, that the jury may have found that it was customary to clean the wire, or, at any rate, that the plaintiff, in cleaning it, acted under the instructions of one in authority.

I am particularly impressed by the evidence from which the jury may have decided that the injury was the result of a false policy of economy in failing to erect a concrete wall between the station bus wires and the transformer. The complaint alleged that defendant's attention had, prior to the time when plaintiff was injured, been repeatedly directed to the dangerous proximity of the 22,000-volt wire. The chief operator testified that, in a conversation with defendant's electrical engineer, who controlled and supervised changes in substation construction, said, referring to the spot, where plaintiff was injured:

"'We have one awfully dangerous place to work here,' and I showed him this bus, how close it was to the 100,000, and where we had to get up in there to work. * * * I told him it was absolutely unsafe. * * * He says: 'I know it is pretty close. This place is not arranged just as we would like to have it, but we have not got money to spare now to make any changes.'"

This witness testified that he had had similar conversations with the superintendent of substations and the superintendent of operations, both of whom acknowledged to him that the place was unsafe, but said that the company could not afford to install safety appliances. As Mr. Justice LENNON points out, the expenditure of $100 would have rendered the place safe. The defendant was under the duty of providing a reasonably safe place for the plaintiff to work, and it must be implied from the verdict, and the order refusing to grant a new trial on the claim of insufficiency of evidence, that the defendant failed to perform this duty. There is nothing in the Roseberry Act to indicate that the term "personal gross negligence" implies that actual knowledge of the dangerous condition of the premises must be brought to the attention of the officers of a corporation before the failure to remedy such condition becomes the negligence of the corporation.

I therefore conclude that it cannot be held, without invading the province of the jury, that, upon the application of the theory of judicial notice, or otherwise, "the plaintiff failed to establish that gross negligence upon which his cause of action was predicated," nor that the plaintiff was careless in wiping the wires, nor that the defendant was not guilty of personal gross negligence in failing to provide a barrier between the station bus wires and the transformer.

183 Cal. 476

THOMPSON v. KOELLER et al. (L. A. 5371.)

(Supreme Court of California. Aug. 4, 1920.)

1. Bills and notes ⊂⊃489(1)—Complaint on note unconditional on face need not allege extrinsic condition and fulfillment.

In an action to recover on a note unconditional on its face and to foreclose a mortgage given to secure it, plaintiff need not allege the existence or fulfillment of a condition to the obligation, but if such condition is pleaded by defendants, he may, under the Code provision, that matter in the answer is denied, prove fulfillment of the condition without variance from his cause of action as alleged.

2. Executors and administrators ⊂⊃227(1)—Claim need not state extrinsic condition to liability on unconditional note.

A claim against a decedent's estate on a note unconditional on its face need not allege the existence and fulfillment of an extrinsic condition to the liability of decedent on the note.

3. Executors and administrators ⊂⊃227(1)—Claim need not state facts with particularity of complaint.

A claim against the estate of a decedent need not, under Code Civ. Proc. § 1494, prescribing the requisites of such a claim, state the facts on which the claim is based with the particularity required in complaint to recover on those facts.

4. Executors and administrators ⊂⊃227(2) — Claim on note to secure another note need not set out secured note.

Where decedent had given a note absolute on its face to secure the payment of a note by third parties, the payee of decedent's note need not set out the secured notes in the claim against decedent's estate, under Code Civ. Proc. § 1497, requiring a copy of an instrument on which the claim is founded to accompany the claim.

5. Appeal and error ⊂⊃762—Points first advanced in appellant's reply brief need not be discussed.

Points for reversal, which are advanced for the first time in appellant's reply brief, need not be discussed by the Supreme Court.

In Bank.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Walter M. Thompson against Frederick Koeller and others. Judgment for the plaintiff, and defendants Frederick Koeller and another appeal. Affirmed.

Waldo M. York and J. H. Ryckman, both of Los Angeles, for appellants.

Overton, Lyman & Plumb, of Los Angeles, for respondent.

OLNEY, J. This is an appeal by the two principal defendants from a judgment against them foreclosing a mortgage upon real prop-

erly given to secure a note for $2,000. The facts are:

The note and mortgage were executed by the defendant Frederick Koeller and his wife, Louise Koeller, the latter of whom subsequently died and the administrator of whose estate, Walter H. Richards, is the other of the appealing defendants. The note and mortgage by their terms denote an absolute obligation to pay on the part of the Koellers, but were in fact given as collateral security for the payment of certain notes of third persons given the plaintiff for the purchase price of certain tractors which such persons were buying from him, and which he was willing to sell to them on credit secured by the Koeller note. These notes were not paid, and the purchasers of the tractors came into default upon them in an amount in excess of the Koeller note, with the result that the obligation of the latter, which in its inception was conditioned upon such default, became unconditional.

In this situation, Mrs. Koeller having died, the plaintiff presented to the defendant Richards as administrator of her estate a claim for the amount due on the note, specifying that the claim was upon the note, a copy of which was attached, and that the note was secured by mortgage, a copy of which was likewise attached. The claim, however, did not specify that the note had been given as security, and in particular did not set out copies of the notes for which it was security. The administrator neither allowed nor rejected the claim, and the statutory time for him to act having expired, the plaintiff brought the present action.

The plaintiff's complaint was in the usual form of a complaint in a foreclosure suit, setting out the note and mortgage in full, and alleging presentation of the claim against Mrs. Koeller's estate. The complaint, however, like the claim, did not set out that the note had originally been given as security. The only substantial defense pleaded in the defendants' answers was that the note had been so given, coupled with the averment that the notes of the third persons evidencing the primary obligation to the plaintiff had been discharged. At the trial the plaintiff introduced the note and mortgage in evidence, the note being overdue by its terms, testified that nothing had been paid upon it, and rested. The defendants then proved that the note had been given as collateral security, and rested. The plaintiff then sought to introduce evidence of the default on the notes which the note in suit had been given to secure. To this the defendants objected. The trial court, however, permitted the evidence, and at the conclusion of the trial found that the Koeller note had been given as security, but that default had been made upon the notes it was given to secure in an amount larger than the amount of the Koeller note, and gave judgment for the plaintiff.

The principal points made by the defendants on appeal are two. It is claimed first that the court should not have permitted the plaintiff, after the defendants had shown that the note in suit had been given as security, to prove the default in the obligations secured. The contention of the defendants is not a mere procedural one, as to which there could be no reasonable question, that the court might not in its discretion permit the plaintiff to reopen his case after he had once rested. Their contention goes much deeper, and is essentially that the evidence introduced made out a cause of action at variance with that alleged in the complaint. The particular point is that the complaint, in alleging merely the execution and maturity of the Koeller note and that it was unpaid, without alleging that it was given as security, sets out an unconditional obligation, while the proof showed a conditional obligation, that is, one conditional in its inception on a default upon the notes it was given to secure.

The second contention of the defendants is based upon much the same proposition. It is that the claim presented against the estate of Mrs. Koeller was insufficient, in that it, like the complaint, failed to set out that the note had been given as security, and in particular failed to set out copies of the notes whose payment it secured.

In support of both contentions, the defendants rely upon Stockton Savings Bank v. McCown, 170 Cal. 600, 150 Pac. 985. In support of the first, they rely particularly upon the following language from the opinion in that case:

"It needs no citation of authority to sustain the rule that in a suit against a surety the principal obligation and its nonpayment must be clearly set forth because the surety's liability is only conditional. But there is ample authority well illustrated by the following citations [citing a number of authorities]."

[1] Now there can be no question as to the correctness of the rule so laid down in a case where the instrument upon which the suit is brought is by its own terms conditional. If such an instrument is set forth in the complaint, or it otherwise appears from the allegations of the complaint that the obligation sued on was conditional, as, for example, if it appear that the note was given as security, the complaint plainly does not state a cause of action unless it also alleges the happening of the condition necessary on the face of the complaint to entitle the plaintiff to recover. None of the cases cited in Stockton Savings Bank v. McCown as authority for the rule goes any further than this.

But such a rule has no application whatever to a case such as the present, where the instrument sued on is unconditional by its terms, and the condition to which it is subject is created by extrinsic facts entirely. In such a case, although the instrument may be set

out in full in the complaint, there is nothing to show that the obligation is not absolute, and the complaint states a good cause of action. As a defense the defendant may allege and show, as the defendants did here, that the obligation was in fact conditional. When the defendant does this, however, he does not make out a variance between the instrument sued on and the one shown by the proof. The instrument shown by the proof is identical with the one pleaded. The facts which the defendant pleads and proves are by way of confession and avoidance of the case alleged by the complaint, not by way of denial of it. That this is so is demonstrated by the fact that the defendant cannot truthfully deny the facts alleged in the complaint, and in particular the fact of the execution of the exact instrument sued upon. The matter alleged in the answer, to wit, that the obligation of the instrument sued on was conditional, being by way of confession and avoidance, the plaintiff might at common law in turn avoid the effect of the matter so alleged by the defendant by replication or reply, alleging that the condition set forth in the defendant's plea or answer has in fact occurred, so that the existence of the condition in the first instance is no longer a defense. Under our system of pleading, there is no replication, but when new matter is pleaded in an answer by way of confession and avoidance, the plaintiff may by his proof either take issue as to its truth, or may avoid it by the showing of still further facts which destroy its validity as a defense. This is exactly what was done in the present case. The plaintiff proved the note which was overdue by its terms, and that nothing had been paid on it. By so doing he made out a prima facie case. The defendants did not deny this or controvert it in any way. They showed merely that payment of the note was conditional because it had been given and accepted as security. This was a good defense, unless there had been a default in the obligation secured, and even then was a good defense, except to the extent of such default. The plaintiff then by way of proper replication to this defense showed that a default on the principal obligation had in fact taken place, and to an extent in excess of that sought to be recovered on the security. The effect of this proof was to show, not that the plaintiff was entitled to recover on a different cause of action from that pleaded in his complaint, but that the defense which the defendants pleaded was not a good defense, that the contingency upon which the defendants were liable upon the note sued upon had in fact occurred.

The identical question under discussion was presented and decided in McGue v. Rommel, 148 Cal. 539, 83 Pac. 1000. There an action had been brought upon a promissory note absolute by its terms, as was the note here. But the obligation upon the note was in fact conditional, since it had been given for the last payment upon the purchase price of certain real property, and our decisions are that in such a case it is a condition precedent to a recovery upon the note that a deed to the property be tendered the vendee. The identical point was made that is made here, that the complaint should have alleged the sale agreement so as to show the conditional character of the obligation on the note, and the tender of a deed so as to show the happening of the condition. Upon this point the court said, in language which might well be used in deciding this case (148 Cal. 545, 83 Pac. 1002):

"On the authority of Naftzger v. Gregg, 99 Cal. 83 (33 Pac. 757, 37 Am. St. Rep. 23), it is said that the complaint is defective because it contains no averment of the agreement of sale and tender of a deed in compliance with its conditions. Some expressions in the opinion in that case imply that a complaint upon a promissory note in the usual form, good upon its face, can be rendered defective by reference to affirmative allegations in the answer. If this were correct, the defendant in such a case would, logically, be entitled to judgment upon the pleadings by reason of allegations in the answer, which by law are deemed controverted (Code Civ. Proc. § 462), and of the truth of which there is no evidence. This would be contrary to long-established rules of pleading and evidence. The decision cannot be given such effect. The course of pleading and procedure in such cases is well established, and it was followed in the case at bar. The defendants in their answer alleged the execution of the agreement showing the concurrent conditions necessary to be performed, and alleged nonperformance by plaintiff. Upon the trial plaintiff introduced in evidence the note sued on. This established all the allegations of the complaint upon which issue was taken, and he thereupon rested his case. Without further evidence he would have been clearly entitled to judgment for the amount of the note. The defendants, in support of the affirmative allegations of the answer, then introduced the agreement, and proved that the note was given as evidence of the debt for the price of the property. Naftzger v. Gregg is perhaps authority for the proposition that upon this being shown the burden lay upon the plaintiff to prove an offer to perform by tendering a conveyance sufficient to transfer the interest agreed to be sold. This we need not determine, for, as above stated, the evidence of such tender was sufficient, and upon this appeal it is immaterial which party introduced it."

See, also, Bank of Paso Robles v. Blackburn, 2 Cal. App. 146, 83 Pac. 262.

An examination of the opinion and also of the record in Stockton Savings Bank v. McCown shows that upon the point under discussion it is not in conflict upon its facts with McGue v. Rommel and the views we have just expressed. The complaint set out the note, and as a part of the note a statement written on its face that it was security for the payment of another note. There was no

allegation, however, of a default upon the note secured. In other words, the complaint set forth in effect a conditional obligation, and failed to allege the happening of the condition which alone would entitle the plaintiff to enforce the obligation, and therefore necessarily failed to state a cause of action. But such was not the case here. Here the complaint did state a cause of action, and the evidence which the plaintiff introduced after the defendants had rested was by way of proper replication in avoidance of the defense made. The plaintiff had a positive right to introduce such evidence, and the action of the trial court in permitting him to do so must be affirmed.

[2] Upon the second point made by the defendants, that the claim presented against Mrs. Koeller's estate failed to state that it was upon a note given as security or to set out a copy of the notes secured by it, the reliance of the defendants is also, as we have stated, upon the authority of Stockton Savings Bank v. McCown. And upon this point we can see no distinction between it and the present case. The very point of the decision there was that, where a claim is presented against an estate upon a note given as security for another note, the claim must contain a copy of the latter as well as the first. The claim in the present case is of just that character, and did not contain copies of the notes secured. The decision goes upon the principle, which it declares, that—

"The rule with reference to the presentation of claims is as rigid as the rule of pleading applying to a complaint."

Now, in the first place, it is evident upon a brief consideration that the rule actually applied in Stockton Savings Bank v. McCown is even stricter than the rule it states. It was not necessary for a valid complaint in that case that it set out a copy of the note for which the note sued on was given as security, or even to state its terms with any particularity. The only bearing of that note on the case was on the point of a default having occurred upon it, so that the condition upon which the note in suit was payable had in fact occurred. When the decision requires a copy of the note secured, as well as of the note on which the claim is based, to be attached to the claim, it requires more than would be required of a complaint, and goes further than the principle upon which it proceeds, that the sufficiency of a claim is to be tested by the rules as to the sufficiency of a pleading, and is in fact at variance with and opposed to that principle.

[3] In the second place, that principle is itself opposed to repeated statements by this court upon the very point. In Pollitz v. Wickersham, 150 Cal. 238, 250, 88 Pac. 911, 916, it is said:

"It is not required that a claim against an estate should state the facts with all the preciseness and detail required in a complaint, and the sufficiency of such a claim is not to be tested by the rules applicable to pleadings. It should of course, as said in McGrath v. Carroll, 110 Cal. 79, 83 (42 Pac. 466), 'sufficiently indicate the nature and amount of the demand to enable the executor and judge in probate to act advisedly upon it,' and this, we think, the claim in question did."

In Elizalde v. Murphy, 163 Cal. 681, 689, 126 Pac. 978, 981, the claim as presented was anything but sufficient as a complaint, but the court said:

"The purpose of presenting a claim is to advise the party against whom the claim is presented of its nature. The Code nowhere defines the precise form of such a claim. Code Civ. Proc. §§ 1493, 1497, 1502. In Pollitz v. Wickersham, 150 Cal. 238 (88 Pac. 911), it is said: 'A claim against an estate is not required to state the facts with all the preciseness and detail required in a complaint, and its sufficiency is not to be tested by the rules of pleading.' Assuming that the presentation of a claim against the estate of Marre was necessary under the circumstances here shown, we are clear that the claim which was in fact presented was sufficient to comply with the law, to convey notice of the nature of the claim, of the circumstances out of which it grew, and its approximate amount, which manifestly was all that could be stated."

The spirit of these decisions at least also appears in the opinion denying rehearing in Raggio v. Palmtag, 155 Cal. 797, 806, 103 Pac. 312, and the rule they lay down was again expressly stated in Western, etc., Co. v. Lockwood, 166 Cal. 185, 196, 135 Pac. 496, 501, thus:

"It is claimed that the complaint does not state a cause of action, in that it does not show the presentation of a proper claim against the estate of deceased. No objection in this regard was made until long after the commencement of this action, and until long after the time for the presentation of claims had expired. We think that there is no force in the claim so made. To our minds, the claim presented was based upon the cause of action here asserted, and sufficiently showed the nature of plaintiff's demand to give the executors such information as was necessary to enable them to act upon it advisedly. It is not fatal to such a claim, especially in the absence of a demand for further particulars, that it is not drawn with the precision which would render a complaint good against a special demurrer."

None of these decisions is referred to in Stockton Savings Bank v. McCown, and apparently were not called to the attention of the court. In the subsequent case of Doolittle v. McConnell, 178 Cal. 697, 705, 174 Pac. 305, the court again repeats their language as stating the established law of the state, and makes no reference to Stockton Savings Bank v. McCown. Now that the question is before us again, we can but conclude that the rule of the decisions mentioned is in truth the

established law of the state, and that Stockton Savings Bank v. McCown should be overruled as contrary thereto. This conclusion is strengthened, if possible, by the fact that this rule is in accord with the requirements of the Code, while that of Stockton Savings Bank v. McCown is not. The whole matter of the presentation of claims against the estates of decedents is purely statutory and dependent upon the Code provisions, and there is not a word in the Code to the effect that a claim against an estate should set forth the facts upon which it is based with the precision and detail of a pleading. In fact, as was said in Thompson v. Orena, 134 Cal. 26, 29, 66 Pac. 24, 25:

"Not even the particulars of a claim already due and not contingent [the plaintiff's claim here was of that character] are required to be set out by the provisions of the section cited" (section 1494, Code Civ. Proc., prescribing the requisites of a claim).

[4] The object, indeed, of requiring the presentation of claims is very different from the object of a pleading in a contested matter. As stated in Preston v. Knapp, 85 Cal. 559, 561, 24 Pac. 811, 812, it is "to save to estates of deceased persons the costs and expenses of useless suits, suits to recover what would have been allowed and paid by the executor or administrator without suit." To subserve this object, both the Code and our decisions require, in the language of McGrath v. Carroll, 110 Cal. 79, 83, 42 Pac. 466, 468, quoted in Pollitz v. Wickersham, supra, and repeated in effect in Elizalde v. Murphy, supra, and Western, etc., Co. v. Lockwood, supra, that the claims "sufficiently indicate the nature and amount of the demand to enable the executor and judge in probate to act advisedly upon it." If a claim meets this general requirement, it is sufficient, unless it fails to meet some particular requirement of the Code. There are a number of such requirements, such, for example, as that prescribing the character of affidavit by which the claim must be supported, but the only one material here is the provision of section 1497, Code of Civil Procedure, that "if the claim be founded on * * * an * * * instrument, a copy of such instrument must accompany the claim." It has been held that if this provision is not complied with, a claim founded on a written instrument is defective. Estate of Turner, 128 Cal. 390, 60 Pac. 967. In the present case, as we have stated, copies of the note and mortgage executed by Mrs. Koeller were attached to the claim against her estate. The question is, Should there also have been attached copies of the notes which her note and mortgage were given to secure? It seems to us that it hardly requires argument to show that the claim against Mrs. Koeller's estate is not "founded," as that word is used in the Code, on the notes of third persons which she never executed, but upon her own note, which she did execute. Putting it succinctly, it may be said that, while Mrs. Koeller was liable through her own note for the notes secured thereby, she was certainly not liable on them. The liabilities on the two are quite distinct and run against different parties, and the liability of Mrs. Koeller was founded on her own note, and not on notes to which she was not a party, even though her note was given to secure those. The claim against her estate was therefore not deficient in not setting out copies of those notes.

[5] There are a number of other points because of which the defendants and appellants ask for a reversal. They are all, however, of a minor character, and advanced for the first time in the appellants' reply brief. In view of this latter circumstance (Phelps v. Mayers, 126 Cal. 549, 58 Pac. 1048; Hibernia, etc., Society v. Farnham, 153 Cal. 578, 96 Pac. 9, 126 Am. St. Rep. 129), we feel under no necessity for discussing them further than to say that we have looked at them and find none of them good ground for reversal.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.; SLOANE, J.

183 Cal. 543

SOUTHERN PACIFIC LAND CO. v. SAN DIEGO COUNTY. (L. A. 5772.)

(Supreme Court of California. Aug. 13, 1920.)

1. Taxation ⟸543(6)—Complaint in action to recover taxes paid under protest held sufficient.

A complaint, under Pol. Code, § 3819, to recover taxes paid under protest alleging plaintiff's land, worth 80 cents an acre, was assessed at $1.50 per acre, also a systematic, willful, and intentional undervaluation of the lands of others, and their assessment at not to exceed 25 per cent. of true value, and that the board of supervisors, sitting as a board of equalization, by competent evidence without substantial contradiction, had full knowledge of such facts, and arbitrarily refused to equalize plaintiff's assessment with the others, *held* to state a cause of action, when construing the allegations liberally with a view to substantial justice, as required under a general demurrer by Code Civ. Proc. § 452.

2. Taxation ⟸537—Willful refusal to reduce excessive valuation held fraud entitling plaintiff to recover excess taxes paid.

Where plaintiff's property was assessed at nearly twice its real value, while other property was assessed in pursuance of a systematic, willful scheme, at not to exceed 25 per cent. of its real value, which was shown to the board of equalization by evidence without substantial contradiction, the board should have reduced plaintiff's valuation and its willful re-

fusal would seem to constitute "fraud" or something "equivalent to fraud," entitling plaintiff to recovery under Pol. Code, § 3819, for excess taxes paid under protest.

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by the Southern Pacific Land Company against the County of San Diego. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Henly C. Booth, of San Francisco, for appellant.

W. F. Schuermeyer, Dist. Atty., and H. V. Mather, Deputy Dist. Atty., both of San Diego, for respondent.

ANGELLOTTI, C. J. This is an action brought under section 3819, Political Code, to recover taxes for the year 1917–18 paid by plaintiff under protest. A general demurrer to plaintiff's complaint was sustained, and judgment was thereupon entered for defendant. Plaintiff appeals from such judgment.

[1] The theory of the complaint is that the assessment of plaintiff's lands in said county upon which the tax was based was in part void, because the property was deliberately assessed at considerably more than its actual cash value, while all other property in the county was assessed systematically at not exceeding 25 per cent. of its actual cash value. According to the allegations of the complaint, plaintiff paid the whole tax under protest that the portion of the assessment in excess of a valuation of $17,790 was illegal and void, and this action was duly brought to recover the alleged tax paid on such excess valuation.

The complaint alleges the assessment of plaintiff's lands on the assessment book for the year 1917–18 at the uniform valuation of $1.50 per acre, "irrespective of the proportion of fair cash value borne by said lands to each other regarding said lands as parcels by government subdivisions," and that the same were not at any time mentioned in the complaint "of a value in excess of 80 cents per acre, treating said lands as an entirety." It further alleged due application by plaintiff to the board of supervisors of the county sitting as a board of equalization for a reduction in the valuation, and the denial, after hearing, of such application. It was further alleged "that it is true and it was shown to said board of equalization by competent evidence without substantial contradiction" that at the time said lands and all other lands in the county were assessed and equalized for the fiscal year 1917–18, there existed "a systematic, willful and intentional undervaluation of lands assessable by the county for the purpose of assessment upon the said county assessment roll, said undervaluation being at a percentage of true value, not to exceed twenty-five per cent. (25%) for said fiscal year 1917–18"; "that the assessment and the equalization of said lands [plaintiff's lands] were each made arbitrarily and capriciously and without regard to their value, and without regard to and greatly in excess of said ratio of twenty-five per cent. (25%) so willfully, intentionally, and systematically adopted"; and "that said board of supervisors did not, as such board of equalization, during said month of July, 1917, or at all, change said ratio of not to exceed twenty-five per cent. (25%) so systematically, willfully, and intentionally adopted and carried out," nor change "the assessment made, as aforesaid, by said county assessor, and shown on said assessment book, so as to equalize the said assessment on said plaintiff's lands with the remaining assessments in said county." It was further alleged that such order denying plaintiff's application "was made with full knowledge of all the facts hereinbefore pleaded, and was made arbitrarily and capriciously, and without regard to said facts, and in disregard of the evidence then before said board showing said facts, which evidence was without substantial conflict or contradiction."

Construing these allegations liberally, with a view to substantial justice between the parties, which we are required to do as against a general demurrer (section 452, Code Civ. Proc.), they substantially state the following case: Plaintiff's lands in San Diego county had an average value of not to exceed 80 cents per acre, and were assessed upon the assessment roll at a uniform valuation of $1.50 per acre. At the time of this assessment there existed in the county "a systematic, willful and intentional undervaluation of lands * * * for the purpose of assessment upon the * * * county assessment roll, at a percentage of true value not to exceed 25 per cent." This scheme was carried into effect on the assessment roll for the year with regard to the lands other than plaintiff's. All these matters were made to appear to the board of supervisors sitting as a board of equalization, "by competent evidence without substantial contradiction," and "without substantial conflict or contradiction;" but said board, with full knowledge of all such facts and without regard thereto, arbitrarily refused to equalize the assessment on plaintiff's lands with the remaining assessments.

Taking these to be the facts, as we must for the purposes of the demurrer, we are satisfied it must be held that plaintiff has stated a good cause of action. We do not understand it to be disputed that, as said by the Supreme Court of the United States in Sunday Lake Iron Co. v. Township of Wakefield, 247 U. S. 350, 38 Sup. Ct. 495, 62 L. Ed. 1154, "it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of

one taxed upon the full value of his property." This statement finds ample support in the authorities, and was recognized by this court in L. A. Gas & Electric Co. v. County of Los Angeles, 162 Cal. 164, 168, 121 Pac. 384, 386, where we said:

"This is as true where the injurious effect so produced is caused by inequality of valuation as by any other cause, for, as said in Judson on Taxation, p. 608, 'it is obvious that where taxation is upon property that requires valuation, inequality of taxation is produced as surely by inequality of valuation as by inequality of the rate of tax.'"

[2] It must be conceded, of course, that it is thoroughly settled in this state that to our county boards of equalization has been confided the duty of determining "the value of the property under consideration for assessment purposes upon such basis as is used in regard to other property so as to make all the assessments as equal and fair as is practicable," and that in discharging this duty "the board is exercising judicial functions, and its decision as to the value of the property and the fairness of the assessment so far as amount is concerned constitutes an independent and conclusive judgment of the tribunal created by law for the determination of that question," adjudicating necessarily that "the property is assessed at the same value proportionately as all the other property in the county," and that this adjudication "cannot be avoided unless the board has proceeded arbitrarily and in willful disregard of the law intended for their guidance and control, with the evident purpose of imposing unequal burdens upon certain of the taxpayers, * * * or unless there be something equivalent to fraud in the action of the board," and that "mere errors in honest judgment as to the value of the property will not obviate the binding effect of the conclusion of the board." Los Angeles Gas & E. Co. v. County of Los Angeles, supra. In this case, however, the complaint substantially charges that the property of plaintiff was assessed at nearly twice its real value, while the other property in the county was assessed, in pursuance of a "systematic, willful, and intentional" scheme to so do, at not to exceed 25 per cent. of its real value, and that all this was shown to the board of equalization by evidence without substantial contradiction or conflict, which means, of course, that there was no evidence sufficient to give lawful support for a conclusion to the contrary, and that the board "with full knowledge" of these facts, and "without regard to said facts, and in disregard of the evidence, arbitrarily denied plaintiff's application for relief." In other words, the board of equalization, with the facts alleged proven before them, and with full knowledge of the existence of those facts, refused to take any action other than to deny plaintiff's application. It seems to us that in such a situation there is to be found the "something equivalent to fraud" that it was said in Los Angeles Gas & E. Co. v. County of Los Angeles, supra, might entitle the taxpayer to relief in the courts, regardless of the denial of his application by the board of equalization.

It is not claimed that there was any actual fraud in the sense that there was any corrupt intent on the part of the board. Indeed, the complaint alleges that a majority of the members voting for the denial of the application stated at the time that, while the assessment was unjust, they deemed it proper for the validity of the assessment to be settled by the courts. But, according to the allegations of the complaint, there was a deliberate refusal by the board to so adjust the assessment values that plaintiff's lands would be assessed upon the same basis of valuation as the other lands in the county, the members knowing that as the assessment stood it was not upon the same basis, plaintiff's lands being assessed at nearly double their value, while the other lands in the county were assessed at only one-quarter of their value. With this knowledge it was the plain duty of the board to so reduce plaintiff's assessment valuation that its lands would be assessed upon the same basis of valuation as all the other property in the county, provided that basis was allowed to remain for such other property. Its willful refusal to do this, notwithstanding its knowledge of the facts, would seem to constitute "fraud," or "something equivalent to fraud," within the meaning of those terms as used in the decisions relative to review of the action of assessing officers, entirely regardless of the motive actuating the members of the board. The effect of this refusal to perform this duty was to allow an assessment to remain, which, in the words of the Supreme Court of the United States in Greene v. L. & I. R. R. Co., 244 U. S. 499, 519, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88, constituted "a fraud upon the fully assessed property"—in this case upon the more than fully assessed property. An entirely different situation would be presented here, if the complaint did not show that the board had denied plaintiff's application with full knowledge of all the facts alleged.

We are satisfied that the facts alleged, if proved, would require a conclusion that the assessment of plaintiff's lands was invalid to the extent claimed, and that plaintiff's remedy was that given by section 3819, Political Code, viz. payment of the invalid tax under protest and an action to recover the same within the time specified therein. This, as we have already noted, is such an action. It follows, from what we have said, that the demurrer should have been overruled, with leave to defendant to answer.

The judgment is reversed, and the cause

remanded for proceedings not inconsistent with the views herein expressed.

We concur: SHAW, J.; WILBUR, J.; LENNON, J,; OLNEY, J.; LAWLOR, J.

183 Cal. 153

Application of HERMAN.

Appeal of HARBISON.

(L. A. 6147.)

(Supreme Court of California. June 14, 1920.)

1. Action ⟸20—Proceeding for establishment of newspaper as one of general circulation a "special proceeding."

A proceeding by a publisher of a newspaper to have its standing as one of general circulation, as defined in Pol. Code, § 4460, ascertained and established, is a "special proceeding" within Code Civ. Proc. § 23, and not an "action" as defined by section 22.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Action; Special Proceeding.]

2. Newspapers ⟸1(5)—Supreme Court has jurisdiction of appeal in special proceeding for establishment of standing of newspaper.

Under Const. art. 6, § 4, an appeal lies to the Supreme Court from judgment in a special proceeding by a publisher of a newspaper to have its standing as a paper of general circulation, as defined in Pol. Code, § 4460, ascertained and established.

3. Appeal and error ⟸151(2)—Contestant of newspaper publisher's application for establishment of paper as one of general circulation entitled to appeal.

Contestant of newspaper publisher's application to have its standing as one of general circulation, as defined in Pol. Code, § 4460, ascertained and established, *held* a proper party to the proceeding, and one aggrieved by judgment for the publisher entitling him to appeal, though without pecuniary interest, in view of sections 4458–4462.

4. Appeal and error ⟸843(2)—Point of unconstitutionality of statute not involved in case will not be considered.

Question whether a valid judgment rendered in a proceeding to have the standing of a newspaper as one of general circulation within Pol. Code, § 4460, established, is conclusive or prima facie evidence of status of newspaper when in a future action the sufficiency of publication of notice or process is controverted cannot arise on appeal by contestant of the publisher's application for establishment of standing of paper; point whether provisions of section 4462 for such establishment are constitutional being abstract.

5. Newspapers ⟸1(5)—Determination by superior court that evidence shows newspaper one of general circulation conclusive unless unsupported.

Under Pol. Code, § 4462, it is for the superior court on the publisher's application to determine from the evidence whether a publication is a newspaper of general circulation as defined in section 4460, a determination which is conclusive on appeal unless it appears, as a matter of law, the evidence is insufficient to support the finding.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Newspaper of General Circulation.]

6. Newspapers ⟸3(2)—Newspaper held not for dissemination of intelligence of general character; "newspaper of general circulation."

Newspaper published at a county seat *held* not for the dissemination of local or telegraphic news and intelligence of a general character, so that the contents did not come within the description of Pol. Code, § 4460, defining newspapers of general circulation for the purposes of publication of notices and official advertising.

7. Newspapers ⟸3(2) — What Legislature meant by "newspaper of general circulation."

By the term "newspaper of general circulation," as used in Pol. Code, § 4460, the Legislature had in view a publication to which the general public would resort to be informed of the news and intelligence of the day, editorial opinion, and advertisements, to render it probable that notices or official advertising published therein would reach the public.

8. Newspapers ⟸3(5)—"Bona fide subscription list of paying subscribers" to newspaper of general circulation defined.

The term "bona fide subscription list of paying subscribers," as used in Pol. Code, § 4460, specifying the requirements of a newspaper of general circulation for the publication of notices and official advertising, means a real, actual, genuine subscription list containing only the names of those paying in good faith regularly for their subscriptions, the assumption, in the absence of legislative specification of numbers of subscribers required, being that it meant the words "bona fide" were to be taken according to common acceptation.

9. Newspapers ⟸3(5) — Newspaper's list a "bona fide subscription list of paying subscribers."

List of subscribers to county seat newspaper, including banks, creameries, produce markets, and others, some 25 subscribers in various lines of business, the paper having circulation in a number of towns and cities, *held* a "bona fide subscription list of paying subscribers" as required by Pol. Code, § 4460, to render the newspaper one of general circulation for the publication of notices and official advertisements.

10. Newspapers ⟸3(2)—County seat newspaper held one devoted to interest of and published for particular class; "newspaper of general circulation."

Newspaper published at county seat *held* one devoted to the interest and published for the entertainment of a particular class, so as not to be one of general circulation for the publication of notices or official advertisements as defined by Pol. Code, § 4460, though cir-

culated in a number of cities and towns through three counties, and among at least ten professions, trades, and callings.

Angellotti, C. J., dissenting.

In Bank.

Appeal from Superior Court, San Bernardino County; Hugh H. Craig, Judge.

In the matter of the application of Basil W. Herman, publisher, to have the standing of the Daily Bulletin of San Bernardino, Cal., as a newspaper of general circulation, as defined in section 4460, Pol. Code, ascertained and established, contested by R. C. Harbison and others. From the judgment so establishing the status of the paper, the named contestant appeals. Reversed.

McNabb & Hodge, of San Bernardino, for appellant.

Bledsoe & Phipps, of San Bernardino (Leonard, Surr & Hellyer, of San Bernardino, of counsel), for respondent.

George D. Squires, of Redwood City, amicus curiæ, for California Press Ass'n.

LAWLOR, J. This is an appeal by R. C. Harbison, one of the contestants in the above-entitled matter, from a judgment in favor of the applicant, Basil W. Herman, to the effect that the Daily Bulletin, published by said Herman, "is a newspaper of general circulation as that term is defined in title 5 of the Political Code [sections 4458–4462], * * * and entitled to print publications, notices by publication, official advertising, or public or legal notices." The appeal is presented under the alternative method.

Respondent has drawn his petition in conformity with the provisions of section 4462. The material allegations of the petition are as follows:

"That your petitioner, Basil W. Herman, at all times herein mentioned has been, and is now, the publisher of the said the Daily Bulletin, a newspaper printed and published in the city of San Bernardino; * * * that the said the Daily Bulletin at all the times herein mentioned has been, and is now, a newspaper published for the dissemination of local and telegraphic news and intelligence of a general character; that said newspaper at all the times herein mentioned has had, and now has, a bona fide subscription list of paying subscribers; that said newspaper was established on the 23d day of June, 1916; * * * that said newspaper has been established, printed, and published at regular intervals, every day except Sunday and legal holidays in the city of San Bernardino * * * for more than one year next preceding the filing of this petition, to wit, from June 23, 1916, to the present date, September 12, 1917; and that said newspaper is not now, nor has it ever been, devoted to the interests, or published for the entertainment or instruction of a particular class, profession, trade, calling, race, or denomination, or for any number of such classes, professions, trades, callings, races, or denominations."

Separate contests to this petition were filed by the appellant and W. S. Conger and O. M. Cannon, respectively. Each of the answers put in issue all of the material allegations of the petition.

Two contentions are made by respondent in his supplemental brief:

(1) That "the provisions of section 4462 * * * furnish * * * an exclusive remedy for the setting aside of such a judgment as was rendered herein," and a fortiori there is no appeal; and (2) that "the appellant herein has no right to appeal because he is not 'aggrieved' by the judgment under section 938 of the Code of Civil Procedure."

1. The Code of Civil Procedure provides:

"Sec. 22. An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Sec. 23. Every other remedy is a special proceeding."

[1] It was said in the case of In re Central Irrigation District, 117 Cal. 382, 387, 49 Pac. 354, 356, citing the sections just quoted:

"It may be said, generally, that any proceeding in a court which was not under the common-law and equity practice either an action at law or a suit in chancery is a special proceeding."

In our opinion this is a special proceeding.

2. We shall next consider whether this court has jurisdiction to entertain an appeal in a special proceeding. The statute authorizing the proceeding does not provide for an appeal. Neither the former nor the present Constitution has ever in express terms, conferred upon the Supreme Court appellate jurisdiction in such cases. Appellate jurisdiction is, however, conferred by section 4 of article 6 of the Constitution upon the District Courts of Appeal. The decisions upon the question whether this court has appellate jurisdiction in special proceedings are not in complete accord. There are, on the one hand, Appeal of Houghton, 42 Cal. 35, Bixler's Appeal, 59 Cal. 550, and In re Curtis, 108 Cal. 661, 41 Pac. 793, each of these cases holding that this court has no such jurisdiction. The last-mentioned case, however, was a quasi criminal action brought under section 772 of the Penal Code, and the decision turned upon the summary character of the proceeding, the court saying:

"These proceedings are intended to be summary, and, as the Legislature has made no provision for a review of the action of the superior court, its judgment is final."

See People v. McKamy, 168 Cal. 531, 143 Pac. 752.

Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717, on the other hand, an action for divorce, held that the court is vested with—

"appellate jurisdiction in all cases, provided that, when the subject of litigation is capable of pecuniary computation, the matter in dispute must exceed in value [the sum fixed by the Constitution of 1849] unless the question of the legality of a tax, toll, impost, or municipal fine is drawn in question."

This case was affirmed on this point in Knowles v. Yates, 31 Cal. 82, which was an election contest.

In Stockton, etc., R. R. Co. v. Galgiani, 49 Cal. 139, the appeal was from a judgment of the county court confirming the report of commissioners in a proceeding to condemn land. An objection to the jurisdiction of the Supreme Court was interposed, but the court said on that point:

"Whether, under the provisions of article 6, § 4, of the Constitution, an appeal lies to this court in special cases cannot be considered at this day as an open question. In Knowles v. Yates, 31 Cal. 82, and Day v. Jones, 31 Cal. 263, this point was directly presented and decided. In numerous other instances this court has entertained jurisdiction in special cases. * * * In view of these cases we do not think a reconsideration of the question at this time would be profitable, and hold that this court has jurisdiction of this appeal."

Justices Crockett and Wallace, who concurred in the Houghton Case, also concurred in the Stockton Case.

[2] Other cases in which this court has exercised such jurisdiction are In re Market Street, 49 Cal. 546; Loomis v. Andrews, 49 Cal. 239; S. P. R. Co. v. Wilson, 49 Cal. 396; N. P. R. R. Co. v. Reynolds, 50 Cal. 90; Wilmington, etc., Co. v. Dominguez, 50 Cal. 505; Delphi School District v. Murray, 53 Cal. 29; San Jose v. Freyschlag, 56 Cal. 8; and Lord v. Dunster, 79 Cal. 477, 21 Pac. 865. And, since the decisions in Bixler's Appeal, supra, and In re Curtis supra, it has been held that special proceedings in general are appealable to this court under the provisions of section 52 of the Code of Civil Procedure. Morton v. Broderick, 118 Cal. 474, 50 Pac. 644; People v. Bank of San Luis Obispo, 152 Cal. 261, 92 Pac. 481. The amendment in 1919 of that section took effect on July 22, 1919 (St. 1919, p. 88), subsequently to the date on which the petition for a hearing in this court was granted—June 2, 1919. Before it was amended that section read in part:

"The Supreme Court shall have appellate jurisdiction: * * * 4. In all special proceedings."

We think it clear that an appeal lies to this court from a judgment in such a proceeding.

3. In support of the contention that the contestant Harbison has no right of appeal for the reason that he is not an "aggrieved" party, respondent argues that said contestant must show that, if the judgment is allowed to stand, he personally will suffer substantial loss before he is entitled to take an appeal. Section 4458 provides that all publications, notices by publication, and official advertising required by statute to be given or made by public officials shall be given or made only in newspapers of general circulation. Section 4459 specifies the minimum size of type that may be used in printing such publications or notices. Section 4460 defines "a newspaper of general circulation." Section 4461 prescribes a penalty for the violation by a public official of any of the provisions of the three preceding sections. Section 4462 authorizes a proceeding in the superior court whereby a newspaper may "have its standing as a newspaper of general circulation * * * ascertained and established." It is plain that the primary object of this legislation was to provide for adequate publicity for notices required by law to be published. This was sought to be accomplished by providing a method for determining whether publications claimed to be newspapers of general circulation are of the required standard. It is made a matter of concern to the general public. Section 4462 provides that any person may appear and contest the petition to have the status of the newspaper established, and that the decision and judgment of the superior court may be vacated on the motion of any person, whether a party to the original proceeding or not. It is not prescribed that the contestant shall have any pecuniary interest in the proceeding. Any person may appear and show that the newspaper in question is not a proper medium for the publication of legal notices because it does not present any or all of the essential attributes of "a newspaper of general circulation," as that term is defined in section 4460. It was said in the case of In re Marks, 45 Cal. 199, at page 216, discussing an act of the Legislature "to prevent extortion in office and enforce official duty":

"There is nothing, either, in the act which requires that Crane, who preferred this complaint, should aver or prove that he is a party in interest in the strict sense, or has himself sustained any special damage by reason of the official neglect complained of. The purpose of the statute was the wholesome one of authorizing any person who would take the duty upon himself to institute an inquiry into the conduct of certain public officers in the manner pointed out. It is not the personal interest of the complainant which the statute regards, but the higher and more important interest of the people * * * in the honest and faithful discharge of official duties. * * *"

[3] In our opinion, appellant was a proper party to the proceeding. While it is true that, strictly speaking, no judgment was rendered against him in the case at bar, nevertheless, since the public has an interest in the proceeding, and the trial court has decided adversely to the contentions of appel-

lant, he must be regarded as an "aggrieved" party for the purposes of this appeal. Indeed, if the position of the respondent on this point be sound, it is difficult to conceive of a party who would be "aggrieved" in such a proceeding where the original petition had been granted. Even if the contestant were the publisher of a rival newspaper, it could not be said that he had any pecuniary interest which had been directly affected by the decree; any prejudice which he might have suffered would be too incidental and remote. We have examined the cases cited by respondent in which it has been held that, in order that an appeal may be prosecuted, it must be shown by the record that the appellant is an aggrieved party in the sense that he has been deprived of a legal right by the judgment. None of these cases, however, is authority where the right of becoming a party is given by statute, and the public has a direct interest in the controversy.

4. During the oral argument here the point was suggested by one of the justices whether the provisions of section 4462 were not an invasion of the powers of the judiciary by the legislative branch of the government. This question had not been raised by the parties. It was adjudged by the court that—

"The Daily Bulletin * * * is a newspaper of general circulation as that term is defined in section 4460, * * * and is entitled to print publications, notices by publication, official advertising, public or legal notices."

In answer to the above suggestion appellant, in his reply to the supplemental brief of respondent, filed after the oral argument, takes this position:

"We believe the judgment rendered in the proceeding at bar does not conflict with any constitutional provision, if it is construed to be conclusive and binding only on the date rendered and on the publication of notices theretofore published in said paper. * * * This judgment, if allowed to stand, undoubtedly validates any and all legal publications being made in the Bulletin the date the judgment was rendered. As to the validity of notices published after said date we submit the judgment as rendered would have no force whatever. If, however, the Legislature contemplated validating the publication of notices made after such judgment is rendered and until it is vacated, modified, or set aside under * * * section 4462, then we respectfully submit that the portion of the section wherein it is declared 'but all publications made in such newspaper during the period it was adjudged to be a newspaper of general circulation shall be held to be valid and sufficient,' is an invasion by the Legislature of the province of the courts, and is therefore unconstitutional. This portion of the section is, in effect, a legislative declaration, without a hearing, of the truth of facts that may or may not exist, viz. that at any and all times after the judgment is rendered establishing a newspaper as one of general circulation until such judgment is vacated, said newspaper possesses all the requirements set forth in section 4460 as necessary to be proved in order to be declared a newspaper of general circulation."

[4] The respondent has not answered this contention. The question whether a valid judgment rendered in such a proceeding is conclusive or prima facie evidence of the status of the newspaper involved when, in a future action, the sufficiency of the publication of notice or process in said newspaper is controverted, cannot arise here. The point made by appellant presents only an abstract proposition which we do not deem necessary or proper to consider. The rule on this point is thus stated in 12 Corpus Juris, 780:

"The constitutionality of a statute will not be determined in any case unless such determination is necessary in order to determine the merits of the suit in which the constitutionality of such statute has been drawn in question. * * * Where that portion of a statute which is involved in controversy is constitutional and complete in itself, the court will not consider a question as to the constitutionality of another portion of the statute. * * * The question of the constitutionality of the statute will be determined only with reference to the parties who are before the court."

See, also, In re Daniels, 140 Cal. 335, 73 Pac. 1053; In re East Fruitvale Sanitary District Board, 158 Cal. 453, 111 Pac. 368; Brookes v. Oakland, 160 Cal. 423, 117 Pac. 433.

The effect of this judgment as evidence of the status of the Daily Bulletin in future proceedings is not involved here. As we have seen, appellant concedes that, in so far as the judgment is binding on the parties and conclusive evidence of the status of the paper on the date such judgment was rendered, "it does not conflict with any constitutional provision." On this assumption the question whether the judgment is conclusive or prima facie evidence of the status of the paper within the meaning of section 4460 is not presented by this proceeding. Section 4462, for the purposes of this discussion, may be divided into three parts: First, that part providing for the determination of the status of a paper in the first instance, where any one, as already shown, may appear and contest the petition; second, that part providing that the decision and judgment in the first instance may be "vacated, modified, or set aside"; and, third, that part which aims to give validity to "publications made in such newspaper during the period it was adjudged to be a newspaper of general circulation." In this proceeding only the first part of the section is involved; for neither in the petition nor in the judgment is it sought to make such judgment conclusive evidence of the validity of publications subsequently made. Our consideration therefore, is necessarily limited to the question

whether the finding declaring that the Daily Bulletin is a newspaper of general circulation is supported by the evidence.

5. Appellant contends that:

"The evidence is insufficient to justify or sustain the finding * * * because said Bulletin: (1) Does not disseminate local or telegraphic news and intelligence of a general character; (2) has not a bona fide subscription list of paying subscribers; (3) is published for the entertainment and instruction of particular classes, professions, trades, and callings."

Section 4460 provides in part:

"A newspaper of general circulation is a newspaper published for the dissemination of local or telegraphic news and intelligence of a general character, having a bona fide subscription list of paying subscribers. * * * A newspaper devoted to the interests, or published for the entertainment or instruction of a particular class, profession, trade, calling, race, or denomination, or for any number of such classes, professions, trades, callings, races or denominations when the avowed purpose is to entertain or instruct such classes, is not a newspaper of general circulation."

[5] Under section 4462 it is for the superior court to determine from the evidence whether a publication is a newspaper of general circulation as that term is defined in section 4460. This determination of the evidence is conclusive on appeal unless it shall appear, as matter of law, that it is insufficient to support the findings. The trial court has found "that all the allegations of petitioner's petition are true." We shall first consider the character of the matter contained in the paper. The publisher testified practically in the language of the statute, that "the paper is published for the dissemination of local and telegraphic news and intelligence of a general character." It is to be noted that the statute refers to local or telegraphic news. Both local and telegraphic news are not required, but there must be one or the other and intelligence of a general character. In re Green, 21 Cal. App. 138, 131 Pac. 91. Seven copies of the paper, which the publisher testified were "fairly representative," were introduced in evidence. A few telegraphic items are contained therein, but the publisher admitted they were not originally published in the Bulletin, and had been copied from other newspapers. For instance, the two "telegraphic" items in the issue of September 10 had appeared elsewhere on September 8, and the six "telegraphic" items in the issue of July 27 were published in another paper the day before. It is not suggested that the republication of telegraphic news was based on any arrangement with such other papers. No other kind of "telegraphic" matter appeared in the paper. The only current "news" is court calendars without any description of court proceedings, lists of new suits filed, documents recorded and marriage licenses and building permits issued. The only legal notices which appear to have been published are those of this proceeding. There is no account of local events, casualties, hotel arrivals, or departures, personal items, and the like such as it might be expected would be found in a newspaper published at a county seat. Other than as above indicated there is no evidence of the collection or dissemination of local or telegraphic news or intelligence of a general character. There is but one editorial, and that appeared in the issue of June 25, 1917. The paper chiefly contains matter of a stereotyped nature, tables of temperature and rainfall for a period of 46 years and of altitudes at various points in that section of the state, names and locations of churches, hospitals, asylums, orphan homes, and clubs, the names and addresses of clergymen and others entitled to perform the marriage ceremony, the locations of fire alarm boxes, directories of public offices and officials, local, state, and federal tables of official fees, a directory of business buildings and halls, a list of public parks, and the location of the public library. Except for the belated "telegraphic" matter, the paper does not contain news of a general character in which the public at large would be interested. It is the general custom to publish editorial matter in a newspaper, and yet among the issues of this publication appears only a single editorial, as we have heretofore noted. The caption of the Bulletin declares that this is "the only paper published in the county that publishes an abstract of instruments filed in the clerk's and recorder's offices."

[6] It is clear to us that the purpose of this paper was not "the dissemination of local or telegraphic news and intelligence of a general character," and that the contents did not come within this description. Respondent relies on In re Green, supra. In that case it was held by the superior court that the Daily Recorder of Sacramento was not a newspaper of general circulation. The judgment was reversed by the district court of appeal. A comparison of these two publications shows a marked difference in purpose and contents. The Sacramento paper, in addition to certain stereotyped matter, contains news accounts of court and other official proceedings, including the activity of the California members of Congress, reviews of court decisions, general advertisements, personal notices and many items of local current events of a diversified character. In short, the paper appears to have been published for the dissemination of news and intelligence of every kind. Nothing in the nature of news, as that term is generally understood, is found in the publication here in question.

[7] By the term "a newspaper of general circulation" the Legislature had in view pub-

lications to which the general public would resort in order to be informed of the news and intelligence of the day, editorial opinion, and advertisements, and thereby to render it probable that the "notices or official advertising" would be brought to the attention of the general public. We think that the purpose of the statute would fail of realization if such a publication as the one involved in this proceeding were held to be a newspaper published for the dissemination of news and intelligence of a general character.

[8] The second contention of appellant is that the Daily Bulletin has not "a bona fide subscription list of paying subscribers." The statute itself does not specify how many subscribers there must be, but does require a "bona fide" list thereof. It seems to us that the term, as used in this connection, means a real, actual, genuine subscription list which shall contain only the names of those who are in good faith paying regularly for their subscriptions. On this question the court said in the Green Case:

"As to whether it is such a newspaper is manifestly a matter of substance, and not merely of size; and that it is of general circulation must depend largely upon the diversity of its subscribers rather than upon mere numbers."

But it is urged in the brief filed in behalf of the California Press Association as amicus curiæ that—

"The words '*bona fide*' * * * mean that the subscription list shall cover a sufficient number of persons in a city or county to constitute an adequate medium for public advertising." (Italics ours.)

Here, as we have observed, the Legislature has not specified the number of subscribers required, and we must assume that it meant that the words "bona fide" were to be taken "according to their common acceptation." Quigley v. Gorham, 5 Cal. 418, 63 Am. Dec. 139; Gross v. Fowler, 21 Cal. 393; Winn v. Shaw, 87 Cal. 631, 25 Pac. 968. On this point Herman testified as follows:

"Q. State whether or not this 'Daily Bulletin' has now and at all times since June 23, 1916, has had a bona fide subscription list of paying subscribers. A. Yes; at all times."

According to his testimony, the list included banks, creameries, produce markets, orange growers, mercantile agencies, real estate dealers and others. After naming 25 subscribers in various lines of business, the witness concluded on this point: "That, I believe, covers it." He further testified:

"The Bulletin has circulated in San Bernardino, in Redlands, in Colton, in Rialto, in Ontario, in Highland, in Victorville, in Pomona, in Los Angeles, and in Riverside."

[9] We are not prepared to hold, in view of the number and diversity of subscribers and the territorial range of circulation, that this would not be "a bona fide subscription list of paying subscribers."

[10] In our opinion the paper is, in the language of the statute, "a newspaper devoted to the interests" and "published for the entertainment and instruction of a particular class. * * *" It is true that, as has been shown, the paper circulated in ten cities and towns, scattered through three counties, among at least ten "professions, trades, and callings," but it appears to us that it was published chiefly to meet the needs of persons and concerns specially interested in information of an official nature, and that the other contents of the paper were merely incidental to this object. It may also have been the purpose of the paper to lay a foundation for recognition under the statute.

In view of our conclusion that the paper was not published for the dissemination of news or intelligence of a general character, and that it was published for a particular class, it must be held that the finding is not supported by the evidence.

Judgment reversed.

We concur: WILBUR, J.; LENNON, J.; OLNEY, J.

SHAW, J. I concur in the judgment on the ground that the evidence shows that the Daily Bulletin was not, at the time in question, a newspaper of general circulation published for the dissemination of news and intelligence of a general character.

I am not certain that the main opinion purports to determine that a judgment given under section 4462 of the Political Code declaring a particular newspaper to be a newspaper of general circulation is binding and conclusive as to the character of the newspaper as of the time it is given. It is my opinion that, in any other action or proceeding in which personal or property rights of persons not parties to the proceeding under section 4462 are involved, the judgment given in a proceeding under that section is of no force or value whatsoever. This question, however, does not appear to be raised by this appeal.

As to the other matters discussed, several of them are admittedly not involved in the question presented. I do not desire to express any opinion upon any of them. It is to be hoped that in the future the Legislatures will refrain from such futile enactments.

ANGELLOTTI, C. J. (dissenting). I have no disposition to question the correctness of the conclusion of the court that in view of the facts shown by the record the publication here involved did not fully measure up to the requirements of our statutory definition of the term "newspaper of general circula-

tion." However, I do not desire to here express any definite conclusion on that question, as I think it should be held that the "decision and judgment" of a superior court in the proceeding authorized by section 4462, Political Code, is not reviewable on appeal. To my mind the matter is confided entirely and finally to the superior court of the county in which the paper is published, with the result that, in so far as the Legislature had the power to so provide, any notice, etc., published in a paper decided by such superior court to be a newspaper of general circulation, while such decision remains unrevoked by the superior court, must be held, wherever assailed, to have been published in a newspaper of general circulation. I think the manifest purpose of the section was to enable a paper about which some doubt might exist, as to being in fact a newspaper of general circulation, to obtain a certificate of standing, as it were, from the superior court of its county, which would have the effect of validating all pulications therein while such certificate remained unrevoked, in so far as any legal requirement of publication in a newspaper of general circulation is concerned. Whether the Legislature had the power to give such effect to the superior court certificate of standing is another question which is not here involved and which cannot here be effectively decided. Being of the opinion that the intent of the section was to leave the whole matter in the hands of the superior court, and that no right of appeal from the "decision and judgment" given by such court was contemplated. I cannot concur in the judgment of reversal, and think the appeal should be dismissed as being from a nonappealable judgment or order.

48 Cal. App. 276

FOWLER et al. v. THORNBERRY.
(Civ. 3420.)

(District Court of Appeal, First District, Division 1, California. June 22, 1920. Hearing Denied by Supreme Court Aug. 19, 1920.)

1. Stipulations ⟨⟩14(7)—Stipulation held not to estop plaintiffs from taking advantage of certain evidence.

In an action for breach of contract for the repurchase of certain live stock, a stipulation on motion for change of place of trial that witnesses would testify that they made an examination of the animals, and that it could not be determined from such examination that the animals shown to the witnesses were the same animals sold by defendant to plaintiffs, *held* not to estop plaintiffs from taking advantage of evidence that the animals were capable of identification by defendant, the stipulation relating only to the particular examination of the animals, and was evidence, but not conclusive proof, of its contents.

2. Sales ⟨⟩153—Offer of registered jennets with registration certificates held sufficient tender.

In an action for breach of contract to repurchase certain jennets, the contract of repurchase providing that the same jennets that were in the original purchase to a number not exceeding nine were to be sold, an offer by plaintiffs of the total remaining number of animals, together with their registration certificates, was sufficient, although they were unable to specify each particular animal according to its certificate.

3. Sales ⟨⟩383—Evidence held to show that purchaser of registered jennets had reasonable means for their identification.

In an action for breach of contract to repurchase certain registered jennets, where the sellers were unable to identify the particular animals covered by the particular registration certificates, evidence *held* to sustain a finding that the purchaser had reasonable means of identification.

4. Sales ⟨⟩333—Posting of notices for resale of property under execution presumed within township of sale.

In an action for breach of contract to repurchase certain registered jennets, where it appeared that plaintiffs, after defendant's refusal to repurchase, retained the animals to enforce their special lien under Civ. Code, § 3049, gave notice to defendant of the time and place of sale under section 3002, and sold them upon notice of sale of personal property under execution as provided in section 3005, the sale was not void because it did not appear that any of the places where notices were posted was within the township in which the sale took place, since it would be presumed that the law was obeyed, and that notices were posted within such township.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by A. J. Fowler and another against H. B. Thornberry. Judgment for plaintiffs, and defendant appeals. Affirmed.

Devlin & Devlin, of Sacramento, and E. F. Brittan, of Bakersfield, for appellant.

Kaye & Siemon and Alfred Siemon, all of Bakersfield, for respondents.

WASTE, P. J. Defendant appeals from a judgment in favor of plaintiffs for the sum of $4,603.50 and interest, damages alleged to have been suffered by the plaintiffs because of the failure and refusal of the defendant to accept and pay for eight head of registered jennets.

The defendant, Thornberry, a dealer in live stock, entered into an agreement in writing with the respondents and G. P. Thornburg for the sale by him to them of 10 head of registered jennets, to be brought by Thornberry from Missouri, at an agreed price of $6,000, the respondents and Thornburg to accept such jennets as might be selected by Thornberry as satisfactory stock,

the purchase price to be evidenced by promissory notes of different amounts. The jennets were shipped from Missouri by appellant in a lot containing 28 head. Upon arrival at the stockyard at Bakersfield, 10 jennets, identified by means of certain numbers burned into one of the hoofs of each animal, were sorted out by appellant and one of his employés, and were delivered to and were accepted by respondents and Thornburg. Some time later certificates of registration, containing the pedigree of each jennet and its registration number, were issued by the Standard Jack and Jennet Registry of America, and were sent to respondents and Thornburg, with a letter, directing the attention to the hoof numbers, and explaining that by reference to these numbers and the corresponding numbers on the certificates of registration each jennet could be identified.

Subsequently certain controversies arose between the parties regarding the qualities of the jennets for breeding purposes, and also concerning the guaranties made by Thornberry in respect to the foals that would be produced during the breeding season of 1914 and 1915. A new agreement was executed, which, after reciting that the parties desired to set aside all previous agreements, provided that the respondents and Thornburg should pay certain balances upon the promissory notes theretofore executed pursuant to the old agreement, and should sell to appellant a jack colt for the sum of $500. It was further agreed that appellant would, at the option of respondents and Thornburg and on notice, purchase the 9 head of jennets (one having died), or as many as might be living and in reasonably good and sound condition, at the original purchase price of $600 per head, it being specified that this stipulation should include "only the same jennets that were in the original purchase, and not exceeding nine head." In the event respondents and Thornburg exercised their option to sell, appellant was to receive, in consideration of the agreed purchase price, one-half of the colts foaled by the jennets between the date of the new agreement and the delivery of the animals, the method of selection being specified. At the time he signed this agreement, appellant knew from "hearsay," and, no doubt, from familiarity with the industry, that the hoof marks on the animals had become obliterated from being worn off. In due time respondents and Thornburg decided to exercise their option to sell the remaining 8 head of jennets (another one having died), and so notified the appellant.

Appellant and Albert Dill, a stock breeder, and respondent Hadlock went to respondent Fowler's ranch, near Bakersfield, for the purpose of examining the jennets. It was then discovered that 3 of the jennets were dead. Hadlock was unable to identify the remaining 7 head. The parties then went to the office of the attorney for the respondents, who offered appellant the 10 registration certificates theretofore received, and demanded the sum of $4,800. Appellant declared himself ready to buy the jennets, but declined to accept them unless the respondents could identify each one, with reference to the individual registration certificate, stating that as the animals were thoroughbred, buyers would require each to be identified as the one mentioned in her registration certificate. Respondents declared they were unable to identify the animals because the hoof marks which were upon the jennets at the time they were delivered had become obliterated. Appellant then requested respondents to pick out the three registration certificates of the three dead jennets. Respondents were unable to do so or to identify any of the living animals as the ones described in any of the 10 registration certificates. Appellant refused to accept delivery unless there was some means of identification whereby he could perpetuate the pedigree of the jennets and their progeny. Some time later the remaining 7 head of jennets were sold by respondents for the total sum of $220. The present action was then commenced against appellant for recovery for his failure and refusal to accept or pay for the jennets and for damages for the value of the pasturage of the animals from the exercise of the option to the date of the sale.

The parties agree that their respective contentions may be stated as follows: Appellant contends that he agreed to purchase, at respondents' option, the same jennets which were in the original purchase contract, i. e., registered jennets, each one duly identified, and each one accompanied by its registration certificate, together with such of the progeny as he would be entitled to receive under the contract, also identified so as to permit the same to be registered. The respondents contend that they agreed to sell, at their election, the same animals they had purchased from appellant, collectively and regardless of identification or registration, that they tendered or offered to deliver the same animals, and that appellant Thornberry is liable for refusing to purchase them. The principal controversy turns upon the interpretation of the repurchase clause, the question being whether or not identification of the individual animals was a necessary incident and a part of the contract. The lower court has decided that it was not, and has decided in favor of the respondents' theory.

It appears that each of the registration certificates for the respective jennets contained, in addition to the numbers burned upon the hoofs, certain height, girth, bone, and hoof measurements, and a statement of the age of the animal, all of which were re-

quired by the rules and regulations of the Jack and Jennet Registry Association, and the lower court found that it would have been, and was, at all times possible for the appellant, or other persons skilled in such matters, to have identified each and every animal from the data given in the registration certificate, with a reasonable degree of certainty. This finding is supported by the testimony of the witness De Ganna, an employé of the appellant, called and qualified by him as an expert, by the testimony of the witness Dill, a breeder of jacks and jennets, also called and qualified as an expert by appellant, and by the testimony of appellant, who was a stock breeder of years' standing, well versed in the details of the business. The respondents and Thornburg knew little, if anything, of such matters.

[1] Appellant contends that the respondents were estopped from availing themselves of the effect of this evidence by a stipulation entered into in connection with the proceedings for a change of place of trial of the action. It was stipulated that in the event the motion was granted, witnesses Dill and De Ganna would testify that they made an examination of the animals on the 1st day of August, 1917, the date fixed by the option for the resale for the purpose of determining whether or not the jennets were the same animals sold by the appellant to the respondents, and "at said time, the defendant and said Albert M. Dill examined certain animals shown by the plaintiff, but that it could not be determined from said examination that the animals so shown to them were the same animals sold by defendant to plaintiffs at the time and in the manner as set forth in said complaint, and the plaintiffs also admit that it is true that it could not be determined from such examination that the animals so shown to said witness were the same animals as were sold by defendant to plaintiff's." We think, however, that the respondents' contention is correct, that a fair reading of the stipulation shows it to relate only to the particular examination of the animals made at that time, and not to any other. Moreover, the stipulation was merely to the effect that the witnesses would, if called, testify as indicated. The stipulation, therefore, became evidence, but not conclusive proof of its contents. Blankman v. Vallejo, 15 Cal. 638, 645; Boggs v. Merced Mining Co., 14 Cal. 279, 358. The authorities cited by the appellant to the contrary only go to the effect that where there has been a stipulation in the course of the trial as to the facts, made as a substitute for evidence, and the findings are contrary to the facts as stipulated, they are unsupported by the evidence. That is not this case.

[2, 3] It would therefore seem that appellant's objection to receiving the animals under the terms of the option was not reasonable. The trial court was correct in concluding that the offer of the respondents to return collectively the same animals received from appellant in the first instance was a sufficient compliance with the terms of the option, notwithstanding the inability of the respondents to specify each particular animal as demanded by the appellant, according to the registration certificate. Appellant agreed to repurchase "the same jennets that were in the original purchase and numbers not exceeding nine." Respondents tendered certain animals and all the registration certificates they had received from appellant with the animals. The court found that the jennets offered to the defendant were the "same identical jennets" sold to plaintiffs by defendant. It also found that appellant had the reasonable means of identification of the animals at hand. Both findings are supported by the evidence and conclude the controversy.

The evidence does not warrant appellant's contention that the time within which he might accept the tender of the jennets on repurchase was extended. He did, apparently endeavor to gain some additional time within which to pay or settle after the 1st of August, but the respondents had given him notice of the exercise of the option long before that date, and the obligation to repurchase the animals was imposed upon him as of that date.

[4] When the respondents tendered, and appellant refused to receive, the jennets under the option of repurchase, the respondents, regarding the transaction as a sale of personal property, retained the animals in their possession in order to enforce their special lien thereon. Civ. Code, § 3049. They subsequently sold them for the sum of $220. They gave actual notice to the appellant of the time and place at which the property would be sold (Civ. Code, § 3002), and sold the animals in the manner and upon the notice of sale of personal property under execution. (Civ. Code, § 3005).

It was proved that notices of the sale were posted in three public places for the required time, but it was not shown that any of the places were within the township in which the sale took place. Appellant maintains that the sale was void for that reason. That contention would be sound if it appeared that the notices were not posted within the township. It does not so appear, and it will be presumed that the law was obeyed in that respect as the court has found. Whether or not the sale was irregular the appellant has suffered no injury. The court found that the jennets were of the value of $220, the exact amount at which they were sold. Under the Civil Code, section 3311, subdivisions 1 and 2, the detriment caused by the breach of appellant's agreement to accept and pay for the jennets was therefore

exactly the same whether the property was resold or not.

The judgment is affirmed.

We concur: RICHARDS, J.; WELCH, Judge pro tem.

48 Cal. App. 171

JONES v. DELLA MARIA. (Civ. 3195.)

(District Court of Appeal, Second District, Division 2, California. June 14, 1920.)

1. Landlord and tenant ⟸112(2)—Right to possession is waived by accepting rent accrued pending action.

The right to maintain an action for unlawful detainer after forfeiture of the lease for breach of covenant to give security is waived where the lessor after the action was begun accepted rent, as rent, not as the value of the use of the premises, which had accrued after the action was begun.

2. Landlord and tenant ⟸112(1)—Acts or conduct of landlord may amount to "waiver" of forfeiture of lease.

A "waiver" is the intentional relinquishment of a known right or such conduct as warrants an inference of such relinquishment, and the forfeiture of a lease may be waived by the acts or conduct of the lessor without reference to any act by the lessee.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Waiver.]

3. Landlord and tenant ⟸112(1)—Waiver of forfeiture defeats unlawful detainer though breach continuing.

An action for unlawful detainer is defeated by the waiver of the forfeiture for breach of covenant to furnish security after the action was begun, though such covenant was continuing and was subsequently breached, since the subsequent breach is available only in a new action commenced subsequent thereto.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action for unlawful detainer by James S. Jones against J. Della Maria. Judgment for plaintiff, and defendant appeals. Reversed.

Jas. W. Glassford and Hickcox & Crenshaw, all of El Centro, for appellant.

J. Stewart Ross and R. B. Whitelaw, both of El Centro, for respondent.

FINLAYSON, P. J. This is an action for unlawful detainer, brought under subdivision 3 of section 1161 of the Code of Civil Procedure. Judgment passed for plaintiff and defendant appeals.

The complaint, in the form usual in such actions, alleges a lease of the premises by plaintiff to defendant, under a written lease, for the term of three years and six months from and after October 1, 1916, at a monthly rental of $50. In their lease contract the parties agreed that the lessee should execute a bond in the penal sum of $1,000, with sureties satisfactory to the lessor, to guarantee the performance by the lessee of all his covenants and agreements. Defendant neglected to give such bond, and on November 11, 1917, plaintiff served a written notice demanding that defendant furnish the bond or redeliver possession. Defendant failed to comply with the demand, and plaintiff, on November 26, 1917, brought the action.

[1] At the trial plaintiff testified that in January, 1918, which was after he had commenced this action, he received from defendant rent up to the end of that month. According to this testimony he must have received, in January, 1918, rent for the months of October, November, and December of 1917, and for the month of January, 1918. The only construction of which plaintiff's testimony is susceptible is that the money received by him from defendant during the pendency of the action was paid to and accepted by him as rent due under the lease, and not as the value of the use and occupation of the premises by defendant after forfeiture of the lease.

The acceptance of such rent by plaintiff was a waiver of defendant's forfeiture of the leasehold and of plaintiff's right to maintain this action.

[2] The right to recover possession in an action such as this is based on the idea that the tenant has forfeited his leasehold. Notwithstanding the breach by a lessee of any covenant that he may have made in the lease contract, the lessor may or may not elect to treat the breach as a forfeiture of the lease. Here, by his notice to give the bond or redeliver possession, served November 11, 1917, and by this action for restitution of possession and the cancellation of the lease, plaintiff elected to treat the lease as forfeited. But, notwithstanding this election, he thereafter could waive the forfeiture of the lease and his right to insist thereon as a ground for restitution of possession and cancellation of the lease contract. This plaintiff did by accepting rent for months succeeding that in which he served upon defendant the three days' notice. Waiver is the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right—an election by one to forego some advantage he could have taken or insisted upon. A person who is in a position to assert a right or insist upon an advantage may, by his words or conduct, and without reference to any act or conduct of the other party affected thereby, waive such right. Once such right is waived, it is gone forever; the person who has waived

the right will thereafter be precluded from asserting it. "The courts, not favoring forfeitures, are usually inclined to take hold of any circumstances which indicate an election to waive a forfeiture." Queen Ins. Co. v. Young, 86 Ala. 424, 5 South. 116, 11 Am. St. Rep. 51.

Under section 1161 of the Code of Civil Procedure the landlord, after giving the three days' notice there provided for, has the right to maintain an action for restitution of possession and cancellation of the lease. The attitude of the landlord, after such notice and the commencement of an action to cancel the lease, is that the tenant no longer is entitled to possession by virtue of the lease contract; that the tenant has forfeited his leasehold. Having elected to treat his tenant as no longer entitled to possession or to any right under the lease, the landlord's course must be consistent with this claim in the further progress of the proceeding that he has instituted. And if thereafter he accept rent accruing subsequently to the demand for possession or accruing subsequently to the commencement of the action, and accept it as rent eo nomine—that is, as payment under the original lease contract—he affirms that the lease is still in existence, and thereby waives the forfeiture that he has elected to enforce. By his own acts he admits the continuance of the lease, and waives any prior forfeiture. A landlord who thus recognizes a lease as a subsisting, operative contract should not be permitted to insist upon a past forfeiture, nor be permitted to assert that the contract is no longer a subsisting lease affording to the tenant all his contractual rights thereunder. Guptill v. Macon, etc., Co., 140 Ga. 696, 79 S. E. 854, Ann. Cas. 1915A, 1249, and notes; Kenny v. Seu Si Lun, 101 Minn. 253, 112 N. W. 220, 11 L. R. A. (N. S.) 831, and notes, 11 Ann. Cas. 60. See, also, Randol v. Tatum, 98 Cal. 390, 33 Pac. 433.

[3] Respondent seeks to avoid the effect of this waiver of the forfeiture upon the theory that the covenant to give the bond was a continuing covenant and its breach a continuing breach. It undoubtedly is the rule that where the covenant is a continuing covenant and the breach a continuing breach, so that there is a continuing cause of forfeiture, the landlord, by accepting rent that has accrued subsequently to any breach of such covenant, is not precluded from taking advantage of any forfeiture occurring after such acceptance of rent. McGlynn v. Moore, 25 Cal. 384; Jones v. Durrer, 96 Cal. 95, 30 Pac. 1027. But, though the waiver of the breach of a continuing covenant will not preclude the landlord from taking advantage of a cause of forfeiture that occurs subsequently to such waiver, the waiver will discharge any forfeiture occurring previously thereto. Therefore, even if as claimed by respondent, the covenant to give the bond be a continuing covenant and its breach a continuing breach, that fact does not help him here, because where, as here, the forfeiture relied upon as the basis of the landlord's right to maintain the action of unlawful detainer has been waived subsequently to the commencement of the action, it is of no consequence, so far as that action is concerned, that the covenant is a continuing covenant and its breach a continuing breach. Where the covenant is a continuing covenant, and the tenant continues to breach it after the landlord has waived his right to insist upon a past forfeiture of the lease, such continuing breach after such waiver may afford ground for again electing to treat the lease as forfeited by again giving the three days' notice required by the Code, and commencing a new action for restitution of possession and cancellation of the lease, based upon such renewal or continuance of the cause of forfeiture. But until the landlord renews his election to treat the lease as forfeited by giving a new statutory notice, and until he commences a new action to enforce such new cause of forfeiture, the tenant cannot be dispossessed for the past forfeiture that the landlord has waived by conduct that is consistent only with a recognition of the continued existence of the lease contract. In this action plaintiff must recover, if at all, upon the right of forfeiture that existed when he commenced his action. But that right he waived, after the action was commenced, by conduct inconsistent with its exercise.

Judgment reversed.

We concur: THOMAS, J.; WELLER, J.

48 Cal. App. 327

VANCE v. SUPERIOR COURT, LOS ANGELES COUNTY, et al. (Civ. 3384.)

(District Court of Appeal, Second District, Division 2, California. June 26, 1920.)

Justices of the peace ⊂=84(2)—Objection to jurisdiction over the person waived by general appearance.

Since the amendment of Code Civ. Proc. § 890, subd. 4, in 1905 (St. 1905, p. 44), so as no longer to provide expressly that objection that the action was brought in the wrong county might be made at the trial, that objection is waived by general appearance in the justice's and superior courts.

Petition by J. A. Vance prayed to be directed to Superior Court, county of Los Angeles, and Leslie R. Hewitt, Judge of said court for a writ of review. Petition denied.

Archie D. Mitchell, of Ontario, for petitioner.

PER CURIAM. The petition is denied. By his general appearance in the justice's and superior court petitioner waived his right to raise the question of jurisdiction. Holbrook v. Superior Court, 106 Cal. 589, 39 Pac. 936, does not aid him. That case was decided when section 890, subdivision 4, Code of Civil Procedure, expressly provided that the objection that the action was brought in the wrong county might be made at the trial. In 1905 (St. 1905, p. 44) the section was amended, and subdivision 4 thereof now merely provides that the action may be dismissed "when the action is brought in the wrong county, or township, or city." Since the amendment, the subject of dismissal of such actions has been considered by the Supreme Court, and it has been uniformly held that objection to the jurisdiction of the person must be made by special appearance for that purpose; otherwise it is waived. Olcese v. Justice's Court, 156 Cal. 82, 103 Pac. 317; American Law Book Co. v. Superior Court, 164 Cal. 327, 128 Pac. 921.

48 Cal. App. 156

BENTE et ux. v. REESE. (Civ. 3117.)

(District Court of Appeal, Second District, Division 1. California. June 11, 1920. Hearing Denied by Supreme Court Aug. 9, 1920.)

1. Vendor and purchaser ⊂=33—Reliance on statements by vendor necessary to establish fraud.

Where there was no confidential relation between the parties to a sale of interest in mining claims except long friendship, and the vendor had knowledge of mining which the purchasers had not, the purchasers cannot recover the payments made because of misrepresentations by the vendor without showing that in fact they relied on such misrepresentations.

2. Vendor and purchaser ⊂=44—Evidence held not to show confidential relations warranting recovery of purchase money for misrepresentations.

In an action to recover purchase money paid for an interest in a mining claim, evidence that the purchasers visited the claim with the vendor, and that the latter only represented that he believed valuable ore would be discovered therein because of the proximity of a paying mine, *held* not to show reliance on confidential relation between the parties, though they were old friends and purchasers who had no knowledge of mining.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by A. E. Bente and wife against Fred Reese. Judgment for defendant, and plaintiffs appeal. Affirmed.

E. J. Emmons, of Bakersfield, for appellants.

W. B. Beaizley, of Bakersfield, for respondent.

CONREY, P. J. Action to recover the sum of $1,500 received by the defendant to and for the use and benefit of the plaintiffs. Judgment in favor of the defendant, from which judgment the plaintiffs appeal.

An amended complaint was filed at the time of the trial, and by stipulation all of the allegations thereof were deemed to be denied. So far as pertinent to the questions presented here, the material facts alleged by the plaintiffs were that prior to the 23d day of April, 1918, when said money was paid over by the plaintiffs to the defendant, the defendant had represented that he was a mining man with knowledge of mines and minerals and a prospector, and that the plaintiffs believed the said statements; that the plaintiffs and each of them were absolutely ignorant of mines and minerals or anything connected therewith; that shortly prior to the 23d day of April, 1918, defendant informed the plaintiffs that he had options upon mining claims, and sent a plan of said mining claims, showing that they were intimately connected with the Cuddyback quicksilver mine; that the defendant informed the plaintiffs that a one-fifth interest in the said Cuddyback mine had been sold for $70,000; that the defendant also took the plaintiffs to the said quicksilver mine and exhibited the rock and showed the plaintiffs through the said mine and brought to the knowledge of the plaintiffs the high price of quicksilver, and informed the plaintiffs that said mine was producing a flask of quicksilver and over every day; that the defendant informed the plaintiffs that the mining claims held under options by him were in the same kind of ground, and that there

was no reason why they should not be able to develop a valuable quicksilver mine upon said grounds; that, believing all the said statements of the defendant, and being absolutely ignorant in respect to mining property or minerals, plaintiffs relied solely upon the judgment, experience, and integrity of defendant, and, so, relying, on the 23d day of April, 1918, purchased a one-half interest in three mining claims for the sum of $1,500; that at said time the defendant well knew that the said mining claims were not worth the amount demanded from the plaintiffs, and that plaintiffs were induced to invest their money with the defendant solely because of their long acquaintance and intimate friendship with each other; that at said time the defendant well knew that the said claims were valueless and without values, and that the defendant made the said representations to the plaintiffs knowing the same to be false, and for the purpose of inducing the plaintiffs to pay to the defendant said sum of $1,500, and that without the said inducement made by the defendant, and without the reliance that the plaintiffs had in the defendant's promises and integrity and knowledge, the plaintiffs would not have so paid the said money; that the plaintiffs went upon the said land and stayed upon the said land "until they were informed that they had been buncoed"; that thereupon the plaintiffs investigated, and from such investigation demanded of and from the defendant the return of the said money, and offered a deed of the said one-half interest back to the said defendant, and in open court tendered to the defendant a deed properly executed, conveying to the defendant the said one-half interest purchased theretofore, which said offer was refused; that the defendant has refused and neglected to pay to the plaintiffs the said sum, or any part thereof, and that the said sum has not been paid nor any part thereof; that the said sum was so paid to the defendant on the 23d day of April, 1918, and a deed for one-half interest in the said three mining claims was executed by the defendant to the plaintiffs on said day; that all of the statements, inducements, and representations made by the defendant were false, fraudulent, untrue, and were known to be so by the defendant at the said time, and were made by the defendant for the sole purpose of inducing the plaintiffs to consummate said purchase.

The findings of fact made by the court concerning the matters before mentioned are the following:

"That defendant did not, on the 23d day of April, 1918, at or within the county of Kern, state of California, or elsewhere, or at any other time, receive from plaintiffs or either of them the sum of $1,500, or any other sum to and for or to or for the use and benefit or use or benefit of plaintiffs, or either of them. That on or about the 23d day of April, 1918, plaintiffs paid to defendant at Tehachapi, Cal., the sum of $1,500, as the agreed purchase price of and for an undivided one-half interest in three certain mining claims situated near said Tehachapi, in Kern county, Cal., and received from said defendant a deed conveying the said one-half interest in said mining claims so purchased. That prior to the payment of said $1,500 and the delivery of said deed, plaintiffs negotiated with defendant upon the said purchase of said interest in said mining claims, and defendant conducted plaintiffs to and upon said mining claims, and exhibited them to plaintiffs, and indicated to them the boundaries thereof. That plaintiffs were given ample time to investigate and consider whether or not they should pay defendant the said sum of $1,500 which was fixed by defendant as the purchase price of a one-half interest in said claims. That after consideration thereof, that said plaintiffs accepted the offer of defendant to sell to them said one-half interest in said mining claims for said sum of $1,500, and so informed defendant, and thereupon, and on or about said 23d day of April, 1918, plaintiffs paid to defendant said sum of $1,500, and received the deed heretofore referred to. That the statements, inducements, and representations made by defendant to plaintiffs respecting the said mining claims were not false, fraudulent, or untrue, nor were they known by defendant to be false, fraudulent, or untrue at the time of the making thereof, nor were such statements, inducements, or representations made by defendant to plaintiffs in and about the purchase of said one-half interest in said mining claims, falsely or fraudulently or untruthfully made by defendant for the sole purpose, or for the purpose, of inducing plaintiffs to consummate the purchase of said interest in said mining claims."

Appellants contend that the findings of fact are totally insufficient; that the evidence is insufficient to support the statements contained in the findings; that the plaintiffs were entitled to a finding under the evidence that the statements made by defendant to the plaintiffs concerning the mining claims were made under confidential relations, and were statements of an expert to one totally ignorant of the subject, and were, as a matter of law, for that reason equivalent to statements of fact; that judgment should be for the plaintiffs. Counsel relies upon the following rule of law as quoted from 20 Cyc. 60:

"Where there exists between the parties some relation whereby the purchaser, being ignorant of the facts, is justified in placing trust and confidence in the honesty and superior knowledge of the vendor, or where, in the absence of any particular relation, special confidence is placed in the vendor on account of his peculiar knowledge and the purchaser's ignorance, the rule of caveat emptor does not apply; and in such cases the purchaser may without further investigation rely on the vendor's statements, even where they might otherwise be deemed mere expressions of opinion or dealers' talk."

[1] There was no legal relation of special trust or confidence between the plaintiffs and the defendant in this case. The parties had been neighbors and friends; the defendant had some experience in the mining business and the plaintiffs had no such experience. These facts were known to all of them. The evidence shows that the plaintiffs had confidence in the integrity of the defendant, but it was further necessary for the plaintiffs to prove, not only that the defendant made false statements to them upon which they were entitled to rely, but also that, without investigating the facts for themselves, they relied upon those statements.

[2] Although we have not been furnished with any definite specification of particulars in which the evidence is insufficient to support the findings, we have examined the evidence as we find it extensively quoted in the briefs. It appears that immediately before the sale took place, the plaintiffs went to the mining claims, where the defendant was then residing, and remained on the ground several days; that they went upon the claims with the defendant and visited the neighboring Cuddyback mine; that at the time when the sale was made the defendant had not represented, and did not then represent, that quicksilver or the mineral cinnabar had actually been discovered on these claims. The parties plaintiff and defendant alike knew at that time that the claims were mere prospects, and that it was a mere matter of opinion that probably such minerals could be discovered and a cinnabar mine developed on these claims. The defendant did state that the ore was "there some place," and that the dikes or ledge on which the Cuddyback mine was located continued on into these claims, or that "it ran that way." He "worked out the trend of it on the hillside," and so exhibited the territory to the plaintiffs. It is very apparent, even from the testimony of the plaintiffs, that the representations made by the defendant concerning the value and mineral quality of these claims amounted to nothing more than that the defendant believed that probably valuable minerals would be found therein by the processes of development, and that when so found the claims could be sold at a profit. So far as the evidence shows, the defendant may have held and believed in that opinion, and ultimately it may prove to be well founded. It is true that the defendant had only paid $400 or $500 for his options on the claims, and that he was selling a one-half interest therein to his friends, the plaintiffs, for $1,500. While this might be characterized as a very strong draft on friendship, it did not constitute fraud; for the defendant made no representation to the plaintiffs concerning the cost of the claims to him, nor did the plaintiffs make any inquiry on that subject. It is not claimed by the plaintiffs, nor is there any evidence tending to show, that this was a case of a joint purchase of the property by the plaintiffs and the defendant from third parties in which transaction the parties were to pay equal amounts for their equal interests in the property purchased. The plaintiffs merely purchased from the defendant one-half of his interest in the claims at a price fixed by the vendor, which price the vendees were willing to pay.

Our conclusion is that the plaintiffs were not entitled to a finding that the statements made by defendant concerning the mining claims were made under confidential relations; and that the evidence is sufficient to justify the facts as found.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

48 Cal. App. 300

PETERKIN v. RANDOLPH MARKETING CO. (Civ. 2942.)

(District Court of Appeal, Second District, Division 1, California. June 22, 1920. On Petition for Rehearing July 14, 1920; Hearing Denied by Supreme Court Aug. 20, 1920.)

1. Sales ⟸52(5)—Evidence held to show sale of fruit instead of consignment for sale on commission.

In fruit grower's action for breach of contract involving issue of whether plaintiff's fruit had been sold to defendant or had been shipped on consignment for sale on commission, evidence *held* to sustain jury's finding that defendant's agent had in fact purchased the fruit.

2. Appeal and error ⟸1002—Finding on conflicting evidence conclusive.

Jury's finding on conflicting evidence is conclusive.

3. Principal and agent ⟸119(1)—Plaintiff, suing on contract made with one known to have been acting as agent, has burden of proving agent's authority.

Plaintiff, having made contract with defendant's agent, knowing agent to have been acting as such, has burden of showing that agent, in making alleged agreement, was acting within the scope of his authority.

4. Principal and agent ⟸155(1)—Principal not liable on agent's contract not within actual or apparent authority.

Defendant, having received fruit shipped by plaintiff without knowledge that it was consigned otherwise than for sale on commission, was not liable to plaintiff on theory that its agent had actually purchased the fruit, in absence of evidence that agent had actual authority to make such contract, or that defendant through its agents had purchased the fruit, warranting conclusion that the making of such contract was within the agent's apparent authority.

On Petition for Rehearing.

5. Appeal and error ⟸768—Court will assume that its attention has been called to all evidence relied on in support of the contentions of the parties.

Where the record is presented in a typewritten manuscript, and that portion thereof upon which the parties rely has been printed in the briefs, under Code Civ. Proc. § 953c, appellate court will assume that its attention has been called, not only to the points relied on, but to all evidence upon which the parties rely in support of their contentions.

6. Appeal and error ⟸832(5)—Rehearing not granted to enable party to present evidence not printed in brief.

Where the portions of the record on which the parties rely have been printed in their briefs, under Code Civ. Proc. §§ 953–953c, a rehearing should not be granted to enable either party to present evidence not printed in brief, and what in fact constitutes a new record.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by W. H. Peterkin against Randolph Marketing Company. Judgment for plaintiff, and defendant appeals. Reversed.

John H. Miller, of San Francisco, for appellant.

F. C. Drumm, of Orange, for respondent.

SHAW, J. In this action a judgment was entered upon the verdict of a jury for $1,740.60 in favor of plaintiff, from which defendant appeals.

Plaintiff sues for himself and as assignee of one Whiting, both of whom were owners of orange groves upon which, in the fall of 1917, there were crops of fruit ready for market. Defendant was a corporation engaged in the marketing of such fruit. The claims of plaintiff and his assignor, as appears from the complaint, are that they delivered their fruit to defendant for shipment upon an agreement by the latter whereby it guaranteed a price, f. o. b. at Anaheim, of a certain stipulated sum per packed box of oranges, less a certain sum for picking, packing, and commission to be received by defendant; while, on the other hand, defendant asserted the fruit was consigned to it for marketing on a commission basis, without purchase or guaranty as to price at which it was to be sold.

The record is presented in a typewritten transcript, and counsel for both parties, recognizing the rule prescribed by section 953c, Code of Civil Procedure, have printed in their briefs that portion of the record upon which they rely to sustain their respective contentions.

It appears that defendant's principal place of business was in the city of Los Angeles; that it had a house in Orange county where it received and packed fruit for shipment; that J. C. Gow, who was a soliciting agent, called upon plaintiff and Whiting and solicited the handling and sale of their fruit crop by defendant on commission; as to all of which there is no controversy in the evidence. A conflict, however, arises as to the nature of the oral agreement under which the fruit was delivered to defendant. The testimony of both plaintiff and his assignor tends to prove that Gow came to them with a proposal to ship on consignment, which they declined; that thereafter, in an interview with Gow, he agreed to guarantee plaintiff a stipulated price for the fruit, out of which defendant was to receive 65 cents per box for picking, packing, and marketing. And like testimony was given by Whiting as to the agreement made with Gow. Plaintiff testified as follows: "It is my theory that I sold the fruit to the Randolph Marketing Company"—and, further:

"I considered it a purchase; if the fruit brought more than the price agreed upon, I was to have the excess. * * * It was understood that the fruit was subject to inspection at the other end. * * * If the fruit had been rejected on inspection, it would have reduced my claim."

[1-3] Notwithstanding testimony of defendant contradicting plaintiff's theory as to the meaning of the contract, the evidence of plaintiff tends to prove his asserted theory, and upon such conflict the conclusion of the jury must, as to the nature of the contract made by the defendant's agent, be deemed conclusive. Gow, however, was acting in the capacity of an agent, and while it is conceded by defendant that he was empowered to solicit contracts for consignments of fruit to it, to be picked, packed, and sold on commission, it denies that he had authority, either express or implied, in acting for defendant, to either purchase fruit or guarantee a price at which it was to be sold f. o. b. or otherwise. Since plaintiff and his assignor dealt with Gow, knowing him to be acting as an agent of defendant, the burden was upon them to show that he in making the alleged agreement was acting within the scope of authority conferred upon him so to do. While counsel for respondent concedes that no express power was conferred upon Gow to either purchase or guarantee the price of the fruit delivered to defendant, he nevertheless insists that he was clothed with ostensible authority to make the agreement, and hence, since as claimed it recognized and adopted like contracts made by him with others, defendant is estopped from denying that Gow as its agent was authorized to make the alleged agreements. Conceding this to be the law, our attention is directed to no evidence whatever, either

printed in the brief or contained in the typewritten transcript, which in the slightest degree tends to show that defendant had, through its agents or otherwise, purchased fruit at a stipulated price or guaranteed the price thereof, or shipped fruit other than on consignment for sale on commission.

[4] The trial court, in recognition of the law, properly instructed the jury that in order to entitle plaintiff to recover they must find:

"That in the making of said agreements with said Gow as the said agent of the Randolph Marketing Company, the plaintiff and said C. H. Whiting acted in good faith and with ordinary care, and that the making of such agreements was within the actual or apparent scope of the authority of said Gow."

Admittedly there was no actual authority conferred upon Gow to make the contracts, and, as stated, our attention is directed to no evidence tending to show any act on the part of defendant from which the conclusion can be drawn that he had apparent authority to make such contracts for and on behalf of defendant, which, upon delivery of the fruit, received it without knowledge or information that it was consigned otherwise than in the ordinary course for sale upon commission.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

On Petition for Rehearing.

PER CURIAM. [5, 6] Respondent's petition for a rehearing herein is denied. In presenting this appeal both parties, as stated in the opinion, printed in their briefs the portions of the evidence, taken from the typewritten transcript, upon which each of them relied. In his petition for a rehearing respondent does not base his claim thereto upon the fact that in considering the evidence so printed we arrived at an erroneous conclusion, but now for the first time in his petition for rehearing he asks us to reconsider the case upon evidence printed therein to which no reference was made in presenting the appeal. In deciding the case the court, as it was justified in doing, assumed that both parties not only directed our attention to all of the points upon which they relied, but likewise to all the evidence upon which they relied in support of their respective contentions; and having, as we believe, properly decided the case thereon, a rehearing should not be granted to enable either party to present what in fact constitutes a new record; that is, evidence which they did not deem of sufficient importance to print in their briefs as required by section 953c, Code of Civil Procedure, which requires one availing himself of the provisions of sections 953, 953a, and 953b, Code of Civil Procedure, in appealing from a judgment or order, to print in his brief such portions of the record as he desires to call to the attention of the court. And where, as in this case, it appears that the parties exercise such right, and submit the appeal, another hearing thereof upon other evidence than that first presented at the hearing should not be granted. Otherwise repeated hearings of the same case must be had by the court.

48 Cal. App. 199

THOMAS v. LAYER et al. (Civ. 3111.)

(District Court of Appeal, Second District, Division 1, California. June 15, 1920. Hearing Denied by Supreme Court Aug. 12, 1920.)

1. Sheriffs and constables ⊂⊃151—Sureties on bond indemnifying constable liable without demand by indemnitee.

The sureties on a bond given to indemnify a constable against all loss and liability which he might sustain by retaining attached property are liable as soon as the constable's liability is fixed by judgment against him, and no demand is necessary before suit is begun against them.

2. Sheriffs and constables ⊂⊃151—Action on bond indemnifying constable maintainable without appeal from judgment against constable.

A constable may maintain an action on a bond given to indemnify him against liability for retaining attached property without prosecuting an appeal from the judgment rendered against him in favor of the adverse claimant of the attached property.

3. Sheriffs and constables ⊂⊃151—Action on bond indemnifying constable maintainable pending appeal by principal from judgment against sheriff.

A constable may maintain an action on a bond given to indemnify him against liability or for retaining attached property pending an appeal prosecuted by the principal on the bond from the judgment against the constable, especially where it was not shown that there was any merit in the appeal, and it was dismissed before trial of the action on the bond.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Charles R. Thomas against Adam Layer and others. Judgment for plaintiff, and defendants appeal. Affirmed.

C. Franklin Baxter and Thomas A. Sanson, both of Los Angeles, for appellants.

J. H. De La Monte and Rupert B. Turnbull, both of Los Angeles, for respondent.

JAMES, J. Defendants appeal from a judgment entered against them. The action was brought upon an undertaking given by Wilson, as principal, and Layer and Schenck,

as sureties, to indemnify the plaintiff, who was a constable, for a liability which might accrue against him. Wilson was plaintiff in a certain civil action, in which action he required the plaintiff, as constable, to attach an automobile, which automobile was later claimed by a third party. Upon the demand of the third party the constable was about to release the property, when the undertaking was given upon which this action was brought. Because of his retention of the property after the third party's demand, the constable was subjected to a suit, and judgment was recovered therein against him by one Bunnell, who was the third party referred to.

There was evidence showing that, upon this action of Bunnell being brought against the constable, the latter's attorney called upon the appellants to assist in the defense of that action, and it appears that two counsel were employed by one or the other of the sureties (appellants here), and that such counsel did appear at the trial in defense of the action. Appellant Layer, one of the sureties, makes the point here that he was not permitted to take part in the defense of that action; but there was ample evidence before the trial court to entitle the inference to be drawn that he was not only well informed of all of the proceedings in that case, but that the counsel, other than counsel for the constable, did represent the sureties, and both of them, with authority, or at least their consent. After the judgment was rendered in favor of Bunnell against the plaintiff here, execution was taken out and money belonging to the plaintiff was attached, whereupon notice of appeal was given and an undertaking prepared and filed for the purpose of staying execution. On this undertaking Layer signed as one of the sureties, but later refused to justify, and the constable by his own means procured a stay bond and caused the same to be filed. While the appeal was pending in this court and undecided, the plaintiff brought this action to enforce the liability assumed by Wilson and his sureties, the appellants here. Before the action was tried, plaintiff dismissed his appeal in the Bunnell Case in this court and satisfied the judgment below.

[1] Defendants contend that the complaint in this action failed to state facts sufficient to constitute a cause of action, because it did not allege that demand had been made upon the appellants for the payment of the judgment. Plaintiff in his complaint set out the undertaking executed by appellants, which undertaking, as appears by its terms, was to indemnify the constable against "all loss and liability which he, the said constable, his heirs, executors or administrators, shall sustain or in any wise be put to, for or by reason of the said attachment, seizing, levying, taking, or retention by the said constable, in his custody, under said attachment, of the said property claimed as aforesaid. * * *" By allegations following, the facts that the judgment had been rendered against the plaintiff, the amount thereof, and that the defendants had failed to hold the plaintiff harmless as agreed, and had failed to pay the amount of the judgment, and that the whole amount thereof was unpaid, were set forth. We think it was not necessary to allege, under the terms of the contract of indemnity, that demand had been made upon the appellants before the bringing of this action. The amount of their liability had become fixed by the judgment, and there was no term of the undertaking which relieved appellants from satisfying the judgment until after demand made. Murdock v. Brooks, 38 Cal. 596; Pierce v. Whiting, 63 Cal. 538; Coburn v. Brooks, 78 Cal. 443, 21 Pac. 2. The contract here, as before noted, was one of indemnity. In interpreting the liability of sureties under such a contract, the Supreme Court, in Showers v. Wadsworth, 81 Cal. 270, 22 Pac. 663, said:

"The contract was in substance a contract of indemnity. In form it was to furnish a bond of indemnity. * * * The indemnity was against liability, and hence there was a right of recovery upon the contract as soon as the liability was incurred."

In McBeth & Compton v. McIntyre, 57 Cal. 49, the court said:

"As has been seen already, the indemnity given the constable was not only against actual damage, etc., but also against all liability therefor; and therefore, the moment the judgment was entered in favor of McBeth & Compton against the constable, the latter became liable for the amount of it, and thereupon a cause of action arose in his favor upon the bond."

We quote also from Tunstead v. Nixdorf, 80 Cal. 647, 22 Pac. 472:

"His liability attached the moment he refused, on demand, to surrender the property to the execution debtor, and that liability was fixed and determined by the judgment of McCue against him. The same judgment fixed the liability of the defendants in this action to the plaintiff. * * * It would have been different if the bond had only indemnified the sheriff against actual damages. In such case the sheriff could not recover until he had actually been compelled to pay the judgment recovered against him. Oaks v. Scheifferly, 74 Cal. 478. The bond in suit was security against liability on the part of the plaintiff, and not against actual damages only, and his liability attached under the original execution."

[2] The liability of this constable became determined as to its amount when the judgment of the third party (Bunnell) was entered against him. The constable was not required to take an appeal from that judgment at his own cost and expense; neither was he required to prosecute any appeal taken by

him to its conclusion. He had the right to rest upon the judgment and require the principal and sureties on the undertaking of indemnity to pay the amount for which he had become liable, and he was at liberty to bring his action against the principal and sureties without himself first satisfying the judgment. In Showers v. Wadsworth, supra, the court, in addition to the language which we have quoted, observes:

"'The sheriff having made a proper request that the indemnifier should litigate the claims against him, it is immaterial whether the indemnifier did so or not. If he neglected to do so, the judgments would be conclusive against him. 'If, after request, the person indemnifying neglects to defend the person indemnified, a recovery against the latter, suffered by him in good faith, is conclusive in his favor against the former.' Civ. Code, § 2778, subd. 5. If he took charge of the litigation, the judgments are equally conclusive. Civ. Code, § 2778; Dutil v. Pacheco, 21 Cal. 442, 82 Am. Dec. 749."

[3] The fact that at the time this action was brought the appeal of the plaintiff Thomas in the Bunnell Case was pending and undetermined, we think did not affect the right of the plaintiff to enforce his claim against the appellants upon the liability assumed under their contract. Moreover, it appears, as has already been observed, that before the trial of this action the appeal of Thomas was dismissed and the judgment of Bunnell was satisfied. It does not appear, if that question is material here at all, that there was any merit in that appeal, or that the judgment as entered in favor of Bunnell against the plaintiff was in any wise improper as to its foundation or amount. We think that the judgment as entered herein is a just one, and we find no error sufficient to sustain appellants' plea for reversal.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

48 Cal. App. 237

PEOPLE v. PORTER. (Cr. 489.)

(District Court of Appeal, Third District, California. June 18, 1920. Hearing Denied by Supreme Court Aug. 16, 1920.)

1. Rape ⟸53(5)—Evidence held to sustain a conviction of assault with intent to rape.

In prosecution for assault with intent to rape an 11 year old girl, evidence that defendant went to the house where he knew the girl was alone with other children, with no particular business, and his own admission as to his acts, with the exception of the attempt charged, *held* sufficient with testimony of the girl to sustain a conviction.

2. Criminal law ⟸1159(4) — Testimony of prosecutrix must be given credit on appeal from conviction.

On appeal from a conviction of assault with intent to rape a girl because of insufficiency of the evidence, the testimony of the prosecutrix must be given full credit.

3. Rape ⟸48(2) — Evidence of fact of complaint is admissible, but not details thereof.

In a prosecution for assault to rape, evidence that prosecutrix made complaint after the crime was admissible, but not the details of the complaint, including the name of the party complained against.

4. Criminal law ⟸695(5)—Objection held not to raise point that question to witness as to complaint stated defendant's name.

In a prosecution for assault to rape, an objection to a question as to whether prosecutrix made any complaint with reference to defendant because it was too indefinite and uncertain does not raise the point that the question was improper because it contained defendant's name.

5. Criminal law ⟸1170½(1)—Naming defendant in prosecution as to complaint by prosecutrix held not prejudicial.

The fact that a question as to complaint by prosecutrix after the commission of the offense named defendant was not prejudicial, where there was no pretense that prosecutrix had grounds for complaint against any one else, and the jury would have inferred that complaint was against defendant if his name had not been mentioned.

6. Criminal law ⟸1170½(6)—Witnesses ⟸375—Question as to animus of witnesses held improper, but not error as construed by trial court.

Though a question asked defendant as to why prosecutrix and her mother told the story they did against him was in improper form, it was not prejudicial error to overrule an objection to it after the court had stated that in effect it asked whether defendant knew of any reason why prosecutrix and her mother should have any prejudice against him.

7. Criminal law ⟸366(4) — Evidence held to show defendant was present when declaration of prosecutrix was made.

It was not error to admit testimony as to a declaration by prosecutrix at the time of the alleged offense on the theory of res gestæ, though the witness did not testify that defendant was present, where the witness did state that she heard the voice of a man whom she did not see, and the testimony of prosecutrix showed that defendant was the only man with whom she was talking at that time and place.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Richard Porter was convicted of assault with intent to rape and he appeals from the judgment of conviction and the order denying his motion for new trial. Affirmed.

W. H. Carlin and W. P. Rich, of Marysville, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. The defendant was convicted of an assault with intent to commit rape, the prosecutrix being of the age of 11 years. The appeal is from the judgment and an order denying the motion for a new trial.

[1] The first claim made by appellant is that the evidence is insufficient to support the verdict of the jury. With this contention we cannot agree. The mother of the prosecutrix conducted a rooming house in the city of Marysville wherein she resided with her four children. About the 9th of May, 1919, the defendant became a roomer therein, and remained continuously for a short time, and afterwards was there at irregular intervals for a night or two. On the 20th of August, about 8 o'clock in the morning, he returned to the lodging house for the purpose of getting some laundry that he had left there. He met and talked with the mother who, in addition to her duties in connection with the lodging house, was also working in the Marysville Steam Laundry. He asked to see the children, and particularly Elsie, the eldest one. The mother said the children were in bed, and he could not see them then, but must wait until some other time. He insisted upon seeing Elsie, the eldest child, but upon being again informed by her that the children were in bed, and he could not see them at that time, he took his laundry and accompanied the mother down the stairs to the sidewalk, and thence toward the laundry until he came to the telephone station, where he parted with the mother, stating that he was going to telephone. A short time thereafter he left the telephone station and returned to the lodging house. As to what occurred then we have the testimony of the little girl, Elsie, which it is sufficient to quote as follows:

"About 10 minutes after Mr. Porter and my mother left he returned and knocked at the door and said he wanted to come in. I told him he couldn't come in. He said, 'Well, get dressed,' and so I got up and got my clothes and came out, and went out on the porch. He said, 'I hear your mother is going to send you to Grass Valley.' I said, 'Yes, she is thinking of sending us there.' He said, 'I will come up and get you out.' I said, 'You can't get us out.' He said, 'Yes, I can, I know one of the Sisters up there.' I said, 'Do you know the Sister Superior?' He said, 'No.' I said, 'You can't get us out unless you know Sister Superior.' He didn't say anything more about Grass Valley. Then we went in the hall and sat down. He wanted me to sit on his lap, and I said, 'No, I can sit here.' I sat down on a bundle of laundry in front of the telephone. There were two bundles of laundry there, and so I sat down. He wanted me to kiss him, and I wouldn't do it. He said he guessed he would have to go. He picked up his laundry and started down the stairs. I started back to the kitchen, he followed me there. He chased me in the corner and started to unbutton his pants. I pushed away from him, and ran over to the other side of the room. He came right after me, and sat down in the chair by the table, tried to pull me over his lap, just then my sister came out of room 1. He jumped up and ran over to the other side of the house. Then he said he guessed he would have to go. He gave me a dollar. I showed him mamma's new dress. Then he said he guessed he would have to go, and wanted me to kiss him, and I wouldn't do it, so he gave me $1, and said he would give me $5 next time he came in. At the time he started to unbutton his clothes he chased me over in the corner, he started to unbutton his pants I said, 'You let me out.' He said, 'I won't hurt you.' At the time he came over and sat down in a chair and wanted me to sit on his lap his clothes were buttoned. At the time he was sitting on the chair by the table he had hold of my bloomer leg, just had hold of my bloomer at the bottom. He was then trying to pull me over on his lap. Before I started back to the kitchen he got hold of my arm and tried to pull me in room 6, and I said I would tell mamma, and he said 'Oh, no.'"

[2] We cannot say that it is an irrational conclusion from the foregoing that the defendant is guilty as charged. In the testimony of the girl is found at least some evidence of every element of the crime. We must accord, of course, full credit to her statements, and, so reviewing the record, we must hold that the case is governed by the principle announced in People v. Johnson, 131 Cal. 511, 63 Pac. 842, and People v. Moore, 155 Cal. 241, 100 Pac. 688.

Indeed, the situation is fairly disclosed in the following statement of the trial judge in denying the motion for a new trial:

"I am bound by the verdict of the jury, and in that respect at this time I am almost in the same position an appellate court would be, looking at the evidence, if there is evidence there, even though it may be conflicting, that would support the verdict, I am to be bound by that verdict unless I think there has been a miscarriage of justice. The incriminating circumstances of this case it is not necessary to comment on, but they are these: He knew the children were there alone, unprotected; he had been told by the mother he couldn't see them at that time; goes away with her, and then immediately returns; has no business to go up there at all; then according to his own story corroborates every detail of the girl's story, except the incriminating circumstances of unbuttoning his pants and trying to force her into the room 6 with moderate force; he followed her into the kitchen for the purpose of hearing her read a letter; the jury may have wondered why the mail carrier was not produced who delivered that letter; the testimony that he forced her into a corner of the room, unbuttoned his pantaloons, afterwards seizing her by the bloomers—those circumstances were sufficiently incriminating to justify the jury in finding a

verdict of guilty of assault, of the crime charged. There are no atrocious details to indicate that he ever had in his mind to use more than moderate force, perhaps overcome resistance by blandishments than any other way, but there was sufficient to indicate his purpose to gratify his passions; I think there is no escape from it."

[3] Appellant claims that the court erred in overruling his objection to the following question:

"I will ask you Mrs. Simmons, if, on the 20th day of August, 1919, in the morning about the hour of 8 o'clock, if Elsie made any reference to the defendant—made any complaint to you with reference to Richard Porter?"

In People v. Wilmot, 139 Cal. 103, 72 Pac. 838, the Supreme Court said:

"The rule enunciated by the authorities generally, and by all the decisions in this state, is in all cases to admit evidence of the fact of complaint, and in no case to admit anything more, * * * for, as said by Greenleaf, 'the evidence when restricted to this extent is not hearsay, but in the strictest sense original evidence. When, however, these limits are exceeded, it becomes hearsay in a very objectionable form.' It is clear that to allow any mere statement of the prosecutrix as to the details of the affair, or as to the name of the person accused by her, to be given in evidence would be to allow hearsay evidence to prove the offense."

It is thus apparent that the only possible objectionable portion of the question was in the use of the name of the defendant. The district attorney so framed the question probably to identify the complaint, in other words, to show:

"That the complaint related to the matter being inquired into, and not to a complaint wholly foreign to the subject." People v. Swist, 136 Cal. 520, 69 Pac. 223.

Manifestly, the question would have been meaningless if it had not been directed to this particular instance, but it would have been better if the district attorney had otherwise identified the complaint and avoided the use of said name. It may be added that the learned trial judge correctly stated the rule as follows:

"You are prevented from going into detail. * * * It may be given in evidence that the complaining witness, shortly after the alleged occurrence, made complaint to some person if that is the fact."

[4] But appellant's counsel failed to point out that specific infirmity in the question. The objection was:

"To which we object as incompetent, immaterial, irrelevant, calls for hearsay testimony, no foundation laid, it is indefinite and uncertain, and particularly we specify the indefiniteness and uncertainty of the question."

There was no suggestion that the question contained too much. Indeed, the principal objection was that it contained too little; that it was too indefinite and too uncertain. A similar objection had been made before, but there was no claim that the question went too far. This particular objection was therefore waived.

[5] We may add that since it was proper to identify the complaint in some manner, it is difficult to see any prejudice in the use of the name of the defendant for that purpose.

There is no kind of pretense that the prosecutrix had any cause for complaint against any one else, arising that day, and if the question had been the entirely proper one, "Did Elsie on August 20, 1919, make any complaint as to the treatment she received that morning?" the jury would naturally and inevitably understand that the reference was to the treatment of her by the defendant. The significance of the interrogatory was indeed not substantially affected by the use of the defendant's name.

[6] Another criticism of appellant is based upon this part of the record:

"Q. Now, Mr. Porter, you state that your relations with this family have always been friendly? A. They have.

"Q. When did they become otherwise?

"Mr. Carlin. Objected to as incompetent, immaterial, irrelevant, not cross-examination; that is an inference to be drawn by the jury to be argued by counsel, and the reasons for it too.

"The Court: Overruled. A. I don't know as they ever did. * * *

"Mr. Manwell: Can you tell this jury here why they (the prosecutrix and her mother) told that story?"

This question was also objected to, but the court overruled the objection, stating:

"He has testified the relationship was pleasant, and the question is cross-examination along that line; if he knows any reason why they should have any feeling to testify against him, that is what it amounts to.

"Mr. Carlin: To such a question I might not object.

"The Court: That is what I take the question means."

The answer was:

"No, I couldn't tell why they told it, I am no mind reader."

The question in form was objectionable. But we think it must be assumed that the witness accepted the court's interpretation of its meaning, and answered accordingly. In other words, the question must have been understood as though the witness had been asked if he knew of any animus or prejudice on the part of said witnesses that might influence their testimony. Appellant, indeed, expressed himself as not averse to a question of that character. Moreover, re-

gardless of this question and answer, it is quite apparent from the testimony of appellant that he knew of no reason why these witnesses should perjure themselves. If he had known of any fact tending to discredit their testimony, of course, he would have mentioned it. Indeed, his testimony uniformly was to the effect that he was upon terms of friendship and intimacy with the whole family of which the prosecutrix was a member. The answer to the question was then simply the conclusion or inference which the jury must necessarily have reached from a consideration of the other testimony of the defendant, that is, that he did not know of any improper motive which might have influenced said witnesses. The question should have been reframed in accordance with the suggestion of the court, but, even if we concede error, we do not think the matter is of sufficient gravity to justify a reversal of the judgment.

[7] Appellant also criticizes the action of the court in allowing Mrs. Simmons to testify that about 8 o'clock in the morning of the alleged assault, while occupying a room in said lodging house, she heard the prosecutrix say: "I am going to tell mamma." An objection was made to the question upon the general ground, and that it was hearsay, and particularly that no foundation had been laid, in that it did not appear that the remark was made to the defendant, or that he was present at the time. Of course, the theory of the prosecution was that the witness heard the remark that was made by the prosecutrix at the time of the alleged assault, and that the testimony as to such declaration was admissible as evidence of the res gestæ. People v. Vernon, 35 Cal. 51, 95 Am. Dec. 49. The rule is familiar, and would undoubtedly apply if the identification of the statement was sufficient. This seems to be the gravest question in the case. The witness heard a man's voice, but she did not recognize it as that of the defendant, since she was not familiar with his voice, nor did she see him on that occasion. But it was not required that the whole question of identification should be established by the testimony of this witness. It appears from the testimony of the prosecutrix that she and the defendant were in the hall at or about that time, and that he was the only man with whom she conversed. The jury were entirely justified, from all the circumstances in the case, in concluding that said statement was a part of the conversation with defendant as related by the prosecutrix, and, hence, we think, the court committed no error in admitting the testimony. At any rate it cannot be said that the verdict was influenced at all by said testimony. The jury must have reached their conclusion from a consideration of the testimony of the prosecutrix, and this, as we have seen, is sufficient to establish the crime. No other point demands attention.

The learned counsel for appellant have presented an able and plausible argument in favor of their client, but after a careful reading of the record, we think it must be said that to reverse the case would be to exceed the limits prescribed for the exercise of power and authority by a reviewing court.

The judgment and order are affirmed.

We concur: NICOL, Presiding Judge pro tem.; HART, J.

48 Cal. App. 70

BARBER ASPHALT PAVING CO. v. ARMSTRONG et al. (Civ. 3414.)

(District Court of Appeal, First District, Division 1, California. June 4, 1920.)

Municipal corporations ⇐519(6)—Lien under last of successive improvement proceedings paramount.

As between special taxes under successive street improvement proceedings, the lien of the special taxes under the last proceeding prevails.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by the Barber Asphalt Paving Company against Edith R. Armstrong and others. Judgment for defendant and cross-complainant Chester A. Bell, and plaintiff, also a cross-defendant, appeals. Affirmed.

Arthur M. Ellis, of Los Angeles, and Chas. A. Gray, of San Francisco, for appellant.

Richard J. O. Culver, of Los Angeles, for respondent.

WASTE, P. J. Plaintiff brought this action against a number of defendants, seeking to quiet its title to certain real property situated in the city of Manhattan Beach. The defendant Chester A. Bell filed a cross-complaint, seeking a like decree, and judgment was entered in his favor. The plaintiff appeals.

The question presented for determination is one arising between plaintiff and cross-defendant Barber Asphalt Paving Company and the defendant and cross-complainant Chester A. Bell. There is no dispute between them as to the facts; the controversy being purely one of law. Each claims title to the property in question by a deed from the treasurer of Manhattan Beach, issued pursuant to a sale after delinquency on a street improvement bond.

The board of trustees of the city of Manhattan Beach initiated certain proceedings for the grading and paving of Highland avenue, under the Vrooman Act (St. 1885, p. 147, as

amended). Jurisdiction was duly acquired and the work was ordered. The contract for the work was entered into between the superintendent of streets of Manhattan Beach and the plaintiff, February 5, 1914. The assessment for the work was recorded October 6, 1914. On December 8th following a bond was duly issued against the lot, under the Bond Act of February 27, 1893 (St. 1893, p. 33). No payments of either principal or interest being made on the bond, the lot was sold by the city treasurer on the demand of plaintiff on the 24th day of March, 1916. The certificate of sale was issued, and in due time deeds followed, vesting the title to the lot in plaintiff.

The proceedings, under which the defendant Bell claims, provided for the construction of a sidewalk on Highland avenue, and were also had under the Vrooman Act. They were subsequent in each respective step to those for the paving of Highland avenue, which resulted in the bond sale, by which plaintiff claims. The assessment for the work was recorded December 8, 1914, and the bond was issued January 8, 1915. The city treasurer sold the lot after delinquency in payment, on defendant Bell's demand, April 22, 1916, certificate of sale was issued, and the deed followed in due time.

The sole question for consideration is one of priority between two claimants, each resting his title in a street improvement proceeding. When the appeal in this case was instituted the question was a novel one. Since then, however, the precise point has been passed upon, and decided by the Supreme Court, in Woodill & Hulse Electric Company v. Young, 182 Pac. 422, 5 A. L. R. 1296, in which a rehearing was subsequently denied by the entire court. The question may therefore be deemed settled.

After a thorough examination of the matter, the Supreme Court, in that case, held that there is no such essential or inherent difference in those special taxes, arising under street improvement proceedings, as to deprive their lien of the benefit of a rule accorded to the lien of general taxes. In both instances the taxing power operates in rem, on the property itself, without regard to different or conflicting interests of ownership, and the universal and general rule is that in proceedings to enforce the payment of taxes, the last tax levied, and sought to be enforced, is superior and paramount to the lien of all other taxes, claims or title. Applying this rule, the court held that the last lien in point of time, under street improvement proceedings, must prevail.

The judgment is affirmed.

We concur: RICHARDS, J.; WELCH, Judge pro tem.

48 Cal. App. 438

ALEXANDER v. PANAMA MACARONI CO.

(Civ. 3308.)

(District Court of Appeal, First District, Division 1. California. July 6, 1920.)

1. Principal and agent ⟸23(5)—Evidence held to prove that offer to make brokerage contract had never been accepted.

In an action for breach of contract making plaintiff exclusive selling agent for defendant's goods for specified period, evidence *held* to sustain finding that defendant's proposal was never accepted.

2. Appeal and error ⟸1010(1)—Finding supported by evidence controlling.

Trial court's finding, supported by the evidence, is controlling.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by William B. Alexander against the Panama Macaroni Company. Judgment for defendant, and plaintiff appeals. Affirmed.

A. H. Foster and Albert A. Kidder, Jr., both of Los Angeles, for appellant.

Rupert B. Turnbull, W. G. Van Pelt, and B. A. Weyl, all of Los Angeles, for respondent.

KNIGHT, Judge pro tem. This action was brought to recover damages for breach of contract. Judgment was for the defendant, and plaintiff appeals.

The basis of the appellant's action is a letter dated April 9, 1915, addressed to Alexander-Callen & Co., and signed by respondent, which appellant contends constituted a contract whereby the firm of Alexander-Callen & Co., a copartnership, of which appellant was a member, was made the exclusive selling agent for respondent's goods for a period of 10 years. Said letter reads as follows:

"We hereby agree to make you our exclusive selling agents for ten years beginning today and expiring April 9th, 1925. We will pay you a commission of fifteen cents per case (case contains 24 packages), when goods are introduced and the price of flour is normal. Said commission to be paid at end of each calendar month. We reserve the right to refuse business where customers' ratings do not justify credit. In consideration of the above commissions, you are to show an increase in our sales each consecutive year, unless impossible, such as panic, etc., causing business to decrease generally. We reserve the right to make the selling prices. The idea of this agreement is to work together in good faith, in building up a good business for the factory. We are to be consulted on all matters such as the territories you are to sell in, and how the goods are to be sold."

Respondent denies that said letter constituted the contract between the parties, and

claims that it was intended to be, and in fact was, a mere offer which was never accepted by appellant and was by the respondent, on December 2, 1915, withdrawn, and that the only contract ever existing between the parties was an oral one, whereby an agency was continued from month to month, and that on February 9, 1916, said oral agreement was terminated. Respondent also relies upon two other defenses, the first of which is that appellant, at the time said letter was written, was a member of a copartnership, which was, subsequent to the date of the letter and prior to the alleged breach, dissolved by the retirement of one of the members of the firm, which fact, respondent contends, terminated any contract of agency which may then have existed. The other defense is that the creation of the agency as contemplated by said letter was made dependent upon the price of flour being "normal," and respondent claims that at no time since the 9th day of April, 1915, has the price of flour been or is it now normal.

The court found for respondent on all the issues, and is would seem that it is not necessary for us to extend our discussion beyond the defense first mentioned, for the reason that the question of whether or not the parties in fact operated under said offer as contained in said letter of April 9, 1915, as contended by appellant, or whether said offer was afterwards withdrawn and the parties operated under an oral agreement from month to month, as contended by respondent, was purely a question of fact for the trial court, and upon which question the record shows there is a substantial conflict. In support of the conclusions reached by the trial court the evidence shows that at no time during the business relation between the parties did said copartnership sell the goods of respondent pursuant to the terms of the letter of April 9, 1915. Previous to that date respondent paid commissions of 6 and 8 per cent. on sales. After the letter of April 9, 1915, they paid a commmission of only 5 per cent. In said letter the commissions were fixed in the sum of 15 cents per box. On December 2, 1915, respondent wrote to said Alexander-Callen & Co. as follows:

"You have been serving us in the distribution of our goods on a basis of 5% of the sales. At the present time there is no account unpaid between us, other than the current month. On April 9th, 1915, we submitted to you a written offer for you to handle our products on a commission basis of 15c per case (case containing 24 packages). This offer was conditional upon the price of flour being normal, and at no time since April 9th has flour been normal, and the prospects are at the present time that, due to the war troubles in Europe, it will not again reach a normal level for at least twelve to eighteen months. This offer has never been accepted by you, and we hereby withdraw the offer, for the reason that it has not been accepted; for the reason that flour has not been normal, and that there is no immediate prospect of its reaching a normal level; and for the further reason that there has been, since the date of April 9th, a change in the personnel of your company. We hereby withdraw our offer of April 9, 1915."

Notwithstanding that, said copartnership in reply to said letter stated that the terms of said letter were not agreed to, it nevertheless continued to sell the product of respondent under an arrangement different from that stated in said letter of April 9, 1915, until February 9, 1916, at which time respondent informed said copartnership that it would no longer fill any orders received from said copartnership, and that it intended to solicit the trade itself, which it afterwards did.

[1, 2] According to the testimony of William F. Schiffer, who was the president of the respondent company at the time these transactions took place, the said copartnership did not operate under the terms of said letter of April 9, 1915. The price of flour was a matter which seemed to have made it impossible to adopt any definite arrangement for the sale of the goods, and pending such uncertain and unsettled conditions the parties operated under the tentative agreement from month to month, and received a commission of 5 per cent. on their sales. During that period conversations were had between the parties, wherein appellant protested against the low commissions of 5 per cent. and as a result an adjustment was effected whereby respondent contributed toward the payment of the salaries of two members of said copartnership to the extent of paying one of them $25 per week and the other $15 per week for the months of May, June, and July, 1915, besides defraying certain traveling expenses of the members of the firm while selling respondent's goods. This and like testimony shown by the record was sufficient to support the trial court in finding that the proposal contained in the letter of April 9, 1915, was never accepted, and that it was consequently inoperative. Therefore under the established rule the conclusions reached by the trial court are controlling.

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

48 Cal. App. 175

McDUFF v. McDUFF. (Civ. 3311.)

(District Court of Appeal, First District, Division 1, California. June 14, 1920.)

1. Husband and wife ⟸257, 264—Profits from real estate bought by husband prior to marriage not community where resulting from increase in real estate values.

In an action by husband to quiet title to land purchased with the proceeds of property he had bought before marriage, evidence *held* to show that the profits on the first transaction were in no sense due to any improvements made through the activities or capacity of spouses, but resulted from the natural enhancement of real estate values, since such profits were not community, and the land was the husband's separate property.

2. Husband and wife ⟸257—Method of computing husband's value of husband's interest in business.

The proper method of determining the value of husband's interest in a business in which he was engaged at the time of his marriage is to allow the usual interest to the husband on the amount invested on the basis of a long-time investment well secured.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action to quiet title by William Gilbert McDuff against Sarah Frances McDuff. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 187 Pac. 37.

Nathan Newby, of Los Angeles, for appellant.

Percy Hight, of Long Beach, for respondent.

KNIGHT, Judge pro tem. This action was brought by plaintiff against his wife to quiet title to certain real property situate in the city of Long Beach, in which the defendant claims a community interest. Judgment was for plaintiff, and defendant appeals.

In the year 1881, four years prior to the marriage of the parties, plaintiff purchased a farm in Kansas for $5,000, paying $2,500 in cash and trading an interest in other property valued at $2,500. The $2,500 in cash was borrowed by plaintiff, and plaintiff gave a mortgage covering the farm to secure its payment. In the year 1913 plaintiff sold the Kansas farm for $11,500, and, after paying off the mortgage, which then amounted to $3,500, received a net balance of $8,000 in cash. Of that sum he invested $4,000 in the property in controversy here, upon which he borrowed $8,500, and erected four houses thereon. Plaintiff is a carpenter and contractor by trade, and contributed some of his time to the construction of the houses.

Appellant contends that part of the profits derived from the sale of the Kansas farm, and with which the purchase of the Long Beach property was made, were the result of the activity, ability, and capacity of plaintiff and defendant, and are therefore community property. The findings and judgment of the lower court are in effect a holding to the contrary, and the only question on this appeal is whether or not there is sufficient evidence to sustain such findings and judgment.

At the time respondent acquired the Kansas farm it was fenced, improved with a dwelling and other structures, a small portion of it was planted to fruit trees and vines, and some of it was covered with a growth of timber. After plaintiff and defendant were married and moved onto the property, no permanent improvements of a substantial character were made. During their occupancy of the property 38 acres were planted to orchard, the cost of the trees being met by increasing the mortgage, but the orchard was an entire failure on account of being destroyed by "borers." The house was destroyed by fire, but was rebuilt with the money received from the insurance, together with $300 more, which plaintiff borrowed from his father. Other farm outbuildings were constructed, but the cost thereof did not exceed $200. They were built with rock obtained on the farm and with lumber cut on the premises by a mill on shares.

[1] It is quite clear from the evidence stated that the activity of the parties added nothing to the value of the property. It is true that from the time plaintiff and defendant moved onto the farm in 1885 until they vacated it in 1905, they worked thereon as farmers usually do, but the proceeds were used, not to improve the property, but to pay the living expenses of the family and the taxes and interest, and at times there was scarcely enough produced by the farm to meet the ordinary expenses, plaintiff being obliged to engage in outside enterprises, the proceeds from which he devoted to the support of his family. After plaintiff and defendant vacated the farm in 1905 it was leased to various tenants for a rental of $500 a year, which was sufficient to pay the interest and taxes without drawing upon the personal earnings of plaintiff or defendant. Upon a full examination of the record it is obvious that the increase in the value of the farm from the time of the purchase in 1881 to the time of the sale in 1913 was due alone to the natural enhancement of real estate values, and not to any improvements made thereon through the activity, ability, or capacity of plaintiff or defendant.

[2] It has been held that the proper method of determining the value of a husband's interest in a business in which he was engaged at the time of his marriage is to allow the usual interest to the husband on the amount invested on the basis of a long investment,

well secured. Pereira v. Pereira, 156 Cal. 1, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107; Estate of Gold, 170 Cal. 621, 151 Pac. 12. Measuring the instant case by that rule, the allowance of a moderate rate of interest on the sum of $2,500, which represented the net value of the farm at the time of its purchase, for a period of 28 years, would bring the entire investment up to as much as, if not more, than plaintiff received net for the property in 1913, and by such computation no allowance is made for the natural enhancement in the value of the property.

We are of the opinion that there is ample evidence to support the conclusions of the lower court, and the judgment appealed from is therefore affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

48 Cal. App. 204

McKUNE v. McKUNE. (Civ. 3324.)

(District Court of Appeal, First District, Division 1, California. June 16, 1920.)

1. Venue ⟹67—Affidavit of residence held to state fact, not conclusion.

An affidavit in support of defendant's motion for change of venue that defendant was a bona fide resident of another county, where she lived with her child and supported herself, states a probative fact, not a mere conclusion, and is sufficient if uncontradicted.

2. Venue ⟹68—Affidavit denying change of residence held a conclusion.

Where the affidavits in opposition to defendant's motion for change of venue of an action for divorce showed that before the commencement of the suit defendant had left the matrimonial residence, and had gone to another county, where she still remained, a denial in the affidavit that defendant resided in the other county merely stated a legal conclusion.

3. Venue ⟹68—Evidence held to establish change of residence by defendant.

Evidence on a motion for change of venue of a divorce action, which showed that defendant had left her husband's home and had gone to another county, with part of her belongings, five days before the commencement of the action, *held* sufficient to show residence in the other county, though she had left some of the belongings of herself and infant daughter at her former residence.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

Action for divorce by Walter T. McKune against Anita McKune. Defendant's motion for change of venue was denied, and defendant appeals. Reversed.

Rohe, Jeffers & Devin, of Los Angeles, and John O'Gara, of San Francisco, for appellant.

Samuel T. Bush and William Sea, Jr., both of San Francisco, for respondent.

KNIGHT, Judge pro tem. This is an appeal from an order denying defendant's motion for a change of place of trial from the city and county of San Francisco to the county of Los Angeles. The action is one for divorce, and was commenced on March 7, 1918. Summons was served on March 14, 1918. The motion for change of place of trial was heard and determined upon the affidavits of the parties.

[1] In defendant's affidavit it is stated:

"That at the time of the commencement of this action, and from since the 2d day of March, 1918, and at this time she is a bona fide resident of the county of Los Angeles, state of California, where she now lives with her infant child, and is supporting herself and child by her own efforts and with the aid of her friends, and without any aid or support from her husband, the plaintiff."

There can be little doubt that the above statement is one of a probative fact, and was sufficient of itself, if uncontradicted, to justify the granting of her motion. O'Brien v. O'Brien, 16 Cal. App. 103, 116 Pac. 692. In the case last cited the court had under consideration a similar affidavit, and it was held that, although the allegation may in a sense involve a legal conclusion, nevertheless, on a motion of this character, in the case of the defendant's affidavit, wherein, without qualification, he states his residence to be at a certain place, without giving other facts to support the statement, such allegation should be construed to be and treated as the statement of a probative fact. It follows that, unless the statements of fact in plaintiff's affidavits are sufficient to raise a conflict, the motion of defendant should have been granted.

[2] Plaintiff filed two affidavits. In the second one he specifically denied the statement of the defendant above quoted, and, in addition, set forth facts relating to the defendant's separation from him and her subsequent departure for Los Angeles, in the following manner:

"That on the 27th day of February, 1918, said defendant remained that night in a separate room in the Ford Apartments, where plaintiff and defendant resided, and that on the 28th day of February, 1918, said defendant stayed at the Marshall Hotel, in the said city and county of San Francisco; that at the time said defendant left the apartment occupied by said plaintiff and defendant on the 27th day of February, 1918, said defendant did not remove all her belongings or clothing or wearing apparel, or the clothing or wearing apparel of the child of said plaintiff and defendant, from said Ford Apartments, but left part of said

belongings and said clothing and wearing apparel in the apartment occupied by said plaintiff and said defendant, and part in the basement of said Ford Apartments, where said plaintiff and defendant resided, for a long period of time after said defendant left the apartment of said plaintiff and defendant, and during the time up to or about the 2d day of April, 1918, while said defendant was staying, as plaintiff is informed, in the county of Los Angeles."

In the first affidavit of plaintiff it is, among other things, stated that defendant departed for the county of Los Angeles "on or about the 2d day of March, 1918, and only five days before this action was commenced," and that "until the 2d day of March, 1918, Anita McKune, the defendant above named, resided with the plaintiff in the city and county of San Francisco, state of California, and that said plaintiff and defendant for two years prior to the commencement of this action continuously resided in the city and county of San Francisco." It will thus be seen that the facts are undisputed that the defendant left the apartments of plaintiff on February 27, 1918, with her child, taking part of her belongings with her, and on March 2, 1918, five days prior to the commencement of this action, departed for the county of Los Angeles, where she thereafter continued to reside, and was residing at the time she made her affidavit of residence on April 2, 1918.

In this state of the record we are of the opinion that the defendant's motion should have been granted. It is true that plaintiff specifically denied the statement of defendant that she was a resident of the county of Los Angeles, but such denial amounts to no more than plaintiff's conclusion, which was based upon and must be considered in connection with the other matters stated in his affidavit, which show without conflict that five days prior to the commencement of the action defendant departed for Los Angeles, and that she was actually living there at the time of the commencement of the action and at the time of the making of her affidavit in support of her demand for a change of place of trial.

[3] Respondent contends, however, that defendant's intention to return to San Francisco was shown by the fact that she did not remove all of her belongings from the apartments of plaintiff when she separated from him on February 27, 1918, but only a portion of them, and because she stored the belongings which she had removed in the basement of the apartment house in which plaintiff and defendant had previously lived. We do not believe that the acts of defendant can be so interpreted. It appears that defendant left plaintiff on February 27, 1918, on account of disagreements between them, and within a few days thereafter departed with her child for Los Angeles. The short period of time which elapsed between her departure for Los Angeles and the filing of this motion was scarcely sufficient within which to remove all of her belongings had she been disposed to do so, and the fact that she did not do so cannot be accepted as indicating her intention to return to San Francisco in the face of her sworn declaration that from and after March 2, 1918, she was a bona fide resident of Los Angeles county. The establishment of her residence depended entirely upon her intention, and she knew her intention better than any other person. As was stated in O'Brien v. O'Brien, supra:

"The defendant himself knows better than any other person whether he has established a legal residence in a particular city or county. He knows, or must be assumed to know, what his intention is with respect to becoming or not becoming a resident, in the legal sense, of a place to which he 'moves.'"

Marston v. Watson, 20 Cal. App. 465, 129 Pac. 611, cited by respondent, does not help him. In that case it was held that the affidavit of the defendant, wherein she stated that she was a resident of another county, was a mere conclusion, and should be disregarded, in view of the counter affidavits, showing clearly that at the very time the defendant claimed that she was a resident of such other county she was then, and for some time prior thereto had been, actually living in the county in which the action was brought, and that therefore the statement of the defendant as to her residence was not and could not be true. In the instant case it is undisputed that the defendant, five days prior to the commencement of this action, departed for Los Angeles, where she subsequently actually lived, and on April 2, 1918, the date on which she made her affidavit, was actually living in that county. These facts, coupled with her positive statement that she was "a bona fide resident" of that place during that time, entitled her to a change of place of trial.

None of the other matters set forth in the affidavits are material. They relate to contributions made by plaintiff to the defendant's support while she was separated from him, and to the matter of the convenience of witnesses.

The order appealed from is reversed.

We concur: WASTE, P. J.; RICHARDS, J.

48 Cal. App. 88

SUTTORI v. PECKHAM et al. (Civ. 3152.)

(District Court of Appeal, Second District, Division 1, California. June 7, 1920. Hearing Denied by Supreme Court Aug. 2, 1920.)

1. Fish ⊂⊃17—Finding of catching within three miles of shore warranted.

Evidence *held* to authorize a finding that white sea bass caught with a net, prohibited by Pen. Code, § 636, had been caught within three miles of the shore of Santa Catalina Island, so to make the fishing illegal, giving no title or right of possession to the fish.

2. Fish ⊂⊃17—Catching of fish illegally gives no ownership.

One's catching of fish in certain waters with a net, being prohibited by law and a criminal act, gives him no ownership or right to possession of the fish.

3. Fish ⊂⊃8—State may regulate taking.

The state may regulate the taking of fish in its waters, and make the taking thereof with a net an offense.

4. Trover and conversion ⊂⊃16—Ownership or right of possession necessary for action.

For one to maintain action for conversion he must at the time of the alleged conversion have had the ownership or right of possession of the articles.

5. States ⊂⊃12(3)—Boundaries, and consequent jurisdiction to regulate fishing, embrace three-mile limit around Santa Catalina Island.

The boundaries of California, defined by its first Constitution as extending three miles into the Pacific, "also all the islands * * * along and adjacent to the Pacific Coast," embrace the waters around and within three miles from the shore of Santa Catalina, one of such islands, by St. 1915, p. 589, included in fish and game district No. 20, so that its jurisdiction, under Pol. Code, § 33, coextensive with its boundaries, authorizes Pen. Code, § 634½, and section 636, subd. 7, making it a misdemeanor to fish with a net therein.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Nick Suttori against J. J. Peckham and another. Judgment for defendants, and plaintiff appeals. Affirmed.

C. W. Pendleton and B. M. Marble, both of Los Angeles, for appellant.

A. J. Hill, Co. Counsel, and J. Allen Davis, Deputy Co. Counsel, both of Los Angeles, for respondents.

CONREY, P. J. Action to recover damages for alleged conversion by the defendant of five tons of fish, being the property of the plaintiff. Judgment in favor of the defendants, and the plaintiff appeals therefrom.

The court found that at the time of the alleged conversion the plaintiff was not the owner of nor was he entitled to the possession of the fish mentioned in the complaint, and that it was not true that at said time, and while the plaintiff was the owner of and entitled to the immediate possession of the said fish, the defendants wrongfully took and carried away said personal property and converted the same to their own use. Appellant contends that these findings are not sustained by the evidence.

All of the fish included in this controversy were white sea bass. According to the testimony produced by the plaintiff, he was the master of a boat called the Jupiter, and on the 25th day of June, 1917, with his crew, he was fishing in that boat at Santa Barbara Island. Off the coast of that island, according to his testimony, he caught four tons of sea bass. Later in the day, and while four miles distant from Santa Catalina Island, he cast his net and caught in it about three tons of sea bass. The run of the tide and the pull of the loaded net drifted the boat to a point which was a mile or less from the shore of the island. At this place the defendant Staples, who was a deputy sheriff of the county of Los Angeles, overhauled the boat, arrested the men, and took the whole outfit to Avalon, Catalina Island, being in the township where the defendant Peckham was justice of the peace. Here the fish were landed. A complaint was filed before the justice, sitting as a magistrate, charging the plaintiff and members of his crew with the crime of misdemeanor, committed by violation of the provisions of section 636 of the Penal Code. The defendants were held to answer, and an information was afterwards filed against them in the superior court by the district attorney, which information was afterwards dismissed by the court. After taking possession of the fish, the defendant Staples telegraphed to the fish and game commissioner at Los Angeles, stating what he had done, and asking what disposition he should make of the fish. The commissioner declined to act officially in the matter, as Staples was not a deputy of the commissioner; but the commissioner conferred with the sheriff, and telegraphed Staples that the sheriff "advised to hold about 100 pounds fish as evidence and return the rest to fisherman." On the same day, June 26th, Peckham, purporting to act as justice of the peace, made an order entitled in the cause pending before him, in which he recited that the fish were liable to spoil unless disposed of, and ordered Staples to ship and deliver the fish to the Los Angeles Examiner, a newspaper in the city of Los Angeles, for free distribution by said newspaper to the poor of said city. Staples then sent to the Los Angeles Examiner the said fish, or so much thereof as was in a condition fit for shipment.

The defendant Staples testified that he only took the fish which he knew were alive

when he made the arrest; that they were all alive when he went aboard the boat; that the fish would not live more than 15 minutes after being taken out of the net. James J. Bates, a witness for the defendants, by occupation a fisherman, testified that he had had extensive experience in fishing in the waters of the Pacific Ocean. Concerning the habits of the white sea bass, he stated:

That they are migratory fish. "Ordinarily I would not say that you could find these white bass upon the surface out from the shore three or four miles. * * * I don't think I have ordinarily seen these out at sea. I would not see them more than three miles away from shore ordinarily."

The defendant Staples, testifying concerning the habits of white sea bass, said:

"White sea bass are around the island all summer. I have never seen a school of white sea bass on the surface away from shore."

[1-4] From the evidence thus produced, the court was justified in believing that all of the fish in question had been taken by the plaintiff with a net from the waters of the Pacific Ocean within three miles from the shore of Santa Catalina Island. This fact was sufficient to justify the court in finding that the plaintiff was not the owner nor entitled to the possession of the fish, if the taking of the fish with a net and within three miles of that island was prohibited by law and was a criminal act.

"The fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which is in the people of the state (Ex parte Maier, 103 Cal. 476, 483, 42 Am. St. Rep. 129), as in England it was in the king; and the right and power to protect and preserve such property for the common use and benefit is one of the recognized prerogatives of the sovereign, coming to us from the common law, and preserved and expressly provided for by the statutes of this and every other state of the Union." People v. Truckee Lumber Co., 116 Cal. 397, 48 Pac. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183.

Laws regulating the taking of wild game and fish and imposing penalties for the violation of such laws are fully within the legislative power of the state and do not destroy any right of property. Ex parte Kenneke, 136 Cal. 527, 69 Pac. 261, 89 Am. St. Rep. 177. It should need no citation of authorities to establish the proposition that no person can acquire title or right of possession to property of the state by the act of taking possession thereof illegally. But the plaintiff cannot maintain this action if at the time of the alleged conversion he had neither ownership nor right of possession in the goods alleged to have been converted. Hilmer v. Hills, 138 Cal. 134, 70 Pac. 1080. This brings us to a consideration of the statutes regulating the taking of fish.

[5] The act of taking fish other than with hook and line "within three miles of shore line of Santa Catalina island" is a misdemeanor, according to the provisions of section 634½ of the Penal Code. The act of taking fish with a net within the limits of fish and game district No. 20 is made a misdemeanor by the terms of section 636, subdivision 7, of the Penal Code. In section 21 of the act to divide the state of California into fish and game districts (Stats. 1915, p. 589), it is provided that "fish and game district 20 shall consist of and include the island of Santa Catalina, with the state waters surrounding said island." If the state waters surrounding that island extend three miles from the shore of the island, then the territorial limits described in section 634½ of the Penal Code are identical with district 20.

Appellant, while conceding that the sovereignty of the United States "extends one marine league at sea in all directions from the shore of the island in question," contends that the state of California has no jurisdiction over any of the waters surrounding any of the islands along this coast below low tidewater mark. The boundaries of the state of California, as declared in its first Constitution (Const. 1849, art. 12) and recognized by the act of Congress admitting the state into the Union (Act Cong. Sept. 9, 1850, c. 50, 9 Stat. 452), are defined as extending "three English miles" into the Pacific Ocean, "also all the islands, harbors, and bays along and adjacent to the Pacific coast." The sovereignty and jurisdiction of this state extend "to all places within its boundaries as established by the Constitution," subject only to the terms of any cession or law under which any part of such places has been or may be ceded to, purchased, or condemned by the United States. Pol. Code, § 33.

Under these conditions it has been held that a liability created by a California statute for the act of one person causing the death of another was enforceable where the tortious act was committed on a ship at sea 2 miles from the shore of the mainland. The court held that "the jurisdiction of the state of California over the sea is that of an independent nation," and cited authorities to the effect that such jurisdiction extends into the sea to the distance of a marine league. Humboldt Lumber Manufacturers' Ass'n v. Christopherson, 73 Fed. 239, 19 C. C. A. 481, 46 L. R. A. 264.

There appears to have been no decision made hitherto, either sustaining or overruling the contention here made by appellant, viz. that jurisdiction over the waters surrounding any of the islands along the California coast below tidewater mark was never conferred upon the state of California. It is our opinion that the contention so made

by appellant is without merit. It has been said that the term "coasts" includes "the natural appendages of the territory which rise out of the water, although these islands are not of sufficient firmness to be inhabited or fortified." Wheaton's International Law, (8th Ed.) § 178. It is not denied that Santa Catalina Island is within the state of California and is a part of the county of Los Angeles. Every reason which in the nature of things justifies the state in extending its jurisdiction over the subject of fishing rights to the distance of 3 miles from the shore of the mainland equally applies to a like distance from the shore of any island which is a part of the state.

Appellant suggests that subdivision 7 of section 636 of the Penal Code, in so far as it applies to district 20, is unconstitutional and void, on the authority of Ex parte Bailey, 155 Cal. 472. 101 Pac. 441, 31 L. R. A. (N. S.) 534, 132 Am. St. Rep. 95. That decision declared void a municipal ordinance which prohibited the use of fish nets and seines at places less than 1000 feet from any wharf, dock, or pier located in said town. The court held that the evident object of the ordinance was to protect fishing with hook and line from the wharves of the town. For that reason it was decided that the ordinance was an attempted interference with the exclusive right of the people of the state in the ownership of wild game and fish and of the state to the control thereof. The case does not at all sustain appellant's position.

The conclusions above stated render it unnecessary to discuss other grounds of appeal presented by appellant and discussed in the briefs.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

48 Cal. App. 178

GRISWOLD v. FRAME. (Civ. 2814.)

(District Court of Appeal, Second District, Division 1, California. June 15, 1920.)

1. Executors and administrators ⟹52—Evidence held to warrant inference of want of consideration for note.

Evidence that plaintiff's intestate, who was payee of the note sued on, had stated when the note was given that the money delivered to the maker was due him from her as part of their mother's estate, and that the note was taken only to protect her records, *held* sufficient to sustain an inference that there was no consideration for the note.

2. Evidence ⟹432, 469—Parol evidence admissible to show want of consideration or satisfaction of note.

While no evidence is admissible to prove that a plain and unambiguous written contract was intended to impose a greater or less obligation than its terms import, such evidence is always admissible to show want of consideration or payment or other satisfaction of a promissory note.

3. Evidence ⟹269(2)—Declarations of plaintiff's intestate, showing want of consideration for note given her, are competent.

Under Code Civ. Proc. § 1870, subd. 2, making competent the act, declaration, or omission of a party, declarations of plaintiff's intestate at the time the note sued on was given to her which showed want of consideration for the note are competent.

4. Evidence ⟹220(1)—Declarations of grantor as to intention made in presence of intestate, are competent.

In an action on a note given plaintiff's intestate by her brother, where the defense was want of consideration because the money represented thereby was due maker of the note from the intestate as part of their mother's estate, declarations by the mother, since deceased, as to her intention in granting property to intestate, made in the presence of intestate, are admissible against plaintiff under Code Civ. Proc. § 1870, subd. 3, making competent an act or declaration of another in the presence and with the observation of a party and his conduct in relation thereto.

5. Executors and administrators ⟹52—Proof that money represented by note was intended as discharge of obligation or gift shows want of consideration.

Evidence that the money given defendant by plaintiff's intestate, for which he executed the note sued on, was given by the intestate to discharge a moral obligation to distribute proceeds of their mother's estate, or was intended as a gift to defendant, is sufficient to show want of consideration for the note, though it does not establish a legal obligation by plaintiff's intestate to pay the money to defendant.

Appeal from Superior Court, Tulare County; M. L. Short, Judge.

Action by Joseph J. Griswold, as administrator of the estate of Margaret E. Griswold, deceased, against J. M. Frame. Judgment for defendant, and plaintiff appeals. Affirmed.

Stephen G. Long, of Long Beach, and E. I. Feemster and Middlecoff & Feemster, all of Visalia, for appellant.

Marley Fisher, of Lindsay, and Power & McFadzean, of Visalia (D. E. Perkins, of Visalia, of counsel), for respondent.

JAMES, J. This action was brought to recover on a promissory note. Defendant's defense of want of consideration was sustained by the trial judge, and the appeal is taken from the judgment which was entered in his favor.

Margaret E. Griswold was the sister of the defendant. Her first husband, Lumereau, died in the year 1909, and the promissory note in question was made on March 6, 1911, which

was prior to the time that the sister married Griswold, who appears here as the administrator of her estate. The promissory note sued upon was among the effects of plaintiff's intestate. In establishing his defense of want of consideration for the making of the note, the defendant, in substance, testified: That prior to the death of his and Mrs. Griswold's mother he had resided in Goldfield. That at the last illness of his mother, who resided with Mrs. Griswold (then Mrs. Lumereau), he was called home to Lindsay, Cal. That just before the death of his mother his sister urged him to buy an interest in a business at Lindsay, and that he replied that it would require $1,000 more than he then had, and that she (Mrs. Lumereau) said:

"'I will get you the $1,000, if you will go in with him,' * * * and I said, 'Well, I have got to go back to Goldfield, and while I am back there I will think it over and write what I will do,' and while I was back to Goldfield I was thinking over that matter, and got the second call that mother was worse, and then I came back. Q. And about when was it that she got the money and let you have it? A. It was some time in March, because I went in with him, I think, on the 1st of April of that year."

He further testified that the money was obtained by Mrs. Lumereau from the First National Bank; that he was present when the arrangements were made for it; that his sister, Mrs. Lumereau, said that she would get the $1,000 and let him have it, because it was coming to him from his mother's estate; that the note in suit was given by him at his sister's request; that "she told me that she would not take a note at all if she didn't have to keep her accounts straight, that she wouldn't exact the note at all, but she had things to attend to, that she had to keep straight, and consequently she thought it best to take a note; she said she would destroy it, or do away with it, when things were straightened up." Witness Reed, cashier of the bank at which Mrs. Lumereau obtained the $1,000 which she delivered to defendant, testified that Mrs. Lumereau obtained the money upon her own note from the bank as a loan; that he asked her what she was going to do with the $1,000 that she wanted to borrow, and she said:

"My brother is figuring on going into business with Mr. Frame—or Mr. Forster, and I want $1,000 to help him pay for an interest, and this, that is the money that I owe him, coming from his mother's estate."

This was all of the testimony covering the immediate transaction touching the giving of the note by Frame to Mrs. Lumereau. It was further shown in evidence that the mother of defendant and Mrs. Lumereau had at one time been possessed of a quarter section of land, one half of which she sold, the remaining half of which she conveyed to Mr. and Mrs. Lumereau by grant deed which instrument of conveyance indicated an intent that the grantees were to take the same as joint tenants with right of survivorship. Another witness, Sims, testified that after Lumereau's death she had a conversation with defendant's mother, in which the defendant's mother stated, in substance, that she had deeded the property to Mr. Lumereau, "and Mr. Lumereau had to take care of her as long as she lived; * * * she told me that herself, that she had deeded them 80 acres to Mr. and Mrs. Lumereau, to take care of her as long as she lived." Another witness, Waltenbaugh, testified that she occupied a close relation of friendship and as a business confidant with defendant's mother and Mrs. Lumereau, and that defendant's mother and Mrs. Lumereau once sent for her after Lumereau's death, and that the mother, in the presence of Mrs. Lumereau, stated that—

"She had given Mr. Lumereau a deed to that place, in case she should become a burden in her old age he would record that deed after her death, but if he died first, that deed was to be divided among her four children, provided Jerry ever returned, and, if not, between the three. But if she died first, it was their property, and when she went to sell it, she found he had recorded it without her knowledge or consent and without the knowledge of Mrs. Lumereau."

It is the contention of appellant that all of this testimony given as to statements made by the sister of the defendant (plaintiff's intestate) and the mother of defendant, is hearsay and incompetent. Further, that by his defense and the evidence offered to sustain the same the defendant attempted to vary the terms of a written contract, which the law does not permit to be done.

[1] Leaving aside for the moment a consideration of those questions, and taking the testimony of the defendant in the view that it was competent, in connection also with the testimony of the cashier of the bank, it seems to furnish sufficient to warrant the inference that Mrs. Lumereau, when she delivered the $1,000 to defendant, delivered the money either as a gift to him or in discharge of an obligation which she assumed rested upon her in connection with the distribution of property obtained from her mother. To the statement of the facts as already narrated may be added the further one that plaintiff's intestate, during all of the years which elapsed subsequent to the making of the note, made no demand on the defendant for the payment of any interest.

[2] It is established law that where a written contract is plain and unambiguous in its material terms no evidence can be admitted to prove that it was intended to impose greater or less obligations than those terms import. In other words, no collateral agreement of a different kind may be imposed by parol upon a plainly worded contract. It is always permissible, however, to show the want of consideration for the making of a contract, or that the contract has been dis-

charged by direct payment, accord, and satisfaction, or in any of the several manners by which parties may extinguish their contractual obligations. Cohen v. Goux, 48 Cal. 97, was a case where the defendant sought to show in his own behalf that a note was signed without consideration and as a mere accommodation to the plaintiff. The plaintiff objected that the note carried on its face a consideration and was the best evidence. The objection was sustained. The judgment was reversed, the Supreme Court saying:

"That the defendant was at liberty, as against the plaintiff here, to show want of consideration for the making of the note, and that such want of consideration, if shown, amounted to a full defense to the action, are propositions too plain to admit of discussion."

In Treadwell v. Himmelmann, 50 Cal. 10, the court said:

"The evidence offered by the defendant in support of the special defense set up in the answer was improperly excluded. It did not contradict or vary the written instrument declared upon. On the contrary, the offer was to prove an executed parol agreement, in the nature of an accord and satisfaction. There is no difference in principle between this case and Hapgood v. Swords (2 Bailey S. C. 305), which was an action on a promissory note; and the defense was that at the time of the execution of the note it was agreed by parol that if the defendant would procure a purchaser for certain land of the plaintiff at a specified price, the plaintiff would surrender the note; and the defendant procured the purchaser at the stipulated sum."

The judgment in that case was reversed. In Howard v. Stratton, 64 Cal. 487, 2 Pac. 263, the court briefly disposed of a similar contention by saying:

"The court erred in excluding evidence tending to prove that there was an agreement between Tyson and Stratton, by which the former agreed to let the latter have the rancho on which he lived in consideration of his giving Tyson a home and support during the residue of his life, and that the notes sued on in this action were given by Stratton to Tyson to secure the performance by Stratton of said agreement on his part, and that he had performed the same. The admission of such evidence would not violate the rule which forbids the introduction of parol evidence to contradict or vary a written contract."

See, also, Schultz v. Noble, 77 Cal. 80, 19 Pac. 182.

In Sprague v. Walton, 145 Cal. 228, 78 Pac. 645, evidence as to declarations of a deceased husband was excluded where the wife was seeking to show that the interest of the husband in money deposited in bank had been transferred to her. The court there said:

"But the superior court erred in excluding evidence of the oral declarations of Moses Sprague at and about the time he signed the orders upon which his wife drew the deposits. It does not appear from the bill of exceptions what was the particular reason for these rulings, but in the brief of respondent they are defended upon the ground that the effect of the declarations would be to contradict or vary the terms of the written orders. * * * The question here is not governed by subdivision 4 of section 1870 of the Code of Civil Procedure, but by subdivision 2 of that section."

[3] This decision is very pertinent here as establishing the competency of the evidence as to the declarations of plaintiff's intestate. Subdivision 2 of section 1870, Code of Civil Procedure, referred to in the decision, provides that "the act, declaration, or omission of a party" is competent evidence against him.

[4] The statements of the mother of defendant, made in the presence of plaintiff's intestate, was competent evidence under subdivision 3 of the same section, which provides that testimony is competent of "an act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto." See, also, Rice et al. v. Howland, 147 Mass. 407, 18 N. E. 229; Greenleaf on Evidence, vol. 1 (16th Ed.) § 284. We have already called attention to the fact that one of the witnesses testified as to such declarations made by the mother with respect to the property that she had transferred to Mr. and Mrs. Lumereau. We do not concede that the testimony of the witness, Sims, as to the conversation with the mother of plaintiff's intestate and without the presence of Mrs. Lumereau, was competent; but that testimony was offered by appellant in rebuttal.

[5] If it were essential to the defense of the defendant to have shown that the Lumereaus were legally bound to account to him for the $1,000 represented by the promissory note as a share of his mother's estate, we would be compelled to say that the evidence was insufficient to establish that legal condition. This for the reason that the deed given by the mother of defendant to the Lumereaus expressed no limitation or condition upon the quality of title conveyed, and because the oral declarations made by said mother after the delivery of her deed and after the death of Lumereau would not be competent evidence to establish the fact claimed. We think, however, that the main question is not to be so resolved; that the question of the intent of plaintiff's intestate when she delivered the $1,000 to the defendant and took the note is to be ascertained. The evidence seems sufficient to show that defendant's sister assumed at least to be under a moral obligation to give this money to the defendant. If the moral obligation existed alone and the legal obligation was absent, then the transaction would result in a gift induced by the view of Mrs. Lumereau that she should provide her brother with the money. If a gift were consummated, then the consideration was that of a gift and there would be left no further

consideration to support the promissory note, for the transaction in which it was given would already have been fully executed on both sides. We are satisfied that the evidence is sufficient to sustain the findings, and that the trial judge committed no prejudicial error in the rulings made during the course of the trial.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

48 Cal. App. 213

WILLIAMS v. STEARNS. (Civ. 2117.)

(District Court of Appeal, Third District, California. June 17, 1920. Hearing Denied by Supreme Court Aug. 16, 1920.)

1. Appeal and error ⟸907(3)—On appeal on judgment roll, evidence is presumed to support findings.

Where the appeal is on the judgment roll alone, it must be presumed that the findings were sufficiently supported by the evidence.

2. Appeal and error ⟸931(7)—Findings presumed to refer to oral contract so as not to show ratification of written lease.

On judgment roll, appeal from denial of damages for cancellation of a lease, where the court found that the lease was not executed by defendant, but also found that plaintiff entered into possession of the property described in the lease, and that defendant gave notice of termination of the lease contract of a certain date, it must be presumed in support of the judgment that the last finding related to the oral lease alleged in the answer, so that it did not establish a ratification of the written lease.

3. Landlord and tenant ⟸86(1)—Tenant held estopped by representations from demanding a longer term.

A tenant in possession, under a lease giving him the option to have an additional term, who represented to the landlord that he had no further use for the property, and would soon surrender possession, and knew that the landlord, relying on such representation, was negotiating a lease with another for the same property, is estopped to claim the right to a further lease.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Fred L. Williams against F. L. Stearns. Judgment for defendant, and plaintiff appeals. Affirmed.

Robert L. Williams, of Los Angeles, for appellant.

W. H. Jamison, Frederick Gros, and C. E. McDowell, all of Los Angeles, for respondent.

HART, J. Plaintiff brought the action to recover as damages from defendant the difference between the agreed rental value of certain premises in the city of Los Angeles, belonging to defendant, under a so-called option agreement, and the reasonable rent of said premises for a period of two years. From a judgment that plaintiff take nothing by his action he prosecutes this appeal.

There is before us a record, prepared according to the alternative method of appeal, but appellant states that he refers to and relies only upon the following portions thereof: The amendment to complaint, the answer to amendment to complaint, the findings of fact and conclusions of law, and the judgment. The appeal is therefore really upon the judgment roll alone.

The basis of the action is a certain "lease contract," dated Los Angeles, June 12, 1916, and addressed to plaintiff at San Francisco. It contains the following provisions:

"Mr. Fred L. Williams, party of the first part, and Stearns Gas Engine Works, party of the second part, hereby agree to the following contract as follows: Party of the second part agrees to lease to the party of the first part the present front office, a space near such office for exhibition purposes, and the machine shop situated and located on premises at 1003 N. Main St., Los Angeles, Cal., for the sum of eighty dollars per month payable as follows: One hundred dollars upon signing this contract, receipt for which is hereby given, sixty dollars on July 12, 1916; this being the date from which said lease shall start; these two payments form the payments for the first and the last month under this lease which is to run for a period of four months from July 12, 1916. All payments thereafter shall be eighty dollars a month in advance.

"The party of the first part shall have the option at any time before the expiration of this lease, to take over the entire lower floor; leasing the same for a period of from two to three years, at the rate of $150.00 a month payable in advance each month, except the last three months of said optional lease, payment for which sha'l be paid on the date of signing the optional lease. This option shall continue as long as this temporary lease."

Provision was then made for the privilege of using certain tools by Williams and the division of operating expenses between the parties, and the instrument proceeded:

"It is understood that either party to this lease may bring same to a close upon one month's notice in writing, and in the absence of such notice it is to be understood that the lease shall continue monthly. The above is to apply only after the four months period covered by this lease, but this lease to continue in the absence of notice monthly."

The instrument was signed:

"Stearns Gas Engine Works, by Francis A. Stearns, Party of First Part. By Fred L. Wiliams, Party of the Second Part."

It was alleged that Francis A. Stearns, who signed said instrument on behalf of the

first party, was at the time "made the agent of defendant authorized in writing, subscribed by defendant, to make and sign said lease." It was then alleged that plaintiff entered into possession of said property and paid rent therefor, amounting to $1,163.29, to and including the month beginning with May 12, 1917; that, in reliance upon said contract, plaintiff also expended $150 in making certain improvements on the property; that, on or before May 17, 1917, "pursuant to the terms of said agreement plaintiff elected and orally notified defendant of his election to exercise the option stipulated and agreed to under said agreement to take over the entire floor of the premises described therein," which included the use of certain mentioned personal property, machinery, etc.; that on said date plaintiff notified defendant in writing of his said election, which writing was addressed to "Stearns Gas Engine Works and Francis A. Stearns, Esq.," and stated:

"You and each of you will please take notice that the undersigned, Fred L. Williams, party of the first part, in that certain agreement executed with the Stearns Gas Engine Works, as party of the second part, said agreement in writing being dated June 12, 1916, * * * hereby notifies you that said undersigned hereby exercises his option under the terms of said agreement [stating the terms thereof]. The undersigned does hereby offer to pay said last three months' rental, to wit, the sum of four hundred and fifty dollars, upon the execution of said new lease, together with the first months advance rental, and does hereby request that you execute said new lease with the undersigned at the expiration of the present lease, to wit, on June 12, 1917. * * * This notice confirms oral notice given you prior to receipt of notice of cancellation from you."

Signed by Fred L. Williams.

On the same day the following notice, on the letterhead of the defendant, was served upon plaintiff:

"Mr. Fred L. Williams, Los Angeles, Calif. Dear Sir: According to the terms of our contract of June 12th, we hereby give you notice of the termination of said lease contract. Very truly yours, Stearns Gas Engine Works, F. L. Stearns."

The refusal of defendant to accept said rental or to lease to plaintiff said premises is alleged, and it is then stated:

"That since said notice was served upon plaintiff and not before, defendant has informed plaintiff that said agreement to lease and option to lease was not valid and enforceable for two reasons, namely, that his son, Francis A. Stearns, who signed said agreement was at said time a minor, and, further, was not authorized in writing by defendant to sign said lease; that prior to said information plaintiff had no knowledge or information that said agreement was not, or that defendant claimed that it was not, enforceable and valid"; that had plaintiff been so informed he would not have entered into said lease or expended the money which he did, and that the representations made by defendant that Francis A. Stearns was duly authorized to execute said agreement were false, and made with intent to defraud plaintiff.

The answer specifically denied all the material allegations of the amendment to the complaint. Among such denials were the following: That defendant entered into or executed the written agreement set forth in the complaint and subscribed by Francis A. Stearns as the agent of the defendant; that said Francis A. Stearns was the agent of the defendant or authorized to execute said written agreement for or in behalf of the defendant; that the defendant represented to plaintiff at any time that said Francis A. Stearns was authorized by it to make or enter into said written agreement for or on its behalf; that the plaintiff entered into and took possession of the premises described in said purported written agreement under said agreement or in pursuance of the terms thereof, but alleged in effect that the plaintiff entered into the possession of said premises under an oral agreement between him and the defendant, made on the said 12th day of June, 1916. The answer then sets up the following affirmative defense:

"That on or about the month of January, 1917, plaintiff notified and represented to the defendant that plaintiff would not have any use for the said premises beyond a short time, to complete certain experiments then pending, and would shortly surrender the premises to the defendant, * * * and on the 21st day of February, 1917, the said plaintiff again notified and represented to defendant that plaintiff would shortly surrender the said premises and thereafter a contract for the use of said premises was entered into by this defendant with one B. C. Donnelly; * * * that thereafter and on or about the 5th day of April, 1917, plaintiff notified and represented to plaintiff that he would shortly surrender the said premises to defendant, and thereafter the defendant entered into a further contract with said Donnelly; * * * that throughout said negotiations and at the time of making the aforesaid contracts, plaintiff knew and was informed that the defendant believed and relied on the aforesaid notices and representations made by plaintiff to defendant, and that defendant but for such belief and reliance would not have entered into said negotiations and made the said contracts with said B. C. Donnelly of February 21st, 1917, and April 5th, 1917."

The court found that at the time of the execution of said "lease contract" Francis A. Stearns was not acting as an agent of the defendant, and was not authorized in writing to make said agreement; "that the defendant made no representations to plaintiff that said Francis A. Stearns was authorized to execute said lease, and that said instrument was executed by said Francis A. Stearns without the knowledge or consent of the defendant." It was also found that

the plaintiff entered into the possession of the premises and property described in said "lease contract" on or about July 15, 1916, etc. It was then found that the cancellation notice of May 17, 1917, was served upon plaintiff before the latter served the defendant, on the same day, with the written demand for a lease; that plaintiff made no tender of rent for any period of time subsequent to June 12, 1917; "that plaintiff and his workmen ceased work at said premises on or about June 9, 1917, and notified and represented to defendant that he had abandoned said premises and intended to claim no rights therein under the aforesaid lease or otherwise." The court also found to be true the allegations in the answer as to plaintiff, notifying defendant that he would have no further use for the premises and as to the entering into of a contract with said Donnelly. It was further found generally that those allegations of the complaint as to which specific findings were not made are untrue, and that the allegations or denials of the answer as to which like findings were not made are true.

Four points are made by appellant for a reversal of the judgment, to wit: (1) That by reason of service by the defendant of the notice of May 17, 1917, referring to "our contract of June 12th," the defendant ratified the lease contract made by Francis A. Stearns; (2) that until that time and by such purported ratification, any statements made by the plaintiff to the defendant could not operate as an estoppel against plaintiff; (3) that plaintiff did not abandon his rights under the lease contract; (4) that if the acts of plaintiff were sufficient to estop him from demanding any rights as against the defendant under the Francis A. Stearns contract, then the alleged act of the defendant in ratifying said contract operates as an estoppel upon the defendant sufficient to prevent him from taking any advantage of any opportunity to establish an estoppel against the plaintiff, and the matter is therefore set at large.

[1] This being an appeal from the judgment, on the judgment roll alone, the presumption must be indulged that the findings were justified by and derive sufficient support from the evidence. The findings of fact, as made by the court, plainly speak for themselves, and are upon their face decisive of the case against the appellant.

[2] As above shown, the court found that the purported written contract of lease was not executed by Francis A. Stearns by the authority of the defendant, and that the latter made no representation to the plaintiff that said Francis A. Stearns was authorized to make any such contract for or in its behalf; and, while the court found that the plaintiff entered into the possession of the premises and property described in said contract of lease, it did not find, either specifically or otherwise, that the plaintiff entered into and took such possession under or by virtue of said contract or in pursuance of the terms thereof. It is true that the court did not specifically find that the plaintiff entered into the possession of said property under some other agreement of contract between the parties than the written agreement, but it is also true that the answer, in effect alleges that such possession was taken under an oral agreement entered into between the parties on the date of the execution of the purported written contract of lease, and that the court's general finding that all the denials and allegations of the answer were and are true necessarily embraces a finding that possession was taken by the plaintiff under said oral agreement; that is to say, such a finding is necessarily implied from the general finding referred to. It follows, therefore, that the written notice which the court found had been given to the plaintiff by the defendant of the termination of the "lease contract of June 12th" must be understood and construed to refer to the oral agreement, and not to the purported written contract. This view results from the familiar rule that findings must be so construed as to support the judgment if such a course may consistently and reasonably be adopted. "It is elementary," as the Supreme Court says in People v. McCue, 150 Cal. 195, 198, 88 Pac. 899, 901, "that if findings of fact are reasonably susceptible of such a construction as will support a judgment, they must receive that construction rather than one that will not so support it." See, also, Hayne on New Trial and Appeal, § 242, subd. 6.

The consequence of the situation as to the findings, as above explained, is that the discussion in the brief of the appellant of the proposition that the defendant, by reason of the written notice given by it to the plaintiff of the termination of the lease, ratified the purported written lease, and is therefore estopped from asserting that said writing was executed without its authority, is beside the legal issues presented on this appeal. In other words, the point as to the asserted ratification by the defendant of the alleged written contract, and that the defendant is foreclosed the right by estoppel arising upon and from such ratification to deny for any reason the validity and binding force of said writing, is wholly without pertinency or force under the state of the findings, as we feel that we are required to view them.

[3] The court found, as has been shown, and so found presumptively from sufficient evidence, that the plaintiff, in the months of January and February, 1917, verbally notified the defendant that he would shortly have no further use of the premises, or any portion thereof, and that thereupon the de-

fendant entered into negotiations with the said Donnelly for the leasing of the same to the latter; that the plaintiff was aware of these negotiations with Donnelly, and that the defendant, relying upon the notices so given to it by plaintiff that he intended within a short period of time to vacate and surrender said premises, did enter into contracts of lease with said Donnelly whereby the latter was to take immediate possession of all and every portion of said premises and the machinery and equipments belonging to the business conducted on said premises; that but for the fact that it relied upon said representations and notices by the plaintiff that he intended to quit and surrender to the defendant the said premises and property the latter would not have entered into the negotiations and contracts referred to with said Donnelly; that the plaintiff, after the defendant's transaction with Donnelly, having failed and refused to surrender said property as voluntarily promised by him, the defendant thereupon served upon him the notice of the termination of the lease, which, under the findings, involved a mere tenancy at will, or from month to month. Thus an estoppel arose against any right the plaintiff might otherwise have had to complain of the action of the defendant in entering into a contract with Donnelly whereby it leased the premises and property in question to the latter and in refusing, as a consequence, to make a further contract of lease of said premises and property to the plaintiff. In other words, the defendant, having in reliance upon the statements of the plaintiff that he would within a brief period of time surrender the premises, because he would have no further use therefor, entered into the contracts whereby it leased the premises and property in question to Donnelly, the plaintiff at all times having knowledge of the pendency and prosecution of the negotiations culminating in the said lease to Donnelly, an estoppel was thereby raised against plaintiff to claim the right to a further lease of the premises.

The judgment is affirmed.

We concur: NICOL, Presiding Judge pro tem.; BURNETT, J.

(48 Cal. App. 135)

FRASCONA v. LOS ANGELES RY. CORPORATION. (Civ. 3193.)

(District Court of Appeal, Second District, Division 2, California. June 10, 1920.)

1. Trial ⟸393(3)—Written findings of fact necessary unless waived.

Where findings were not waived, the trial court must give its decision in writing, including written findings of fact under Code Civ. Proc. § 632.

2. Appeal and error ⟸1071(1) — Failure to make findings of fact ground for new trial or reversal.

The provision of Code Civ. Proc. § 632, requiring written findings of fact, is for the benefit of the court and the parties, and failure to make such findings is prejudicial to such parties, and requires reversal.

3. Trial ⟸396(1)—Findings of fact should answer issues made by pleadings.

Where it is not necessary that findings should follow the precise language of the pleadings, it is essential that they be so drawn that the truth or the falsity of every material allegation can be demonstrated therefrom, and the findings must answer the questions put by the pleadings.

4. Negligence ⟸119(4) — Recovery only on proof of act alleged.

Recovery can be had only on the proof of the specific act of negligence alleged.

5. Carriers ⟸322—Finding of careless operation of car supports averment that car started before plaintiff alighted.

Where a complaint alleged defendant's act of negligence in starting the street car before plaintiff alighted, a finding that defendant operated its car in a negligent manner, thereby injuring plaintiff, is insufficient.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Mary Frascona against the Los Angeles Railway Corporation. Judgment for plaintiff, and defendant appeals. Reversed.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for appellant.

A. E. T. Chapman, of Los Angeles, for respondent.

FINLAYSON, P. J. This is an action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, a common carrier of passengers, while plaintiff was a passenger on one of its street railway cars. The case was tried by the court without a jury. Judgment passed for plaintiff, and defendant appeals. The principal question involves the sufficiency of the finding upon the issue of defendant's negligence as alleged in the complaint.

The complaint alleges a specific act of negligence on defendant's part. After alleging that, while she was riding as a passenger on defendant's street car, plaintiff requested the conductor to let her off at the intersection of San Pedro and Sixteenth streets, in the city of Los Angeles, and that the conductor thereupon gave the motorman the signal to stop, the complaint proceeds to allege that—

"Said car was brought to a standstill, and while this plaintiff was attempting to step from the bottom step on said car to the ground, said

car was suddenly started forward, and this plaintiff was violently thrown upon the ground."

The answer denies that the car was brought to a standstill; denies that, while the car was standing still, plaintiff attempted to alight; denies that, while plaintiff was alighting, the car was suddenly started forward; and alleges that before the car had reached the customary and usual stopping place at the intersection of Sixteenth and San Pedro streets, and while it was still in motion, plaintiff carelessly and negligently attempted to step on the ground and fell.

There was a sharp conflict in the evidence. Plaintiff and her witnesses testified that the accident happened as alleged in the complaint; while the witnesses for defendant, with equal positiveness, testified that plaintiff stepped from the car before it had come to a standstill.

Instead of a finding showing the truth of the averment of negligence as made in the complaint, we are left to conjecture whether the trial court may not have attributed the accident to some other and wholly different act of negligence. Instead of a finding that the accident happened as specifically described by plaintiff in her complaint, the court's finding of negligence is couched in most general terms. The sole finding upon the issue of negligence is this:

"That defendant corporation operated said street car in a careless and negligent manner, then and there injuring plaintiff, Mary Frascona, and that said carelessness and negligence of the defendant corporation was the direct and proximate cause of plaintiff's injuries."

[1] Unless findings are waived—and here, as the record shows, they were not—the trial court must give its decision in writing, i. e., it must file written findings of fact. Section 632, Code Civ. Proc. The right to findings is a substantial right, as inviolate, under the statute, as that of trial by jury under the Constitution. Bard v. Kleeb, 1 Wash. 370, 25 Pac. 467, 27 Pac. 273.

[2] The Code provision requiring written findings of fact is for the benefit of the court and the parties. To the court it gives an opportunity to place upon record, in definite written form, its view of the facts and the law of the case, and to make the case easily reviewable on appeal by exhibiting the exact grounds upon which the judgment rests. To the parties it furnishes the means, in many instances, of having their cause reviewed without great expense. It also furnishes to the losing party a basis of his motion for a new trial; he is entitled to know the precise facts found by the court before proceeding with his motion for a new trial, in order that he may be able to point out with precision the errors of the court in matters either of fact or law. Bard v. Kleeb, supra; Savings & L. Soc. v. Burnett, 106 Cal. 539, 39 Pac. 922; Polhemus v. Carpenter, 42 Cal. 385. "The right to have a material issue presented by the pleadings in a cause determined by a finding of the court is one important to the parties to a suit, and the failure to make such a finding results in prejudicial error, entitling the complaining suitor to reversal." Huntington v. Vavra, 36 Cal. App. 355, 172 Pac. 168. See, also, Tucker v. United Railroads, 171 Cal. 704, 154 Pac. 835.

[3] While it is not necessary that the findings should follow the precise language of the pleadings, it is essential that they be so drawn that the truth or falsity of every material allegation can be demonstrated therefrom. The purpose of findings "is to answer the questions put by the pleadings." Dam v. Zink, 112 Cal. 93, 44 Pac. 332. The province of the court is to determine, not to raise, issues. And a finding upon a fact not in issue can form no element in determining the appropriate judgment to be rendered. Commissioners v. Barnard, 98 Cal. 199, 32 Pac. 982. The plaintiff must recover, if at all, upon the case as made by his complaint, and not on some other which he might have made.

[4] For these reasons, to sustain a judgment for the plaintiff in an action the findings must be responsible to the issues as tendered by the complaint; and, where specific facts are put in issue, it is the duty of the court to find the facts specifically. "The findings must be specific on the issues presented, and judgment will be reversed if they are not so." Franklin v. Franklin, 140 Cal. 609, 74 Pac. 155. "It is well settled," says the Illinois court in Chicago City Ry. Co. v. Gates, 135 Ill. App. 185, "that the allegations of the declaration and the proof must agree, and that when a specific act of negligence is alleged, the recovery can only be on proof of such specific act, and not on proof of negligence not alleged."

[5] When put to the proof of these elementary rules, the finding of negligence in this case fails to meet the test. The complaint alleges one distinct and specific act of negligence, namely, starting the car before plaintiff had alighted. The finding is not at all specific; it could hardly be more general than it is. It is no more than this: That defendant operated its car in a careless and negligent manner, thereby injuring plaintiff. Such a finding is broad enough to include an almost infinite number of acts of negligence, each differing radically from the specific act alleged by plaintiff as the ground of her action for damages. Having carefully defined and described in her allegation of negligence the particular negligent act with which she charges defendant, we must assume that the latter came into court prepared to meet the charge that it committed that specific negligent act, and not some other act of negligence in the operation of its car that plaintiff might have alleged, but did not. If the judgment

against defendant be upheld, it is not entirely beyond the realm of possibility that the trial court did not believe that defendant had been guilty of the precise act of negligence pleaded by plaintiff, but did believe, and intended to find, that in some other and radically different respect defendant had negligently operated its car, thereby causing the injuries.

For these reasons we are constrained to hold that the failure of the trial court to make a finding responsive to the issue as tendered by the complaint was prejudicial error for which the cause must be remanded for retrial.

Judgment reversed.

We concur: THOMAS, J.; WELLER, J.

48 Cal. App. 263

BANK OF NEWMAN v. MONTEREY COUNTY GAS & ELECTRIC CO. (Civ. 3404.)

(District Court of Appeal, First District, Division 1, California. June 21, 1920. Hearing Denied by Supreme Court Aug. 19, 1920.)

Corporations ⟸471—Guaranty held not increase of bonded debt without consent of stockholders.

A contract of guaranty, executed by a corporation, "For value received. M. C. G. and E. Company agrees to and with the holder of this bond and the attached coupons, that if the several sums of money agreed to be paid thereby are not paid in the manner therein stated, as they severally become due, then and in that event the M. G. & E. Company will pay the same," *held* on its face to have been issued for value received, and not to be an attempt to increase the bonded indebtedness of the guarantor without the proceedings required to be taken by corporations under Civ. Code, § 359, and was valid.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the Bank of Newman against the Monterey County Gas & Electric Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wise & O'Connor, of San Francisco, and Goldman & Altman, for appellant.

Chickering & Gregory and Thos. H. Breeze, all of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of plaintiff in an action to recover upon a certain written agreement executed by the defendant whereby it undertook to guarantee the payment of certain bonds issued by the Monterey & Pacific Grove Railway Company, a corporation, upon which bonds default in payment had been made by said last-named corporation. The guaranty in question was indorsed upon each of the bonds issued and sold by the Monterey & Pacific Grove Railway Company, and was in the following form:

"Guaranty of Payment.

"For value received, Monterey County Gas & Electric Company, a corporation, agrees to and with the holder of this bond and the attached coupons, that if the several sums of money agreed to be paid thereby are not paid in the manner therein stated, as they severally become due, then and in that event the Monterey Gas & Electric Company will pay the same.

"This contract is duly authorized by a resolution of the board of directors of the Monterey Gas & Electric Company."

The trial court rendered its judgment in plaintiff's favor for the amount due upon the bonds held by it bearing this guaranty. The defendant has appealed from said judgment, the only contention which the appellant makes upon this appeal being that the guaranty of the said bonds of the Monterey & Pacific Grove Railway Company by the appellant was an attempt to increase the bonded indebtedness of the guarantor; and, since said guaranty was not founded upon the proceedings required to be taken by corporations under section 359 of the Civil Code relating to the creation or increase of a bonded indebtedness, said guaranty was void.

We are unable to agree with the position taken by the appellant in this regard. The guaranty in question appears upon its face to have been issued for value received, and there is nothing in this record to indicate that it was not issued in good faith and in the regular course of the business of the corporation issuing the same. It does not purport to have any relation to any past bonded indebtedness of the appellant, or to have been issued in the form or with the intent of creating or increasing any bonded indebtedness of the corporation; but, on the other hand, it appears as to both its form and substance to belong to that class of written instruments which include promissory notes, checks, bills of exchange, and like obligations of corporations or of individuals issued in the ordinary course of business. The term "bonded indebtedness" has never been held to apply to or include this class of obligations, but as used in the Constitution and statutes has had reference to those more formal transactions of both municipal and private corporations which require such prerequisites as elections, or the express approval of stockholders, in order to their creation, and which when thus permitted take the express form of bonds either secured by liens upon property or payable by means of public taxation.

The Supreme Court of this state in the case of Underhill v. Santa Barbara, etc., Co., 93 Cal. 300, 28 Pac. 1049, in construing the term "bonded indebtedness" as found in sec-

tion 11 of article 12 of the Constitution having reference to the obligations of private corporations, has held that a note and mortgage issued by such a corporation is not a bonded indebtedness within the meaning of said provision of the Constitution. To hold otherwise would be to extend the language of the Constitution to practically every form of indebtedness which a private corporation could create, and to require in every case the consent of its stockholders to the creation of such indebtedness and to the issuance of the writing which would evidence the same. The only authorities cited by the appellant herein as sustaining its position are those from other jurisdictions wherein by the express terms of their statutes the consent of stockholders is required to guaranties by one corporation of the bonds of another. Such cases are not in point in this state, wherein no such statutory requirement is to be found.

Judgment affirmed.

We concur: WASTE, P. J.; WELCH, Judge pro tem.

48 Cal. App. 298

BOWEN v. HICKEY. (Civ. 3090.)

(District Court of Appeal, Second District, Division 1, California. June 22, 1920.)

Appeal and error ⊂=1071(1)—Judgment for defendant held justified, notwithstanding erroneous finding.

Where in forcible entry and detainer it appears that on plaintiff's demand defendant surrendered possession, a judgment for defendant *held* proper, notwithstanding an erroneous finding that in plaintiff's absence defendant unlawfully entered and took possession of the land.

Appeal from Superior Court, Riverside County; Wm. D. Dehy, Judge.

Forcible entry and detainer by Theodore Bowen against Seth Hickey. Judgment for defendant, and plaintiff appeals. Affirmed.

Frank C. Prescott, of Los Angeles, and Burton E. Hales, of Redlands, for appellant.

F. E. Dunlap, of Los Angeles, and H. F. Bridges, of Sierra Madre, for respondent.

CONREY, P. J. In this action of forcible entry and detainer, the plaintiff appeals from a judgment entered in favor of the defendant.

The complaint alleged that on the 23d day of November, 1912, and for more than four years previous thereto, plaintiff was in the peaceable and actual possession and entitled to the possession of the real property described in the complaint; that on the 23d day of November, 1912, during the absence of the plaintiff therefrom, the defendant unlawfully entered upon said land and took possession of the same. On these allegations the court made its findings in favor of the defendant. The evidence is not sufficient to support those findings, but, on the contrary, without conflict, sustains the allegations in the complaint.

The complaint next alleged that on the evening of the 23d day of November, 1912, plaintiff made a demand in writing upon the defendant to deliver up to plaintiff the possession of said premises, but the defendant refused, and still refuses after a period of five days, to surrender possession, etc. The evidence shows, and the court found, that the notice was served as stated. But the court found that—

"Thereupon, pursuant to said demand, defendant surrendered possession thereof to plaintiff, and that defendant does not still unlawfully hold or continue in possession of same, against the form of the statute in such cases made or provided."

The evidence is sufficient to sustain this finding. Immediately upon service of the said notice, the defendant and the persons with him left the premises, taking with them their wagon and implements and everything that they had brought to the land. The defendant testified that it was his intention at that time to surrender possession of the land to the plaintiff, and that he did not at that time give any thought as to his future action with reference to the land. It is true that the evidence further shows that 28 days later the defendant again went into possession of the premises, and still remained there at the time of the commencement of this action on January 13, 1913. It does not appear that any notice demanding possession by the plaintiff was ever served other than the notice of November 23, 1912. At the time of said transactions in November and December, 1912, the plaintiff was occupying a house erected by him on a part of the premises in question, and his occupancy thereof was not disturbed by the defendant. Since the evidence justified the court's finding in favor of the defendant to the effect that he surrendered possession to the plaintiff in response to the notice given, it becomes immaterial that the findings first mentioned were not sustained by the evidence. If those findings had been favorable to the plaintiff, the appropriate judgment nevertheless would have been in favor of the defendant.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

48 Cal. App. 208

SHERWOOD et ux. v. ROBERTSON.
(Civ. 3235.)

(District Court of Appeal, First District, Division 1, California. June 17, 1920.)

1. Mortgages ⟸257—Assignee of nonnegotiable note held not bound by equities in favor of mortgagor.

While an assignee of a nonnegotiable note and mortgage takes them subject to all the equities and infirmities which could be urged by makers against the original mortgagee, if the assignee uses proper diligence and makes reasonable inquiry to ascertain what, if any, outstanding equities there are in favor of the mortgagor, and after having used such diligence and made such inquiry he finds no circumstances which would lead a reasonable person to believe that the full consideration had not passed or that equities were outstanding, he takes the paper free from equities which the mortgagor might otherwise have asserted.

2. Estoppel ⟸72——Note and mortgage will not be reformed to detriment of innocent purchaser in view of rule as to two innocent parties.

Where a mortgage in terms secured a straight loan evidenced by a note, while in fact the consideration was payable in installments, as a building was constructed by mortgagor, and the mortgagee sold the note and mortgage for their face value, the mortgagor having notice thereof, but failing to apprise the purchaser that all the consideration had not been paid, the note and mortgage will not be reformed at the mortgagor's instance to express the true consideration, since under Civ. Code, § 3543, where one of two innocent persons must suffer by the act of the third, he by whose negligence it happened must be the sufferer.

3. Reformation of instruments ⟸29—Failure of purchaser of note to make inquiry held not to permit reformation.

Where a mortgagee sold for full value a note and mortgage to an innocent purchaser without notice, and the consideration had not in fact been fully paid to the mortgagor, failure of the purchaser to inquire of the mortgagor as to the amount of advances did not constitute negligence, where mortgagor had an opportunity to explain the condition of the loan to the purchaser before the purchase, and therefore the note and mortgage will not be reformed at the mortgagor's instance.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Suit by C. S. Sherwood and wife against Maria Robertson to reform a note and mortgage. Judgment for defendant, and plaintiffs appeal. Affirmed.

John B. Haas, of Los Angeles, for appellants.

Lewis Cruickshank and Vincent B. Vaughan, both of Los Angeles, for respondent.

RICHARDS, J. This appeal is from a judgment in favor of the defendant in an action instituted by the plaintiffs for the purpose of having their promissory note and mortgage in the hands of the defendant so reformed as to express the amount actually due upon said note and to secure that amount.

The defendant was the holder of said note and mortgage by virtue of an assignment to her of the same from the original payee thereof. The facts attending the execution of these instruments by the plaintiffs are undisputed and may be summarized as follows:

On August 1, 1917, the plaintiffs executed and delivered to one Joseph M. Gore their promissory note for the sum of $2,300 and interest, due three years after date, giving as security for said note their mortgage upon a certain piece of real estate in Los Angeles county, which mortgage was recorded upon the date of its execution. The transaction upon the face of these instruments appeared to be a straight loan of $2,300 to the plaintiffs, but it appeared at the trial that the money for which said note and mortgage were given was to be used by said plaintiffs in erecting two buildings upon the mortgaged premises, and was to be advanced from time to time by the mortgagee to them as the erection of said structures progressed. This plan was carried out to the extent that between the date of said loan and the 15th day of September, 1917, the said mortgagee had advanced on account of said loan the sum of $895. On or about said last-named date said Gore undertook to sell said note and mortgage to the defendant herein, an old lady having some money which she desired to have safely invested. The sale of said securities was being negotiated by one R. W. Martin, who on September 15th took one Arthur J. Madison, a son-in-law of the defendant, to inspect the property which was the subject of the mortgage. They found the plaintiff Mr. Cedric Sherwood upon the premises. As to the conversation which occurred there between Mr. Madison and Mr. Sherwood there is a dispute in the evidence; but Mr. Madison, who was acting as the agent of the defendant, testified that he spent from 15 minutes to half an hour looking over the property after being introduced to Mr. Sherwood by Mr. Martin as a gentleman who was looking at the property with a view to buying the mortgage, and that in the course of that time Mr. Sherwood stated to Mr. Madison that both bungalows were rented to be occupied as soon as completed, and that the property was worth approximately $4,500; and when Mr. Madison stated that the property looked like a nice piece of property, and as it was new was a good loan, Mr. Sherwood answered, "Yes; he thought so." Mr. Martin corroborates that portion of the testimony of Mr. Madison wherein the latter stated that Mr. Sherwood was informed that

Mr. Madison might buy the mortgage if it was all right. Two days later the defendant herself went out to see the property, accompanied by Mr. Martin, and she testified that she was there introduced to Mr. Sherwood by Mr. Martin as a prospective purchaser of the note and mortgage, and that, to quote her own language:

"I said to Mr. Sherwood, 'It looks like a good loan; I have to be pretty careful; I haven't very much money, and I have to be very careful how I let it;' and he said it was a good loan; my money would be safe, and everything was all right. * * * Mr. Sherwood stated that the interest was to be paid on it; I think he said there would be no trouble."

Mr. Martin also corroborated Mrs. Robertson in her testimony to the effect that she was introduced to Mr. Sherwood as "the woman with the money, and if the loan suited her she would possibly buy it." A few days later Mrs. Robertson bought the note and mortgage from Gore, paying to him the full face value thereof. The assignment of the mortgage to her was recorded on September 26, 1917, and on the following day the plaintiffs brought this action to have the instruments reformed.

Upon the trial of the cause the court accepted the statements of Mrs. Robertson and her agent, Madison, as to the substance of the conversations between them and the plaintiff, Cedric Sherwood, who, it is conceded, was acting not only in his own behalf, but as agent for his wife, during the course of these interviews; and the court thereupon made its findings in favor of the defendant, holding that the plaintiffs were liable to her for the full amount of said note and mortgage and were not entitled to have the same reformed.

[1] The plaintiffs upon this appeal attack these findings as unsupported by the evidence in the case, and they also insist that the said decision of the court is against law. The question which is thus presented is one of estoppel. It is conceded by both parties to this appeal that a note and mortgage are to be read together and are nonnegotiable, and hence that an assignee thereof takes them subject to all the equities and infirmities which could be urged by the makers thereof against the original mortgagee. This admitted rule of law has, however, this exception, that if the assignee of the note and mortgage uses proper diligence and makes reasonable inquiry to ascertain what, if any, outstanding equities there are in favor of the mortgagor, and if, having used such diligence and made such inquiry, he finds no circumstances which would lead a reasonable person to believe that the full consideration had not passed for the execution of said note and mortgage, or that there were any equities outstanding in favor of the mortgagor, and if, having used such diligence and made such inquiry with such result, he takes the assignment of said note and mortgage, paying in good faith full value therefor, he takes the same free from such equities as the mortgagor might otherwise have asserted. The respondent herein relies upon this exception to the general rule, and depends upon the evidence of the interviews held between herself or her agent and the plaintiff Cedric Sherwood as sufficient to sustain such exception and to work an estoppel against the Sherwoods to deny their full liability upon said note and mortgage.

[2] In support of this view the respondent cites the case of National Hardwood Co. v. Sherwood, 165 Cal. 1, 130 Pac. 881. We are unable to find any distinction between that case and the case at bar. The facts of the two cases are practically identical; and the Supreme Court in the case before it fully applies the principle of estoppel for which the respondent herein contends, and we can see no escape from the application of that principle to the facts of the case at bar. The cases cited by the appellants from other jurisdictions cannot be held to be availing in the face of the decision of our own Supreme Court upon this subject; and while it is true that the compulsion laid upon the plaintiffs herein to pay the full face of their note and mortgage works a hardship upon them, the adoption of the other view would work a greater hardship upon the respondent, who appears throughout to have acted with the utmost good faith. The plaintiffs at the time of their interviews with the defendant and her agent had their opportunity to enlighten them both as to the extent of the advancements which had been made upon said loan; and, this being so, the rule laid down in section 3543 of the Civil Code that, "where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer," is to be given application to the facts of the case at bar. The plaintiffs herein, by giving to Gore their note and mortgage in the form in which these were given, put it in the latter's power to exhibit the same to a purchaser thereof, and to induce the belief in such purchaser that these instruments were good for their full face value. They could easily have avoided this consequence and sufficiently protected themselves and any assignee of their securities by an insertion in their mortgage of a recital showing that the same was given for advances yet to be made. Not having done this, they must be held, as between themselves and this defendant, to be the parties by whose negligence the wrong occurred from which one or the other of them must be the sufferer.

[3] The appellants, however, insist that the respondent herein was also negligent in not requiring from Gore upon her purchase of these securities a statement from the mak-

ers thereof as to the amount then due. Ordinarily this might be true; but in the case at bar the necessity for such a statement was obviated by the direct interview with Sherwood and by the opportunity then afforded to him to explain the exact condition of the loan. We are satisfied that the evidence in the case was sufficient to sustain the findings of the court in the defendant's favor, and that there is no error disclosed by the record upon this appeal.

Judgment affirmed.

We concur: WASTE, P. J.; KOFORD, Judge pro tem.

48 Cal. App. 360

SMITH v. ROSS, Sheriff of Santa Barbara County. (Civ. 3360, 3390.)

(District Court of Appeal, First District, Division 2, California. June 29, 1920. Hearing Denied by Supreme Court Aug. 26, 1920.)

1. Justices of the peace ⟸59—Facts conferring jurisdiction must be shown.

A justice's court being one of limited jurisdiction, one relying on its judgment must show affirmatively every fact necessary to confer jurisdiction.

2. Justices of the peace ⟸122(2)—In action on oral contract, summons served out of county not basis for default judgment.

A justice has no jurisdiction of defendant so as to authorize default judgment against him, action being on an oral contract, and service of summons on him being outside the county in which action was brought, which is prohibited by Code Civ. Proc. § 848, in an action in such court, unless on a written contract of a certain class.

3. Justices of the peace ⟸135(4)—Negativing of remedy at law necessary to restrain execution on default judgment without jurisdiction.

Suit to enjoin enforcement of an execution on a default judgment of a justice who had not acquired jurisdiction will, on the ground that there is an adequate remedy at law by motion in the justice's court to set aside the execution, not lie, at least in absence of allegation that such motion was made and denied, or of other facts showing special circumstances of fraud or hardship.

4. Pleading ⟸34(4) — Facts presumed stated as strongly as truth permits.

It is to be presumed that the pleader has stated the facts as strongly as the truth will permit.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by W. D. V. Smith against James Ross, Sheriff of Santa Barbara County. From an adverse judgment and order, plaintiff appeals. Affirmed.

W. P. Butcher, of Santa Barbara, for appellant.

W. C. Wilde, of San Diego, for respondent.

BRITTAIN, J. The plaintiff appeals from a judgment entered after his refusal to amend his complaint on demurrer being sustained with leave to amend, and also from an order setting aside a temporary restraining order. The judgment must be affirmed on the ground that the complaint did not show sufficient facts to constitute a cause of action for equitable relief by injunction, and this result renders unnecessary consideration of any matters presented by the appeal from the collateral order.

Summarized, the complaint shows that the plaintiff is a resident of the county of Santa Barbara and was never a resident of San Diego county; that he was sued by one Creamer in a justice's court in the latter county, on a claim based on an oral contract, made payable in Santa Barbara; that no part, note, or memorandum of the contract was in writing; that summons in the action was served on the plaintiff in Santa Barbara county; that default judgment was entered in the action; that an abstract of the judgment was filed in the office of the county clerk of San Diego county, and an execution thereupon issued to the defendant sheriff of Santa Barbara county; and that the defendant as such sheriff will, unless restrained by injunction, levy upon property of the plaintiff in Santa Barbara county to satisfy the judgment which the plaintiff alleges to be void. It is further alleged that the plaintiff, in the event of such levy, will suffer great and irreparable injury, and that he has no speedy or adequate remedy at law.

It is provided by section 848 of the Code of Civil Procedure that in a suit in a justice's court the summons cannot be served outside of the county wherein the action is brought except "when the action is * * * against a party who has contracted in writing to perform an obligation at a particular place, and resides in a different county, in which case the summons may be served in the county where he resides."

[1] The justice's court being of limited jurisdiction, one relying on its judgment must show affirmatively every fact necessary to confer jurisdiction. Rowley v. Howard, 23 Cal. 401. Under the facts pleaded and assumed for the present purpose to be true, it is shown that the default judgment was entered without jurisdiction of the person of the defendant by service of summons in that action.

[2-4] It does not follow that the plaintiff in the present action stated sufficient facts to warrant the relief demanded in his complaint. No facts were alleged from which the legal conclusion could properly be drawn that he had not a plainer, speedier, and more

adequate remedy at law than in equity. Upon authority it was determined in this state as early as 1887 that injunction will not lie to restrain the enforcement of an execution issued on a default judgment in a justice's court in a suit where the justice had not acquired jurisdiction, for the reason that the defendant has an adequate remedy at law by motion in the justice's court to set aside the execution. Luco v. Brown, 73 Cal. 3, 14 Pac. 366, 2 Am. St. Rep. 772. It may be that, if such a motion were made and denied, or other facts were alleged showing special circumstances of fraud or hardship, a court of equity might be moved to grant injunctive relief, but no such facts are set forth in the complaint under consideration as were shown in a case on which the appellant chiefly relies, and which does not sustain his contentions. Newman v. Barnet, 165 Cal. 423, 132 Pac. 588. In that case it was shown on the trial that the plaintiff in equity had applied for relief in the justice's court, and that it was denied. In this case the plaintiff did not allege that he had made any application for the relief the law provides, and under the rule that it must be presumed the pleader has stated the facts as strongly as the truth will permit, the conclusion is irresistible that no such application was made.

The judgment and order appealed from are both affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

48 Cal. App. 343

WILSON v. SAN FRANCISCO-OAKLAND TERMINAL RYS. et al. (Civ. 3314.)

(District Court of Appeal, First District, Division 1, California. June 28, 1920.)

1. Release ⟸57(2)—Fraud in securing release for personal injuries may be shown by circumstantial evidence.

In a personal injury action, where plaintiff claimed that signing of a release resulted from misstatements and fraudulent misrepresentations, plaintiff was not required to show a direct connection between one of the parties making such representations and the defendant, but was entitled to prove fraud and conspiracy by circumstantial evidence.

2. Release ⟸17(2)—Defendant may not rely on release secured by misrepresentations of agents or others.

In a personal injury action, whether or not there was any connection between one who by misrepresentation or fraud induced plaintiff to sign a release and defendant street railway's claim agent, the defendant corporation should not be allowed to take advantage of an unfair settlement thus made.

3. Release ⟸58(6)—Whether release for personal injury is tainted with fraud is a jury question.

Whether a release for personal injury is tainted with fraud is a question for the jury.

4. Release ⟸56—Plaintiff may prove that she was a profound neurasthenic when induced to sign.

If plaintiff was a profound neurasthenic at the time of the execution of the release for personal injuries, the release should under the law be scrutinized with even more care than if she were in a normal condition, and she was entitled to prove such physical condition when executing a release which she claimed was fraudulently procured.

Appeal from Superior Court, Alameda County; William S. Wells, Judge.

Action by Ada P. Wilson against the San Francisco-Oakland Terminal Railways and others, in which only the named defendant answered. Directed verdict and judgment for defendant, and plaintiff appeals. Reversed.

Ostrander, Clark & Carey, of Oakland, for appellant.

W. H. Smith, of Oakland, and A. L. Whittle, of San Francisco (Chapman & Trefethen, of Oakland, of counsel), for respondent.

KNIGHT, Judge pro tem. This action was brought by plaintiff to recover damages for personal injuries claimed to have been sustained by her through the negligence of the defendant corporation while she was riding as a passenger on the street car of said defendant corporation. The action was tried by a jury, and the court directed a verdict in favor of the defendant. Judgment was entered accordingly, from which plaintiff appeals.

The defendant corporation was the only defendant answering, and it pleaded a release executed by plaintiff to the effect that she had accepted from said defendant corporation the sum of $200 in full settlement of her claim and had discharged said defendant corporation from further liability. After the jury had been impaneled and sworn, counsel for defendant corporation called the court's attention to the release pleaded in its answer. Plaintiff admitted the execution of said release, but claimed that it was procured through the fraud and conspiracy of the agents of the defendant corporation, and was therefore not binding upon plaintiff. The court thereupon directed that the evidence bearing on said release be first presented. Defendant corporation then offered said release in evidence, after which plaintiff, in support of her claim of fraud and conspiracy, offered certain oral testimony, concerning the activities and declarations to her of one Norwood, whom she claimed had, with the aid

of the claims agent of the defendant corporation, fraudulently induced her to settle her claim. The evidence of Norwood's activities and declarations was excluded by the court, upon the ground that there had been no connection shown between said Norwood and the defendant corporation. After having unsuccessfully offered oral testimony on that point, counsel for plaintiff reduced to writing and read into the record a statement embodying the facts and circumstances which plaintiff offered to prove and upon which plaintiff stated that she would rely as showing fraud and conspiracy. The court refused to allow evidence to be introduced in support of said offer, and, on motion of the defendant corporation, directed the jury to return a verdict for the defendants, and said verdict was rendered accordingly.

Plaintiff's complaint was filed on September 27, 1917. Summons was served on the defendant corporation on September 29, 1917.

[1] The following, in substance, are the facts which plaintiff offered in writing to prove: On the afternoon of September 29, 1917, the same day on which the summons in the action was served, plaintiff was called to the telephone at her home in the city of Oakland by some person who, after inquiring if she was Miss Wilson, represented himself to be Mr. Carey, one of plaintiff's attorneys. Plaintiff remarked that it did not sound like Mr. Carey's voice, to which said person replied that he had a dreadful cold and was hoarse. He then asked plaintiff what she had said to Dr. Buteau's nurse, to which plaintiff replied that she had told the nurse that she was feeling better. The person then stated that the nurse had so informed him, and that he was afraid that it was damaging evidence against plaintiff, and that if she wanted to drop the case or settle it with the company he would not charge her anything for his services. He then asked if she would settle for $100, to which plaintiff replied that she would not. The telephonic communication then ended. As a matter of fact plaintiff had been examined by Dr. Buteau prior to the filing of her complaint. At the time of said telephonic communication plaintiff was attending her sister, who required almost constant attention, and plaintiff herself was extremely nervous, and afterwards became discouraged with reference to her case because of what had been stated to her over the telephone. On October 10, 1917, said C. J. Norwood, who was a total stranger to plaintiff, called at plaintiff's home and inquired for her, but, finding that she was not in, departed and returned the next day, at which time he stated to plaintiff that he had observed that she had brought suit against the San Francisco-Oakland Terminal Railways; that he himself had been in the same accident, but had not yet settled with the company, although he intended to do so. Plaintiff informed him that her attorneys had told her to settle her case, that she would like to settle, and she asked said Norwood to let her know if he settled his case. Norwood stated that he thought he would see what he could do; that he himself had not done anything, but that he did not want to give his case to the lawyers; that he would rather settle with the company; and that he thought he would go down and see them, and he did not want to wait any longer. Norwood then departed, but afterwards, on the same day, telephoned plaintiff that he had settled with the company, and requested the privilege of again calling on plaintiff, stating that he had something to her advantage to tell her. Later in the afternoon he called at her residence and stated to her that Mr. Mills, the claims agent of the defendant corporation, had told him that the attorneys for the company were going to call plaintiff down the next day and take her deposition, and that, since plaintiff's attorneys had released her, if she wanted to settle with the company, she had better go that afternoon; that if she waited until the next day it would be too late; that Mills had told him that he could not do anything afterwards because it would be in the hands of the lawyers. Norwood then, at the request of plaintiff, telephoned Mills and made an appointment with him for plaintiff, and afterwards accompanied plaintiff to the office of said Mills. After conversing with Mills, plaintiff accepted a check for $200 in full settlement of her claim. The telephone message purporting to have come from Mr. Carey was not from Mr. Carey, nor was it from any of plaintiff's attorneys, but plaintiff did not know that she had been deceived until the next day, October 12, 1917.

Plaintiff further offered to prove that the statement made by said Norwood at the time he called on plaintiff on October 11, 1917, to the effect that he had not yet settled with said company was false, and that he had in fact settled with said company in August, 1917, and that prior to visiting plaintiff said Norwood had consulted with said Mills with reference to plaintiff's case and with reference to a settlement of plaintiff's case. Plaintiff further offered to prove by said Dr. Buteau that as a result of the injuries received by her she was a profound neurasthenic and had suffered a severe shock to her nervous system. Plaintiff further offered to prove that at the time she called at Mills' office with Norwood she was in an extremely nervous condition and was depressed and discouraged because of the telephone message that she supposed was from Mr. Carey; that in accepting the check for $200 she did so because of the fact that she believed that she had been abandoned by her attorneys, and because of the statements made to her by said Norwood to the effect that if she did not settle before the following day it would be too late for her to settle, and because of the various matters stated to her by said Nor-

wood with reference to the treatment a Mrs. Marshall had received who had a claim against said company for injuries received in an accident while on a street car of said company, to the effect that Mrs. Marshall had been subjected to X-rays and had been severely examined by the attorneys for the company; that in making the settlement with said Mills plaintiff was ignorant of her rights in the premises and believed that if she did not settle upon that day it would be too late for her to settle, which belief was induced by the statements of said Norwood to her; that upon ascertaining from her attorneys on the following day that they had not withdrawn from her case she authorized them to tender the check back to said Mills and to said defendant corporation; and that said check was, within a few days thereafter, tendered to said Mills and to said corporation defendant, but that said tender was refused.

Plaintiff further offered to prove the main allegations of her complaint with reference to the negligence of said defendant corporation, etc.

The oral proof offered by plaintiff previous to the making of the written offer was, as above stated, excluded by the court, upon the objection of said defendant corporation. Plaintiff was not allowed to testify as to said telephonic communication, nor as to any of the statements made to her by Norwood. Nor was she allowed to give her reasons why she accompanied Norwood to the office of said claims agent, nor the reason for her acceptance of said check of $200 in full settlement of her claim.

Norwood was called as a witness by plaintiff, but the court would not allow plaintiff to examine him as to any of the statements claimed to have been made by him to plaintiff. One of the important points relied upon by plaintiff to show fraud and conspiracy was the asserted false statements of Norwood on his first visit to plaintiff to the effect that he had not yet settled his case with the company, but that he intended to do so, and that he did not want to give his case to the lawyers, but would go down and see the company without waiting any longer. Norwood, while a witness, admitted that he had settled his case with the company several days prior to his first visit to plaintiff, but the court refused to allow plaintiff to interrogate said Norwood with reference to said asserted false statements. In fact, all evidence offered by plaintiff tending to show the activities of Norwood and the statements made by him to plaintiff was excluded.

We are of the opinion that the rulings of the court in this respect constituted error. We are of the opinion also that, had plaintiff been successful in establishing the truth of the facts asserted by her in her written offer, the question of the fraudulent procurement of said release should have been submitted to the jury together with the main issues of the case. The trial court, in excluding this evidence, was evidently acting upon the theory that plaintiff was required to show a direct connection between the supposed agent, Norwood, and the recognized agent of the defendant corporation, Mills. By the adoption of such a rule, however, plaintiff was deprived of the right accorded her by the law, of proving fraud and conspiracy by circumstantial evidence. Maxson v. Llewelyn, 122 Cal. 195, 54 Pac. 732; People v. Donnolly, 143 Cal. 394, 77 Pac. 177; People v. Kizer, 22 Cal. App. 10, 133 Pac. 516, 521, 134 Pac. 346; Butler v. Collins, 12 Cal. 457; Levy v. Scott, 115 Cal. 39, 46 Pac. 892; Cassel v. Bullard, 64 U. S. (23 How.) 172, 16 L. Ed. 424; Drake v. Stewart, 76 Fed. 140, 22 C. C. A. 104.

[2] In brief, the substance of plaintiff's proffered proof was that she had been led to believe by trickery that her attorneys had abandoned her case; that through falsehood and deception she had been frightened into the belief that if she did not settle her case that day she could not be allowed to settle it afterwards; that, if she did not settle that day, she would on the following day be subjected to the rigors of severe examination by opposing counsel and perhaps be required to submit to X-ray examination as to her physical condition; and that while she was in that condition of mind she was persuaded to go before the claims agent of the company, where, without the aid of counsel or friend, she was induced to settle for an inadequate and trifling sum.

If the release relied upon by the defendant corporation to defeat plaintiff's action was the product of such methods, plaintiff should have been allowed to prove it. Whether or not there was any existing relation between Norwood and Mills was one of the questions for the jury to decide after hearing all of the circumstances surrounding the transaction. Norwood was admittedly a total stranger to plaintiff. He had already settled his claim against the company prior to his visit to plaintiff. Plaintiff's action was not one such as would excite the public interest. The parties thereto were the only ones concerned. Norwood was obviously not acting in behalf of plaintiff. The jury, then, had a right to know what his interest was, and the extent of it, and the reason for his asserted false statements to plaintiff, if he did in fact make any. Plaintiff should have been permitted to present all of these circumstances to the jury in order to prove, if she could, that the unusual activities of Norwood could be accounted for on no other hypothesis than that he was the agent of the defendant corporation. It would make little difference whether it was shown that he was an authorized or a self-constituted agent of the defendant corporation, because, in either event, if an impecunious settlement was brought about through his trickery and falsehood, the defendant corporation should not be allowed to

take advantage of an unfair settlement thus made, accept the benefits thereof, and deprive plaintiff of a trial upon the real merits of the case. Wilder v. Beede, 119 Cal. 646, 51 Pac. 1083; Pope v. J. K. Armsby Co., 111 Cal. 159, 43 Pac. 589; Riser v. Walton, 78 Cal. 490, 21 Pac. 362; Shoninger v. Peabody, 57 Conn. 42, 17 Atl. 278, 14 Am. St. Rep. 88.

[3] The courts have frequently held in no uncertain terms that, where a release is tainted with fraud, it should not be sustained, and that the question of whether or not such taint exists is one to be submitted to and decided by the jury. In Kansas City, M. & B. Ry. Co. v. Chiles, 86 Miss. 361, 38 South. 498, it was said:

"No release of this nature should be upheld if any element of fraud, deceit, oppression, or unconscionable advantage is connected with the transaction. And in passing on the validity of such release, when assailed, all surrounding conditions should be fully developed, and the relative attitudes of the contracting parties clearly shown. So that the jury, in the clear light of the whole truth, may rightly decide which story bears the impress of verity."

In Carr v. Sacramento C. P. Co., 35 Cal. App. 439, 170 Pac. 446, in dealing with the question of a release, the court said:

"It is true that the law does not discourage settlements of controversies by agreement, and is disposed as far as possible to uphold them, but it is equally ready to relieve parties from fraud and imposition through which they have been induced to barter away their rights. In cases like this especially, where the opportunity for over-reaching is so great, the law demands good faith on the part of the releasee and a full understanding on the part of the person injured as to his legal rights."

Additional cases to the same effect are Atchison, T. & S. F. Railway Co. v. Cunningham, 59 Kan. 722, 54 Pac. 1055; Smith v. Occidental, etc., Steamship Co., 99 Cal. 462, 34 Pac. 84; Kelley v. Chicago, etc., Ry. Co., 138 Iowa, 273, 114 N. W. 536, 128 Am. St. Rep. 195; Mattson v. Eureka Cedar Lumber & Shingle Co., 79 Wash. 266, 140 Pac. 377.

[4] Plaintiff also claims and she offered to prove, that she was a profound neurasthenic at the time of the execution of said release. If that be true, said release should, under the law, be scrutinized with even more care than if she were in a normal condition. Edmunds v. Southern Pacific Co., 18 Cal. App. 532, 123 Pac. 811; 23 Rul. Case Law, 388 et seq.; Carr v. Sacramento C. P. Co., supra.

It is our opinion that the evidence offered by plaintiff was improperly excluded, and that the question of the asserted fraudulent release should have been submitted to the jury.

The judgment is therefore reversed.

We concur: WASTE, P. J.; RICHARDS, J.

48 Cal. App. 351

SIMMONS et al. v. STEPHENS et al.

(Civ. 3296.)

(District Court of Appeal, First District, Division 1, California. June 28, 1920.)

1. Municipal corporations ⟸706(5)—Finding of death of pedestrian from negligence of driver of auto authorized.

Evidence *held* to support finding that death of pedestrian on street from collision of automobile was caused by negligence of driver in excessive speed and operation.

2. Appeal and error ⟸1011(1)—Conclusion on conflicting evidence not reviewable.

Conclusions of the lower court on conflicting evidence as to the facts will not be disturbed.

3. Municipal corporations ⟸705(1)—Collision of auto with pedestrian held not unavoidable accident.

There having been a space of over 15 feet on either side of a pedestrian crossing a street, through which the automobile which struck him could have passed, and he being in view for a considerable distance down the street, it cannot be said the accident was unavoidable.

4. Appeal and error ⟸931(6)—Trial court cannot be presumed influenced by evidence admitted and then stricken.

The trial court cannot be presumed to have been influenced by evidence which after admitting it struck out on motion, especially where it expressed doubts as to admissibility thereof when offered.

5. Appeal and error ⟸1054(3)—Admission of evidence on trial without jury harmless, in view of other evidence and basis of decision.

Admission, in action for collision of automobile with pedestrian, of traffic ordinance of city, if error, was harmless, the machine's rate of speed being also in violation of state law, and the decision being based, not only on excessive speed, but on negligent operation, for which Civ. Code, § 1714, declared the owner of property liable.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by Hattie A. Simmons and others against Henry H. Stephens and another, partners as Southern California Stage Company. Judgment for plaintiffs, and defendants appeal. Affirmed.

Duke Stone, of Los Angeles, for appellants.

H. S. Laughlin and Muhleman & Crump, all of Los Angeles, for respondents.

KNIGHT, Judge pro tem. This is an appeal by the defendants from a judgment rendered against them in an action brought by the surviving widow and children of Frank Henry Simmons to recover damages on account of the death of the said Frank Henry Simmons, who was struck and instantly kill-

ed by an automobile driven by one of the employés of the defendants. The court, sitting without a jury, awarded plaintiffs a judgment in the sum of $3,000.

Appellants contend that the evidence is insufficient to support the findings, and that the court erred in admitting certain evidence. There is no merit in any of appellants' points.

[1] The evidence in many respects is conflicting, but there is ample proof in the record to support the findings of the trial court that the deceased met his death through the negligence of the driver of the automobile. The accident occurred on January 4, 1918, at about the hour of 7 o'clock in the evening, at or near the intersection of Seventh and Ceres streets in the city of Los Angeles. The automobile at the time of the accident was being operated as a stage between San Diego and Los Angeles, and was on the in-bound trip going toward Los Angeles. Seventh street runs east and west, and on it there is constructed the double tracks of the street car company. Ceres street runs north and south and intersects Seventh street. There is a slight jog in Ceres street where it intersects Seventh street, the northerly intersection being a short distance to the east of the southerly intersection. The deceased, Simmons, a carpenter by occupation, lived near said intersection. During the evenings he was employed as doorkeeper at a moving picture theater located on Seventh street near the northwest corner of Seventh and Ceres streets. On the evening of the accident Simmons, who was 64 years of age and in full possession of all of his faculties, started straight across Seventh street, in a direction which, if he had succeeded in crossing the street, would have brought him immediately in front of the theater and only a few feet west of the most westerly line of Ceres street. According to the testimony of disinterested eyewitnesses, Simmons, before starting across the street, stood near the curb, and looked to his left for approaching vehicles which might be traveling down the right side of Seventh street. The street was clear and he started to cross, and when he reached a point between the north-bound and south-bound street car tracks he stopped and looked to the left and then to the right, and, observing the approach of the automobile stage from his right, remained stationary to allow the stage to pass in front of him. The stage at the time was traveling westwardly on the north side of Seventh street, with the left wheels running on or a little to the north of the farthest northerly rail of the street car track. When the stage reached a point about 40 or 50 feet from where Simmons had stopped the driver of the stage changed his course slightly to the left, which brought Simmons directly in front of the rapidly moving stage, and before Simmons could get out of the way he was struck by the stage and killed. The stage proceeded some 40 feet before it was stopped. The headlights of the stage were lighted at the time, and several witnesses estimated the speed of the machine immediately prior to the impact to be upwards of 25 miles an hour. It was fully shown that, had the stage continued in the straight direction in which it was traveling before the driver deviated its course it would entirely have cleared Simmons. Some of the witnesses testified that the horn was not sounded, and others that it was.

[2] The driver of the stage claims, and it is the theory of appellants on this appeal, that Simmons was proceeding across the street with his head down and his hat drawn down over his eyes, looking neither to the right nor to the left, and that as the driver of the stage endeavored to pass Simmons to the left and behind him, Simmons stepped back in front of the machine, and the impact was inevitable.

At best, this testimony raised a mere conflict, and in that state of the record the well-established rule is that the conclusions of the lower court will not be disturbed. Holroyd v. Gray Taxi Co., 179 Pac. 709; Covel v. Price, 179 Pac. 540.

[3] The court found and the evidence shows, that there was a space of over 15 feet of open clear roadway on either side of Simmons, through which the stage could have passed without colliding with him, and Simmons could be seen for a considerable distance down Seventh street. Under such circumstances it cannot be said that the accident was unavoidable. Irwin v. Golden State Auto Touring Corp., 178 Cal. 10, 171 Pac. 1059. The trial court was fully warranted in finding upon the facts presented that the proximate cause of Simmons' death was the excessive speed of the stage and the negligent operation of it by the driver.

[4, 5] The court did not err in admitting certain evidence, as complained of by appellants. The declarations of the stage driver made subsequent to the accident were stricken out by the court on motion of appellants, and it can hardly be presumed, as appellants contend, that the court allowed itself to be influenced by such evidence, particularly in view of the fact that doubts were expressed by the court as to the admissibility of the proof when it was offered. If it was error at all to admit in evidence the traffic ordinance of the city of Los Angeles, it was harmless, for the reason that the rate of speed at which the stage was traveling at the time of the accident was also in violation of the state law, and the decision of the trial court was not based alone upon the evidence of excessive speed, but was also founded upon the negligent operation of the stage by the driver, which was in violation of the law of negligence as declared in the Civil Code. Section 1714.

We are of the opinion that the judgment of the trial court is correct and, finding no error

in the record, the judgment is therefore affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

48 Cal. App. 245

PEOPLE v. MOORE. (Cr. 500.)

(District Court of Appeal, Third District. California. June 18, 1920. Hearing Denied by Supreme Court Aug. 16, 1920.)

1. False pretenses ⊜35—Information for misrepresentations that defendant was agent of another held sufficient.

An information alleging that defendant fraudulently misrepresented that he was the agent of others authorized to buy cattle for them, and that, relying on those representations, the prosecuting witness delivered cattle to defendant, and was thereby defrauded of them, sufficiently alleges that the cattle were delivered to defendant as the agent of the others to sustain a conviction.

2. False pretenses ⊜43(2)—Evidence that misrepresentations influenced delivery of property is admissible.

In a prosecution for obtaining cattle by false representations, it was not error to overrule defendant's objection to question whether defendant's statement influenced prosecuting witness in making the trade.

3. Criminal law ⊜419, 420(12)—Public weighmaster's certificate of weight of cattle is hearsay.

In a prosecution for obtaining cattle by false pretenses, the defendant's offer in evidence of the public weighmaster's certificate of the weight of the cattle was properly rejected as hearsay.

4. False pretenses ⊜48—Subsequent efforts of defendant to pay for property fraudulently secured not admissible.

Since the crime of obtaining property by false pretenses is complete when the property is delivered, it was not error to exclude evidence of defendant's offers and attempts to pay for cattle which he had previously obtained by falsely representing himself as the purchasing agent of others.

5. Criminal law ⊜390—Error to exclude denial by defendant of intent to defraud.

In a prosecution for obtaining property by false pretenses, it was error to exclude testimony by defendant that he had no intention to defraud the prosecuting witness when he obtained the property.

6. Criminal law ⊜1186(4)—Exclusion of denial of fraudulent intent held not substantial error warranting reversal.

Error in excluding defendant's denial of fraudulent intent in obtaining cattle from prosecuting witness does not require reversal under Const. art. 6, § 4½, forbidding reversal for improper rejection of evidence unless the error resulted in a miscarriage of justice, where defendant had denied making the alleged false representations, and his testimony, if believed, completely exonerated him from the charge of fraud.

7. Criminal law ⊜1159(3)—Evidence held not to warrant reversal, notwithstanding defendant's denials.

Where the evidence for the prosecution sufficiently showed that defendant obtained cattle from the prosecuting witness by false pretenses, as alleged in the information, the conviction cannot be set aside for insufficiency of the evidence, though defendant's testimony conflicted with that of the prosecution and established his innocence if the jury had believed it.

8. Criminal law ⊜720(7)—Evidence held to authorize argument of prosecuting attorney.

In a prosecution for obtaining cattle by false representations that defendant was the agent of others, where the prosecuting witness had testified without objection that he had not been paid anything for the cattle delivered to defendant, it was not improper for the prosecuting attorney in his closing argument to call the jury's attention to the fact that prosecuting witness had received nothing for his cattle.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

J. W. Moore was convicted of obtaining property by false pretenses, and he appeals from the judgment of conviction and from the order denying his motion for new trial. Affirmed.

Levey & Lipman, of San Francisco, and Mannon & Mannon, of Ukiah, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

NICOL, Presiding Judge pro tem. The defendant, J. W. Moore, was convicted in the superior court of Mendocino county of the crime of obtaining property by false pretenses, and prosecutes this appeal from the judgment and order denying his motion for a new trial.

[1] 1. Appellant claims that the court erred in overruling his demurrer to the information; the objections to the information being that it is not direct and certain as to the offense charged, and that it fails to disclose any natural or causal connection between the alleged false representations and the delivery of the property to the defendant. The charging part of the information is as follows:

"The said defendant, J. W. Moore, on the 30th day of June, A. D. nineteen hundred and nineteen, at the said Mendocino county, state of California, and before the filing of this information, did then and there devising and intending by unlawful ways and means and by false and fraudulent pretenses and representations to obtain and get into his custody and possession the goods and personal property of W. H. Edmands, with intent to cheat and defraud and thereby then and there willfully and unlawfully, know-

ingly and designedly, falsely and fraudulently pretend and represent to W. O. Edmands that he, the said J. W. Moore, was then and there buying cattle for Lewis and McDermott, and that he the said J. W. Moore was then and there authorized by the said Lewis and McDermott to negotiate for the purchase of, and to purchase, cattle for said Lewis and McDermott as their agent, whereas in truth and in fact the said J. W. Moore was not buying cattle for the said Lewis and McDermott, nor any one acting in their behalf, to negotiate for the purchase of, nor to purchase, cattle as their agent, or otherwise, as he the said J. W. Moore, then and there well knew. And the said W. O. Edmands, then and there believing the said false and fraudulent pretenses and representations so made, as aforesaid by the said J. W. Moore to be true, and being deceived thereby, was induced by reason of the said false and fraudulent pretenses and representations so made as aforesaid to deliver, and did then and there deliver to said J. W. Moore 50 head of beef cattle of the value of about $5,095 lawful money of the United States of America and of the personal property of said W. H. Edmands, and the said J. W. Moore then and there, and by means of the said false and fraudulent representations so made as aforesaid, did then and there willfully and unlawfully, knowingly, designedly, and fraudulently receive and obtain from said W. O. Edmands the said goods and personal property hereinbefore described and set forth, with the intent to cheat and defraud said W. H. Edmands of the same, and the said J. W. Moore did then and there willfully, unlawfully, and fraudulently take and carry away the same. Whereas in truth and in fact the said pretenses and representations so made as aforesaid was and were then and there in all respects utterly false and untrue and fraudulent, and whereas in truth and in fact the said defendant, J. W. Moore, well knew the said pretenses and representations so made by himself as aforesaid to be utterly false and untrue and fraudulent at the time of making the same. And the said defendant, J. W. Moore, then and there in the manner and by the means aforesaid did then and there and thereby willfully and unlawfully, fraudulently, knowingly, and designedly cheat and defraud the said W. H. Edmands of the said goods and personal property hereinbefore described and set forth. All to the damage of said W. H. Edmands. * * *"

In our opinion the demurrer was properly overruled. It is clear from the allegations of the information that the defendant falsely represented that in all his negotiations concerning the cattle mentioned in the information he was acting as the agent of Lewis and McDermott, and the fact that it is alleged that the cattle were delivered to the defendant does not render the information void in any respect whatever; for, if it were true that the defendant in all his negotiations concerning the purchase of the cattle was the agent of Lewis and McDermott, then it was proper that he should receive the cattle.

In the case of People v. Griesheimer, 176 Cal. 44, 167 Pac. 521, the defendant was convicted of the crime of obtaining money by false pretenses under section 532 of the Penal Code, and it was claimed by the defendant that the information did not show the causal connection between the false pretenses and the parting with the property by the prosecuting witness. The court, in passing upon this objection, uses the following language:

"We are of the opinion that as against the defendant's general demurrer the information should be held sufficient on appeal. While there is no direct allegation that the money was paid to the defendant as a subscription or loan to the 'Fatherland Magazine,' a reader of the information could hardly draw from it any other inference than that the payment was made for such purpose. It may be conceded that a direct allegation to this effect would have been more in accord with technical requirements. But what was intended to be charged in this connection is perfectly plain from the language in fact used, and no person of common understanding could fail to understand that it was substantially charged, by necessary inference at least, that the money was paid because of the alleged false representations, and for the purpose suggested thereby. Section 4½, art. 6, of the Constitution provides that 'no judgment shall be set aside, or new trial granted, in any case, * * * for any error as to any matter of pleading, * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' We are satisfied that to reverse the judgment on this ground would be to entirely ignore this provision of our Constitution."

Applying this language of the Supreme Court to the information in the case at bar it is equally clear that no person of common understanding could fail to understand from reading the information that the defendant, in negotiating for the purchase of the cattle, falsely represented and pretended to W. O. Edmands that everything he was doing he was doing as the agent of Lewis and McDermott, and that by these false and fraudulent representations and pretenses he obtained the cattle, and that the prosecuting witness was thereby defrauded out of his property.

In People v. Haas, 28 Cal. App. 182, 151 Pac. 672, the court, in passing upon the sufficiency of an information for obtaining money or property by false pretenses, said that—

"An indictment or information charging the crime of obtaining money or property by false representations and pretenses must show the facts as to what the pretenses were; that there was an intent to defraud, the name of the person defrauded, with a description of the property and a statement of its value, together with an allegation that the false and fraudulent pretenses charged were relied upon by the party who claims to have been defrauded, and that he was induced thereby to part with his property."

In the case at bar all these necessary averments are fully alleged, and the information in this case is as full and complete as the

information that the court in People v. Haas held to be sufficient. See, also, People v. Hines, 5 Cal. App. 122, 89 Pac. 858; People v. Donaldson, 70 Cal. 116, 11 Pac. 681. Tested by the principles announced in the foregoing cases, the information before us in this case is ample and sufficient. "It contains every essential allegation necessary to charge the defendant with the commission of the offense, and is calculated to fully acquaint him with the nature of the charge." People v. Hines, supra.

[2] 2. Complaint is made that the court erred in overruling defendant's objection to the following question propounded by counsel for the people: "Did the statements he was representing Lewis and McDermott have any influence with you in bringing about this trade?" We see no error in the court's ruling. Rightly understood, the question had the effect of simply asking the witness if he relied upon the false representations that defendant was the agent of Lewis and McDermott in the purchase of the cattle.

[3] Defendant offered in evidence what is termed the "public weighmaster's certificate of weight and measure" for these cattle. The court sustained an objection to the same, and in this ruling we think the court was correct, as the certificate was clearly hearsay and inadmissible.

[4] Appellant also contends that the court erred in sustaining an objection to the following question: "Did you or not on or about the 2d day of July, 1919, send your wife, Rosa Moore, to the Bank of California in San Francisco to arrange for the payment of this note?" We do not consider that this alleged act of the defendant was relevant or material to the issue involved in the case. To have allowed this question to be answered would have been to allow evidence of the act of a third party performed after the crime had been fully completed and consummated. Furthermore, the matter sought to be elicited by this question would be self-serving in character and would be irrelevant to any issue in the case, and we also find no error in the refusal of the court to allow the witness Friedman to testify in regard to a letter claimed to have been written by him to the prosecuting witness after the crime had been fully completed, and which had reference to an offer by defendant to pay to the prosecuting witness a certain amount of money which was claimed to have been received as part of the proceeds of the cattle.

[5] An objection was sustained to the following question asked the defendant: "Did you intend, Mr. Moore, at the time when you got these cattle from Mr. Edmands to cheat or defraud Mr. W. O. Edmands or W. H. Edmands out of those cattle or any of them?" We think this question was proper, and that the defendant should have been allowed to answer it. "The general rule is well settled that, under our system, a witness may be examined as to the intent with which he did a certain act, where that intent is a material thing in the action." Fleet v. Tichenor, 156 Cal. 343, 104 Pac. 458, 34 L. R. A. (N. S.) 323; Wohlford v. People, 148 Ill. 296, 36 N. E. 107; Cummings v. State, 50 Neb. 274, 69 N. W. 756; Kerrains v. People, 60 N. Y. 221, 19 Am. Rep. 158; People v. Farrell, 31 Cal. 576; 1 Jones' Law of Evidence, §§ 170, 170a; 12 Cyc. 403.

[6] But, while we think the defendant had the right to state to the jury his intent at the time he procured the cattle, still we do not consider that the ruling of the court on this question resulted in any serious error to the defendant. We are satisfied from an examination of the record that this error was not prejudicial to the defendant's case. He testified very fully as to the transaction; denied repeatedly of ever having told Edmands that he was acting for Lewis and McDermott; said that he told him that he was in business for himself and buying for himself. His testimony was utterly irreconcilable with the theory of the presence of any intent to cheat or defraud Edmands out of his cattle. It is perfectly plain from a full examination of the evidence given by the defendant that a further statement by him to the effect that at the time he got the cattle from Mr. Edmands he did not intend to cheat or defraud him out of the cattle could not have changed the views of the jury or affected the result. Fleet v. Tichenor, 156 Cal. 343, 104 Pac. 458, 34 L. R. A. (N. S.) 323. To reverse the judgment for this error would be to ignore section 4½ of article 6 of the Constitution, which provides that—

> "No judgment shall be set aside, or new trial granted, in any criminal case, on the ground of * * * the improper admission or rejection of evidence, * * * unless, after an examination of the entire cause including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

The objections to the questions asked W. O. Edmands as to offers of payment made at the meetings with defendant after the transaction at the police station in Berkeley and before his arrest were properly sustained by the court. The crime was complete at the time the defendant perpetrated the fraud upon Edmands and thereby procured his cattle.

[7] 3. It is next claimed that the verdict is contrary to the evidence. The evidence sufficiently shows that the defendant falsely represented to Edmands that he was acting for Lewis and McDermott, and, after so deceiving him, the cattle were taken over by the defendant, or, as the information alleges, were "delivered" to him. It appears that Edmands relied upon these false representations, that he was the agent of Lewis and

McDermott, and was thereby defrauded out of his property. The gist of the offense lies in the making of the false pretenses which were made by the defendant for the purpose of defrauding Edmands and upon which Edmands relied and was thereby deceived and defrauded out of his cattle. Defendant on the trial claimed that the cattle had been actually sold to him, and that he did not receive their "delivery" to himself by reason of any false representations that he was the agent of Lewis and McDermott.

This defense of the defendant was by the verdict of the jury rejected, and this verdict is final and conclusive.

"Undoubtedly the defendant's own story exculpates him, but it was for the jury to say whether or not that story should be believed. The evidence was therefore sufficient to justify the verdict." People v. Rongo, 169 Cal. 71, 145 Pac. 1017.

In People v. Emerson, 130 Cal. 562, 62 Pac. 1069, it is said:

"For, if the evidence which bears against the defendant, considered by itself, and without regard to conflicting evidence, is sufficient to support the verdict, the question ceases to be one of law—of which alone this court has jurisdiction—and becomes one of fact upon which the decision of the jury and the trial court is final and conclusive."

[8] 4. Finally the appellant contends that the assistant prosecuting attorney was guilty of misconduct in his closing argument to the jury. But there is no merit in this contention. There was a proper basis in the evidence in the case upon which the attorney had the right to call the jury's attention to the fact that Edmands had received nothing from the defendant for his cattle. The prosecuting witness, W. O. Edmands, answered without objection to questions propounded by counsel for defendant as follows:

"Q. You also testified that this amount set out in that paper $5,095 was not paid, did you not? A. No; nothing, none of it has been paid. * * *

"Q. Mr. Edmands, in that conversation that you had with Mr. Moore on the 14th day of July, 1919, at Berkeley, Cal., and on the 15th day of July, did or did not Mr. Moore offer to pay you in full? * * * A. No. * * *

"Q. I will ask you if at that time an offer was not made to you for payment in full of this note by Mr. Terrill representing Mr. Moore, the defendant in this case. A. No."

This evidence, as above stated, was received without objection, and it furnishes a proper basis for all the argument of the assistant prosecuting attorney which was objected to by the defendant.

The judgment and the order are affirmed.

We concur: HART, J.; BURNETT, J.

48 Cal. App. 228

COOPER et al. v. SELIG et al. (Civ. 2113.)

(District Court of Appeal, Third District, California. June 18, 1920. Hearing Denied by Supreme Court Aug. 16, 1920.)

1. Deeds ⟸155 — Granting clause considered in determining whether habendum creates condition subsequent.

Where deed to a city of a strip of land contained an unconditional grant of the strip "and the reversion," followed by a habendum clause, stating the grant was "for the purposes of a public road of said city," the inclusion of the reversion in the granting clause was important in determining whether a condition subsequent was created.

2. Deeds ⟸145—In view of granting clause, matter in habendum held to create a covenant and not condition.

Where a deed to a city granted the reversion, the habendum clause provision, "for the purposes of a public road of said city," has no greater force than if the grantee, in consideration of the conveyance, had promised to use the land for a highway, and must be construed as a covenant and not a condition, and the fee would not thereby be affected in the absence of a stipulation for forfeiture and re-entry, and upon abandonment of the road the property would not revert to grantor or his assigns.

3. Easements ⟸1—Granting clause not cut down by habendum clause of doubtful import.

If grantor intended to convey to city only an easement for a roadway, he could easily have expressed that purpose; and his failure to do so, together with the application of the principle that where the asserted modifying or limiting clause, in this case a habendum clause stating "for purposes of a public road of said city," is of doubtful import, the fee contemplated by the granting clause, in this case containing a reversion, will not be cut down, show he did not convey a mere easement.

4. Deeds ⟸90—Construed in favor of grantee.

A grant in a deed is to be interpreted in favor of the grantee under Civ. Code, § 1069.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Mary Cooper and another against William N. Selig and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Charles Lantz, Howard F. Shepherd, and Samuel M. Garroway, all of Los Angeles, for appellants.

Loewenthal, Loeb & Walker, of Los Angeles, for respondents.

BURNETT, J. The action is in ejectment to recover possession, together with the damages for use of a strip of land which was formerly a part of a public street in the city of Los Angeles. The evidence fails to show any interest in the property on the part of

T. A. Davis, and we shall, therefore, in the opinion refer to Mary Cooper as the only plaintiff and appellant. According to the statement of her counsel she claims relief "under the principle of law that the adjoining owner of realty owns the fee to the center of a street, subject only to the easement for street purposes, and upon the abandonment or vacation of the street, takes the fee freed of the easement." On March 11, 1882, John S. Griffin conveyed to the city of Los Angeles, by a grant, bargain, and sale deed in the usual form, but providing, however in the habendum clause that it was "for the purposes of a public road of said city" a strip of land sixty feet in width, being thirty feet on each side of a line which was described in the deed. At the date of this deed, the grantor was the owner of the land on the westerly and also on the easterly side of this 60-foot strip. This public road was called "Mission Road," and ran in a general north and south direction, and it will be referred to hereafter as "Old Mission Road."

In September, 1883, John S. Griffin conveyed to Louisa H. Griffin, his wife, certain land which lay on the westerly side of Old Mission Road and adjoined it along the portion of the former street here in controversy. Louisa H. Griffin recorded a plat of the property conveyed to her, calling it the "Park Tract," and showed her tract as adjoining Old Mission Road on the west. The lot which adjoined said road along the land here involved was designated on her plat as lot 17, block C. Thereafter, the title of Louisa H. Griffin in the Park tract (including said lot 17, block C) was, by decree of distribution made upon the settlement of the estate distributed to John S. Griffin; and this lot, by conveyance from said John S. Griffin, became the property of plaintiff Mary Cooper prior to the commencement of this action.

Shortly prior to the year 1915, the city of Los Angeles widened Old Mission Road to 100 feet, and moved it at the point here involved some 40 feet westerly from its former course. This wider street, referred to to herein as New Mission Road, being situated some 40 feet westerly and toward lot 17, block C, left a portion of the westerly half of Old Mission Road lying easterly from New Mission Road, which portion prior to the street being moved adjoined the said lot 17, block C. This abandoned portion of Old Mission Road was vacated by the city of Los Angeles under an ordinance, which was duly passed.

The defendant owned the land on the easterly side of the old road and bordering thereon, and after the new road was laid out he moved his fence up to the easterly line of said new road. It is conceded by appellant that respondent had a right to take possession of the portion of the old road which lay to the east of the center line thereof. The controversy, however, is over the strip which was bounded on the east by the center line of the old road and on the west by the new road, which strip is a part of the westerly half of the old road which formerly adjoined said lot 17, block C, of the Park tract.

Respondent characterizes the action of appellants as an attempt "to jump across the full breadth of New Mission Road, alight on the easterly line thereof, and interpose themselves between respondent and the present highway, depriving him of access to the road throughout the length of the strip of land described in his pleadings."

However, regardless of either party's animus or convenience, the question here is simply one as to the proper interpretation of certain instruments, and particularly of said deed from Griffin to the city of Los Angeles. For, if that deed conveyed to said city the entire estate in said strip of land, then it is conceded that the judgment of the lower court must be upheld. But, if thereby an easement only was granted, then it would be necessary to inquire whether any merit exists in the contention of respondent that appellant has not succeeded to the fee in said strip.

At the outset it may be stated that there is really no dispute that if the fee was conveyed to the city, no change in the title was effected by the abandonment of the street, but if the fee to said strip was in the owner of the abutting property, then upon said abandonment, the complete title became vested in said owner. San Francisco v. Center, 133 Cal. 673, 66 Pac. 83; Elliott, Roads and Streets, §§ 1190, 1191.

Various circumstances are suggested by both parties as lending support to their respective interpretations of said deed, but they seem to furnish little, if any, aid to the proper solution of the question. To ascertain the intention of the parties, we must rely upon the language which they used in the instrument, viewing it in the light of the recognized rules of interpretation for such cases.

[1] The granting part of said deed is as follows:

"The said party of the first part, for and in consideration of the sum of five hundred dollars * * * does by these presents, grant, bargain and sell and convey and confirm unto the said party of the second part forever, all that certain tract and parcel of land situated in the city and county of Los Angeles, state of California, bounded and described as follows [describing it]. Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof."

Then follows the habendum clause:

"To have and to hold all and singular, the said premises, for the purposes of a public road of

said city, unto the said party of the second part forever."

It is properly stated by respondent that except for the expression, "for the purposes of a public road of said city" in the habendum clause, there is not a word to indicate any intention than that the grant was of an unconditional fee. The question is whether this expression operates to limit the grant to that of an easement.

In urging their respective claims, both parties attach much importance to certain cases as precedents, which it may be well to notice briefly.

One view suggested by respondent is that any possible effect of said expression to limit the conveyance to an easement is obviated by the grant of the reversion, and it is said:

"The grant of the reversion is on its face a complete contradiction of the claim that it was intended by the parties that the reversion should not be granted."

In support of this particular contention is cited Vaughn v. Stuzaker, 16 Ind. 338, wherein one Bassenger had conveyed to Jenks certain property for the purpose of a street, together with the reversion and reversions. The court held that the effect of the reversionary clause was to vest in Jenks "the reversionary right, if any, that might have arisen out of the failure to apply the property to the purpose for which it was conveyed." Appellant claims that in holding that a reversion was created by the use of the words, "to have and to hold for the purposes of a public road," said decision is contrary to all other cases cited by respondent. Attention is also called to the fact that it is somewhat ancient, having been rendered in 1861. However, no doubt many important legal principles were promulgated by the courts long prior to that date. As to a reversion there is this to be said: If the deed herein conveyed an unlimited fee, or simply an easement for highway purposes, no estate would be created by operation of law, but if thereby was granted a fee upon condition subsequent, then, manifestly, upon the failure of said condition a reversionary interest would be involved. We may add that it is quite possible to construe said deed so as to fall within any of these designations. In other words, it would not be altogether unreasonable to say that it conveyed an unconditional fee, or simply an easement, or the fee upon condition subsequent. If we have the last of these, then, of course the grant of the reversion would be quite important. At any rate, the use of said expression seems to be some evidence of the intention of the grantor to convey to the grantee the entire estate in the property.

[2] In Greene v. O'Connor, 18 R. I. 56, 25 Atl. 692, 19 L. R. A. 262, the Supreme Court of Rhode Island held that the words, "this conveyance is made upon the condition that the said strip of land shall be forever kept open and used as a public highway, and for no other purpose," inserted between the description of the property and the habendum clause, did not create a condition subsequent, that it was merely a declaration of the purpose for which the land conveyed was to be used and improved, and that "such a declaration does not create an estate on condition, but merely imposes a confidence or trust in the land, or raises an implied agreement on the part of the grantee to use the land for the purpose specified."

In Kilpatrick v. Mayor of Baltimore, 81 Md. 179, 31 Atl. 805, 27 L. R. A. 643, 48 Am. St. Rep. 509, it was said that conditions subsequent are not favored in law, that they will not be raised by implication, and that a deed of land to a municipality which in the habendum clause adds the words, "as and for a street to be kept as a public highway," does not create a condition subsequent, and "the property does not revert to the grantor because of the failure to use it as a street."

In Rawson v. School District, 7 Allen (Mass.) 125, 83 Am. Dec. 670, the grant was to the public for a burying place, and the Supreme Court of Massachusetts held that the deed was not to be construed as a grant on condition subsequent, solely for the reason that it contained a clause declaring the purpose for which the premises were to be used, particularly since such purpose did not inure specially to the benefit of the grantor and his assigns, but was in its nature general and public, and there were no words indicating an intent that the grant was to be void if the declared purpose was not fulfilled. The court said:

"Language so equivocal cannot be construed as a condition subsequent without disregarding that cardinal principle of real property already referred to, that conditions subsequent which defeat an estate are not to be favored or raised by inference or implication."

A similar view is expressed in Devlin on Deeds (3d Ed.) §§ 838b, 970.

In Eldridge v. See Yup Co., 17 Cal. 49, a lot had been conveyed to Athaie by deed of bargain and sale in usual form, except that in the habendum clause these words appeared:

"For the use of a Chinese Church, or place of religious worship or moral instruction, under his direction and in conformity to the rules of the See Yup Company."

The Supreme Court cited with approval cases holding that, after the words of grant in the usual form, any restriction upon the use of the land by the grantee is void, and "where the habendum clause is irreconcilable with the premises, the premises must prevail," and concluded that the mere direction in the deed as to how the property was to be

used did not qualify the title nor raise a use or trust.

In Taylor v. Danbury Public Hall Co., 35 Conn. 430, the deed conveyed to the town a piece of land "for the sole use and purpose of a public highway." The court said:

"This deed conveys something more than an easement. Whatever effect ought to be given to the limitation under other circumstances, so long as the premises continue to be used for a highway the town has a complete title, in the enjoyment of which it cannot be disturbed, not only to a right of way, but to the fee of the land."

It was further declared that the grantors parted with their title to the original highway, and they had nothing left to convey.

There are other cases to the same effect, holding that such expressions as "for the purposes of a public road" are directory only, that they do not qualify or limit a grant which is in absolute form, or operate to reduce the conveyance to that of an easement only. Appellant attempts to distinguish those cases from this by urging the view that therein no contention was made that only an easement was conveyed, but that the controversy was whether an unconditional or a defeasible fee was granted. But the character of the estate was certainly involved, and the courts held that the fee was not qualified by the expression of the purpose to which the property was to be devoted.

Appellant has not cited any case to the contrary directly in point, but she claims that by somewhat analogous decisions her theory is supported.

Among these is Montgomery v. Sturdivant, 41 Cal. 290. Therein, though, the habendum clause plainly provided that the grantees were to hold the property for life and the court properly held that this was to be considered in determining the intention of the grantor. The Supreme Court said that without the habendum clause the deed would have conveyed an estate in fee simple, but that said clause could not be disregarded without ignoring the clear intention of the parties. The case was substantially the same as though the deed had provided that the party of the first part grants to the party of the second part certain real estate to have and to hold for the natural life of the grantee.

In Anderson v. Yoakum, 94 Cal. 227, 29 Pac. 500, 28 Am. St. Rep. 121, the controlling question was as to the effect of a quitclaim deed upon an after-acquired title, although the court said that an habendum clause may limit and qualify the interest conveyed. The case has no bearing upon the interpretation of the deed before us.

A case more nearly in point is Pellissier v. Corker, 103 Cal. 516, 37 Pac. 465. The deed therein provided:

"I, David Winbigler, for value received, do hereby grant to W. V. Rhinehart, his heirs and assigns, for the sole purpose of an alleyway, to be used in common with the owners of other property adjoining said alleyway, all that tract of land," etc.

The Supreme Court said:

"We think this deed is an express grant of an easement—a right to the use and nothing more."

It is to be observed, though, that the qualifying words are in the granting part of the deed and so clearly connected with the word "grant" as naturally to suggest that what was intended was simply to convey the right to the use of the property for an alley.

Moreover, said statement was entirely unnecessary to the decision, since there was, as the Supreme Court held, a dedication of the strip of land "for use as an alleyway by the owners of the adjacent lots," and as the use had not been abandoned such owners were entitled to continue it without interference, regardless of the question whether the fee or only an easement was conveyed by the deed to Rhinehart. The case did not involve, as does this, an action by one asserting title after the use has been discontinued, but it was brought by one of the owners of adjoining property for whose benefit the conveyance had been made for an injunction to restrain interference with the use of the property for an alleyway. Applying the principle to the case herein, it would, of course, not be contended that, if Dr. Griffin had conveyed said strip to a third party while the city was actually using it, the municipality could thereby be precluded from the further use of the land as a street regardless of the question whether the city owned the fee or simply an easement. It is to be further observed that in the Pellissier Case the court finally reached the conclusion that the legal title was held by Rhinehart, his heirs and assigns, in trust for the benefit of the other property owners and subject to an easement created by the dedication of the land as an alleyway. Probably there is not much difference in the legal effect of the two statements. At least, as far as the merits of that action were concerned, it was unimportant whether the deed to Rhinehart conveyed merely an easement or the fee in trust subject to the easement. But herein, if the deed to the city of Los Angeles conveyed the legal title in trust for the purpose of a highway, then significance should be attached to the grant of the reversion.

In Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049, the habendum clause clearly limited the interest conveyed to a life estate. It is true that the court said:

"The intention of the parties to the grant is to be gathered from the instrument itself and determined by a proper construction of the language used therein, but for the purpose of as-

certaining this intention the entire instrument, the habendum as well as the premises, are to be considered, and, if it appear from such consideration that the grantor intended by the habendum clause to restrict or limit or enlarge the estate named in the granting clause the habendum will prevail over the granting clause."

In Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603, it appeared from an examination of the deed and a contemporaneous instrument constituting a part of the same transaction that it was clearly the intention of the parties to convey a life estate, and the Supreme Court very properly said:

"When, upon a fair consideration of all the parts of a deed, and of the contemporaneous instruments constituting parts of the same transaction, it appears that it was the intention, by other expressions in the deed, to limit and qualify the effect and meaning of the granting clause, so that it should not operate to transfer the entire estate, but only a limited estate, the rule that repugnant conditions restraining alienation are void does not apply, unless the conditions refer to the limited estate actually granted. In such cases the other provisions in the deed operate on and affect its true meaning, the granting clause is to be taken in the limited sense which the entire instrument shows it was intended to have, and the limitations and conditions relating to the fee are not to be considered as repugnant to the grant, but as descriptive of the estate conveyed, and in harmony with the grant when truly interpreted."

The decision follows well-established principles, but it is controlling here only upon the assumption that the habendum clause shows an intention to limit the estate to an easement.

The principal question in Gordon v. Cadwalader, 164 Cal. 509, 130 Pac. 18, was as to the meaning of the term "heirs" used in the deed in controversy. From a consideration of the whole instrument it was held that the rule in Shelley's Case did not apply, and that the word "heirs" was not used in the technical sense. The situation there was so different from this that the decision cannot afford us much assistance.

Some cases from other jurisdictions are cited by appellant, but further than stating general principles that apply to the interpretation of deeds they are not in point.

While the case is not free from difficulty, yet, we think, the recital of the purpose for which the land was to be used should have no greater force than if the grantee in consideration of the conveyance had promised to use the land for the purposes of a highway. If such had been the case, it would not be disputed, in view of the decisions, that the promise to so use the land would be construed as a covenant and not a condition, and the fee would not thereby be affected, in the absence of a stipulation for forfeiture and re-entry.

[3, 4] In construing this instrument, it is difficult to overlook the fact that if Dr. Griffin really intended to convey only an easement, he could easily have so expressed his purpose. His failure to do so, together with the application of the principle that where the asserted modifying or limiting clause is of doubtful import the fee contemplated by the granting clause of the deed will not be cut down, and the rule that a grant is to be interpreted in favor of the grantee (section 1069, Civ. Code), in connection with the other considerations to which we have directed attention, lead us to the conclusion that the trial court should be upheld.

The judgment is affirmed.

We concur: NICOL, Presiding Judge pro tem.; HART, J.

48 Cal. App. 57

BUTTERS et al. v. BRAWLEY STAR et al.

(Civ. 2484.)

(District Court of Appeal, Second District, Division 2, California. June 3, 1920.)

1. Appeal and error ⊜193(3)—Misjoinder of causes of action not considered for first time on appeal.

Under Kerr's Cyc. Code Civ. Proc. § 434, objection that plaintiff stated two causes of action in one statement cannot be raised for the first time on appeal.

2. Witnesses ⊜275(7)—Cross-examination of defendant held proper in view of direct examination.

In an action against newspaper publishers for subscription contest prize, where one of the publishers had been examined on direct examination as to the rules of the contest, it was proper for plaintiff on cross-examination to produce copies of the newspaper containing the rules and question the witness in regard thereto.

3. Principal and agent ⊜177(3) — Principal chargeable with knowledge of agent.

Newspaper publishers were chargeable with knowledge of their agent that contestant for subscription contest prize had sold her votes to such agent and withdrawn from the contest, though she remained listed as an active contestant and received the votes secured by the agent.

4. Contracts ⊜189—Contestant for newspaper prize held not a legal contestant.

Where rules of newspaper subscription contest prohibited newspaper employés or members of their families from participating in the contest, a contestant, who sold her votes to an employé, but remained listed as an active contestant, receiving credit for votes procured by such employé, was not legally a contestant, and though she received the largest number

of votes, the contestant receiving the next highest number was entitled to the prize, though the publishers had paid the employé a cash sum in lieu of prize, according to the rules of the contest.

5. Contracts ⟨=189—Consideration for assignment of right in prize contest held immaterial in action against offerer of prize.

Where contestant who received highest number of votes in subscription contest was not legally a contestant, having withdrawn from the contest and having sold her votes to an employé of newspaper, who thereafter secured votes in her name in violation of the rules of the contest, and where such contestant, after being declared winner, assigned her right to the prize to contestant who received the next highest number of votes, the latter contestant was entitled to the prize, in action therefor against publisher, regardless of the question whether there was a consideration for such assignment, since the assignor, not having been legally a contestant, had nothing to assign, and since no one except the assignor could raise the question of form or want of consideration.

6. Trial ⟨=419—Denial of nonsuit cured where defendant introduces evidence supplying defect.

Action of court in overruling motion for nonsuit because of insufficiency of evidence was cured, where defendant himself introduced evidence supplying the defect.

7. Estoppel ⟨=72—He who trusted most must suffer as between two innocent persons.

Where one of two innocent persons must suffer by the fraudulent act of a third, it must be he who trusted most, or he whose misplaced confidence enabled the wrong to be committed.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Anna D. Butters and husband against the Brawley Star, a corporation, and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Galen Nichols, of El Centro, for appellants.

Frank Birkhauser, of El Centro, for respondents.

THOMAS, J. By this action plaintiff seeks specific performance of an agreement to deliver a certain Overland automobile, or the payment of the sum of $795, the value thereof, if delivery cannot be made, and general relief.

From the record we gather that defendants were the publishers of a newspaper called the Brawley Star, at Brawley, Imperial county; that during a certain period—from May 13, 1916, to June 24, 1916, both dates inclusive—they conducted what is commonly known as a newspaper subscription contest, for the purpose of securing paid subscriptions for said newspaper; that as an inducement for candidates to obtain such subscriptions they offered as "first prize" a certain Overland automobile, the value of which, it is alleged, was $795, and for which plaintiff Anna D. Butters was one of the contestants; that for each paid subscription secured by any of the candidates a certain number of votes was credited to the contestant securing the same, or to whose credit a subscriber making a voluntary subscription might direct; and that at the end of such contest one Frances Blake, also a contestant, was declared to have received the largest number of votes, and was therefore claimed to be entitled to said automobile. It appears that thereafter said Frances Blake informed plaintiff that she—Miss Blake—was not entitled to the automobile in question, for the reason that she had not received 2,700,020 votes, as credited but, on the contrary, that her total vote was not in excess of 150,000; while the plaintiff, in the same count, had received 1,497,000 votes. According to Miss Blake, one Keane, the manager of said contest and an employé of said defendants, had used her name, as hereinafter set forth, and that by right the auto should have been awarded to plaintiff. Miss Blake thereupon made, executed, and delivered to said plaintiff Anna D. Butters a "writing," which, in words and figures, is as follows:

"Mr. De Rackin and Mr. Kintz: Please give the Overland automobile which I won through your contest to Mrs. Ralph Butters, as she is the one who is entitled to it. Frances Blake." (Mrs. Ralph Butters and Anna D. Butters, one of the plaintiffs, appear to have been understood to be one and the same person.)

In the complaint this instrument is referred to as an "assignment," and it is alleged that by it Frances Blake "assigned and transferred all her right, title, claim, and interest and any and all right she might or could have in and to said automobile to said plaintiff Anna D. Butters, for a valuable consideration." On the trial, however, the evidence shows that no consideration was given therefor. Thereafter plaintiff made demand on defendants for the delivery of the automobile, both by reason of the fact that she had actually received the highest number of votes in the contest and by virtue of the said "assignment," as the successor in interest of the rights, etc., of the aforesaid Frances Blake, which demand was not complied with by defendants, or any of them.

A general demurrer to the complaint was interposed. This was overruled by the trial court, which ruling is assigned as error.

Defendants answered, denying, except for certain formal portions of the complaint, all the material allegations thereof, and set up certain affirmatives defenses, which, how-

ever, in view of the record, it is unnecessary here to set forth. After trial the court found for the plaintiff, and in due time judgment was entered accordingly, from which judgment this appeal is taken.

[1] It is urged by appellants that the complaint does not state a cause of action. In this connection appellants say:

"* * * It is apparent that plaintiff intends to state two causes of action therein, which are commingled in one statement. One of these is (a) that plaintiff received the highest number of legal votes cast in the contest, and therefore won the first prize; and the other is: (b) that plaintiff purchased, by assignment from Frances Blake, the latter's interest in the first prize."

Although the complaint is far from what might be termed a model in pleading, we think it invulnerable to the general demurrer. Conceding specifications (a) and (b) of the argument above referred to to be well taken, and that if pressed in the trial court that the court would not have hesitated in sustaining them, still it is beyond the power of this court to act thereon, under the condition of the record before us. Section 434, Kerr's Cyc. Code of Civ. Proc. and cases cited thereunder.

The seventh finding of fact, as shown by the record, is as follows:

"That Frances Blake quit and withdrew from said contest on about June 10, 1916, at a time when she had not to exceed 100,000 votes, and was out of the said contest from that time on. That the person or persons in the employ of said defendants, to wit: E. A. Keane and Paul Du Pron, who took up the list of said Frances Blake and concluded it of their own accord did not do so according to the rules of said contest, and their taking up the same was not according to the said rules of said contest; that by reason of the fact that the highest number of subscriptions credited to the contestant who was regularly in the contest according to the rules thereof, is to the plaintiff herein, Anna D. Butters, and she therefore had the highest number of votes to her account."

From this it appears that whatever was done by Keane and Du Pron in connection with the contest was in violation of the rules thereof. The evidence upon which that finding is based was elicited on cross-examination of the defendant De Rackin, after plaintiff's case in chief had been closed, and while the defendants were putting on their case, and was received over the objection of defendants' counsel. The witness was asked if he had the newspaper's issues between the dates of May 13, 1916, and June 24, 1916, and as to whether they contained the rules under which the contest was to be conducted. Upon his giving an affirmative answer to these questions, the witness was asked to produce them. This was objected to by defendant "on the ground that it is improper cross-examination, and if they were competent at all it is part of plaintiffs' case in chief; they are incompetent, irrelevant, and immaterial." This objection was by the court overruled. Counsel for defendants then made the following objection:

"I want to object before you begin to read relative to the introduction of the papers; it is incompetent, irrelevant, and immaterial, and not proper cross-examination, and if competent at all should have been introduced in the plaintiffs' case in chief."

This objection was also overruled by the court.

[2] We have read the entire record. No doubt rests in our minds that the rulings made were correct. During the examination in chief of the defendant De Rackin, he was asked the following questions relative to the rules of the contest, and gave the following answers thereto:

"Q. Now, in regard to the rules of the contest; I will ask you whether or not a contestant could get credit for a slip mailed in with a subscription? A. Sure. Q. To be more definite, if I wanted to vote for Miss Blake, or one of those other ladies, I could have mailed to this office a check or money order, or anything else of that character that covered a certain amount of money, and then I would receive the paper, and the votes would be put in the ballot box? A. Yes, sir. Q. And would they or would they not go through the hands of the contestant in that case? A. Not necessarily."

This was on direct examination of the defendants' said witness, in reference to a part of the rules of the contest, and opened the door for the cross-examination permitted by the court. We think, therefore, that the ruling on the objection was proper. By this line of examination defendants supplied evidence without which plaintiff might have failed.

It is next urged that the evidence is insufficient to support the judgment, for the reasons: (a) That the so-called assignment executed by Frances Blake as aforesaid "is not an assignment at all, but a mere expression of opinion"; (b) that said assignment was given without consideration; and (c) was so executed and delivered "long after the said Frances Blake had sold whatever interest she had in the votes in said contest mentioned in said complaint, or the prizes to be won thereby, to another person." From the evidence it appears that plaintiff paid nothing for said "assignment." It also affirmatively appears that Frances Blake had, "about two weeks" before the contest closed, sold her votes to one Keane for $25, and thereafter took no further part in the contest, although her name continued to be carried in the Brawley Star as a contestant. The $25, however, were never paid to Frances Blake. It is further shown that one Du

Pron, an employé of defendants, carried on the contest on behalf of said Frances Blake from the time of such sale and actual withdrawal by her from the contest to the close thereof, and solicited and secured subscriptions on his own behalf and that of one E. A. Keane, a coemployé of defendants, but in the name of said Frances Blake, and without her knowledge or consent. Because of this fact, we entertain serious doubt, even although we were to hold said "assignment" good, as to whether Frances Blake had any interest that she could assign or transfer. But with the record before us we think this point immaterial.

The rules of the contest provided, among other things, as follows:

"No employé or members of an employé's family will be allowed to enter the contest."

[3] Keane was the agent of the defendants Kintz and De Rackin. Keane employed one Du Pron and others to represent Frances Blake, but without her knowledge, in gathering subscriptions to said paper, and ostensibly on account of the contest in question. At the close of the contest, as shown by the record, the standing of the contestants was as follows: Miss Frances Blake, 2,700,020; Mrs. Ralph Butters, 1,497,940; Mrs. J. E. Ramsdell, 577,740; Miss Naomi Campbell, 415,515; Mrs. Earl McReynolds, 322,555; Mrs. Joe Winters, 149,590. According to the testimony of Frances Blake, she had not to exceed 100,000 votes to her credit at the time of her transaction with Keane as aforesaid. There is no contradiction of this testimony, except the showing made by the defendants themselves, as above set forth, as to the standing and showing of the respective contestants. From the date of the transaction last referred to Miss Blake was in fact out of the contest. The activities of Keane and those working under him were in fraud of both the newspaper proprietors, whose agents they were, the other contestants, and those who subscribed under the false impression that they were doing so to help Miss Blake, because of a violation of the "rules of the contest" which we have already pointed out. We find no evidence that either Mr. Kintz or Mr. De Rackin, the proprietors of the Brawley Star, had any personal knowledge of this violation of the rules mentioned. The evidence is conclusive that the name of Miss Blake was actually carried out as an active contestant to the end of the contest. This advertised fact, as we have already seen, was false. This was known to Keane, who was the agent of the defendants Kintz and De Rackin, and as such his knowledge, as a matter of law, was theirs.

[4] Under these conditions Miss Blake was not legally a contestant, and hence it naturally would follow that plaintiff, being the contestant, legally in the contest, receiving the highest number of votes cast, was entitled to the highest award offered. If this conclusion be correct, then the point which we are now discussing must be decided in favor of the plaintiffs. This is the point which has given us much trouble. In its consideration many questions have come up. Is the person, under conditions such as here exist, receiving the second highest number of votes so cast, but actually the highest number of votes cast for a legal contestant, entitled to the highest award? If so, is the principle involved in such a case as this different from that which prevails in an ordinary election contest? If a different principle prevails, what is the difference? Is it not possible that had Keane withdrawn Miss Blake's name from the contest and from the paper that the result might have been otherwise? These and many other questions have occurred to us.

[5] In the case of Bush v. Head, 154 Cal. 277, 97 Pac. 512, the Supreme Court held that—

"An unworthy motive could not convert the exercise of this right [the right to vote] into an illegal vote, within the meaning of the Code provisions under discussion."

In this case a candidate for judgeship had made promises that if elected he would not qualify for the office, but, after election, failed and refused to carry out the promises so made. From this appellants argue that—

"The party getting the second highest number of votes, even though the motive of the one receiving the highest number is bad, does not obtain the office, the votes being legal, even though the motive is bad."

In the case of Henry v. Jordan, 179 Cal. 24, 175 Pac. 402, the Supreme Court held that "a candidate who received next to the highest vote, the highest vote being obtained by the candidate for the nomination of another political party, which he did not receive, cannot be held to be the party candidate." The principle underlying the foregoing decisions does not, we think, maintain in the case at bar. In the foregoing cases there were the question of construction of both our Constitution and statutes, and there was also one of public policy. There was no question of fraud, either actual or constructive, involved. In the case at bar, the decision hangs almost, if not quite entirely, on the fraud practiced by the agents of defendants—the arrangement by them with one of the contestants legally in the contest by which the latter was to and actually did withdraw from the contest in favor of said Keane, which fact was kept from the public and the other contestants, as well as from the defendants Kintz and De Rackin. The name of the withdrawing contestant, Frances Blake, was carried in the paper as an actual contestant. By this arrangement it was made possible for Keane and his subordi-

nates to ascertain from time to time the relative standing of the various contestants in the contest, and what it would be necessary for them to do, or the number of subscriptions which it would be necessary for them to procure in order to lead in the contest. This arrangement, too, was an absolute violation of the "rules of contest," as we have already seen. Under these conditions we do not think the cases just referred to apply. We hold, therefore, that the point which we are now considering must be decided against appellants, for the reason: (1) That we think that no one, save Frances Blake, can raise any question as to the validity of the "assignment" involved, either as to its form or want of consideration—and, so far as she is concerned, according to her own testimony it was given as an assignment of whatever right she may have had to the plaintiff herein—and (2) because it is immaterial, for the reason that at the time Frances Blake executed such purported assignment to plaintiff she had nothing to assign.

[6] At the close of plaintiffs' case defendants moved for nonsuit. The grounds of the motion for nonsuit did not include the fact that there was no evidence to show what the position of the plaintiff was in the contest. The only evidence of the number of votes polled for any one was that of the testimony of Miss Blake, which was that she had "not to exceed 100,000 votes." These, as we have seen, she had sold. The motion for nonsuit was denied. We think properly so. Christenson Lbr. Co. v. Buckley, 17 Cal. App. 37, 118 Pac. 466; De Leonis v. Hammel, 1 Cal. App. 390, 82 Pac. 349. Especially is this true when, even although granting that such ruling in certain cases were error, that error is cured where the defendant, as in this case, supplies the defect by evidence which he himself introduces. Elmore v. Elmore, 114 Cal. 516, 46 Pac. 458; Higgins v. Ragsdale, 83 Cal. 219, 23 Pac. 316; Abbey, etc., Ass'n v. Willard, 48 Cal. 614; Winans v. Hardenbergh, 8 Cal. 291; Smith v. Compton, 6 Cal. 24. If there was any uncertainty as to the number of votes polled for plaintiff, irrespective of any rights which the said Frances Blake may have assigned to plaintiff, that was cleared away absolutely by a showing as to the number of votes polled for each purported contestant, and this included plaintiff. We think the evidence supports the judgment.

The next point urged is that "such decision and judgment is against law." We do not think it would serve any good purpose to quote the specifications urged in support of this contention. Suffice it to say that all have been considered, and we do not think the point well taken.

It is quite obvious now, we think, that the defendants Kintz and De Rackin, the owners, etc., of the Brawley Star, are free from actual fraud. The fact is, too, that they have paid the sum of $700, which was made possible by the "rules of the contest" to be accepted in lieu of the automobile, to said Keane. But Keane, being, by the rules of the contest, ineligible as a contestant for the reasons already stated, was not entitled to the same. His fraud was, as a matter of law, chargeable to the defendants Kintz and De Rackin. The plaintiff is also entirely free from any taint of such fraud, practiced as stated by said persons.

[7] We hold, therefore, that the plaintiff was the contestant legally in the contest receiving the highest number of votes so polled, and was entitled to the highest award. The rule applies that where one of two innocent persons must suffer by the fraudulent act of a third, it must be he who trusted most, or he whose misplaced confidence enabled the wrong to be committed. Ruiz v. Norton, 4 Cal. 355, 60 Am. Dec. 618; Poorman v. Mills & Co., 39 Cal. 345, 2 Am. Rep. 451; Bedell v. Herring, 77 Cal. 572, 20 Pac. 129, 11 Am. St. Rep. 307; Tafft v. Presidio, etc., R. Co., 84 Cal. 131, 24 Pac. 436, 11 L. R. A. 125, 18 Am. St. Rep. 166; Blaisdell v. Leach, 101 Cal. 405, 35 Pac. 1019, 40 Am. St. Rep. 65.

No other point urged needs consideration.

Judgment affirmed.

We concur: FINLAYSON, P. J.; WELLER, J.

48 Cal. App. 314

MOHN v. SUMNER. (Civ. 3128.)

(District Court of Appeal, Second District, Division 1, California. June 26, 1920. Hearing Denied by Supreme Court Aug. 23, 1920.)

1. Trespass ⊂=46(1)—Evidence held not to sustain finding for defendant.

Where the uncontradicted testimony showed that defendant, acting as attorney for plaintiff's wife, procured the dray and was present when all of plaintiff's personal property in the house was removed therefrom to another house selected by the wife during plaintiff's absence, a finding that defendant did not remove plaintiff's property from the house is not sustained by the evidence.

2. Evidence ⊂=317(2)—Declarations of plaintiff's wife to her attorney concerning difficulties with husband held hearsay.

In an action for damages caused by the removal of plaintiff's goods from his house during his absence, where defendant claimed to have been acting as the attorney of the wife, declarations by the wife to defendant concerning her difficulties with her husband, made out of the presence of plaintiff, are hearsay and incompetent.

3. Husband and wife ⟸22—Wife had no authority to remove or authorize removal of husband's property.

Under Civ. Code, § 103, authorizing the husband to choose any reasonable place or mode of living, and section 104, making it desertion by the husband to choose an unreasonable place or mode of living, in the absence of competent evidence that the residence and mode of living established by the husband were unreasonable, a wife had no authority as agent for her husband which justified the removal by the wife's attorney of the husband's property during the husband's absence from his residence.

4. Trespass ⟸30—Wife's attorney liable for removal of property from husband's home.

An attorney for a wife who has had disagreement with her husband cannot justify the removal of the husband's property from the home selected by him during the husband's absence on the ground of instructions by the wife.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

Action by George F. Mohn against Charles E. Sumner for damages for trespass. Judgment for defendant, and plaintiff appeals. Reversed.

W. R. Andrews, of San Diego, and Iverson L. Harris, for appellant.

Wright & McKee, of San Diego, for respondent.

CONREY, P. J. Action to recover damages for a trespass alleged to have been committed by the defendant by wrongfully taking and removing from plaintiff's house the furniture of the plaintiff and all of his personal property therein. From the judgment entered in favor of the defendant, the plaintiff appeals.

[1] The court found that it was not true that the defendant wrongfully or at all removed from the plaintiff's house and domicile plaintiff's goods and chattels contained therein. It is shown by undisputed evidence that on the 4th day of February, 1918, and for several years prior thereto, the plaintiff had resided with his wife in a house rented by him and known as "North House" on the "Point Loma Homestead Grounds," in the city of San Diego; that in the latter part of the year 1917, and thereafter, there were domestic difficulties between the plaintiff and Mrs. Mohn, and that the defendant as an attorney at law was from time to time consulted by Mrs. Mohn concerning her troubles with her husband; that on the 4th day of February, 1918, the plaintiff on going away from home, told his wife that he would be absent four or five days; that within the following week she received from him a letter mailed from Ash Fork, Ariz., through which place he was passing, in which plaintiff stated that he would return and be at home about the 1st of April, and gave her no address at which she might communicate with him; that Mrs. Mohn consulted further with the defendant, Sumner, and in conformity with advice given by him, she determined to remove from North House to a house which she rented on Front street in San Diego, and took with her out of North House all the personal property of the plaintiff therein, as well as her own personal belongings; that the defendant not only gave this advice as Mrs. Mohn's attorney at law, but rendered her some personal assistance in executing her plans; that the defendant employed drays for the purpose, and accompanied them to North House, where he remained throughout the day while the packing and moving was being completed. Without more ample statement of the testimony, we may say that we are satisfied that the evidence is not sufficient to sustain the finding that the defendant did not at all remove any of the plaintiff's goods and chattels from North House. He was a participant in that removal, and may be held responsible therefor if the act was wrongful.

We are further of opinion that the evidence is insufficient to sustain the court's finding that the defendant "did not wrongfully and by force" remove said property. The plaintiff having proved that the property was his separate personal property left by him at his place of residence, and that during his absence it was taken away without his consent or knowledge, defendant having actively participated in the act of removal of the goods as above stated, plaintiff was entitled to recover the damages resulting therefrom, unless by other evidence the defendant was able to prove that his acts in the premises were not wrongful.

[2] Notwithstanding objections by the plaintiff, the court permitted the defendant and another witness in their testimony to repeat numerous statements made by Mrs. Mohn to the defendant concerning her difficulties with the plaintiff and the circumstances of his absence from home, upon which statements of fact the defendant based his advice to Mrs. Mohn. This testimony should have been excluded. The defendant was not charged with having committed any wrong as an attorney at law in giving advice to his client upon any statement of facts which she had made to him. Defendant's liability, if any, to plaintiff in this action arises from defendant's acts wherein he took part in the removal of the property, and not from anything done by him as a counselor or attorney at law. His acts in connection with the taking away of plaintiff's property might be justified by establishing the right of Mrs. Mohn to remove the property, and that he was merely an agent acting for her and at her request; but the facts offered to establish her right should not have been per-

mitted to be proved by the repetition of statements made by her without the presence or knowledge of the plaintiff. If we leave out of consideration the evidence thus erroneously admitted, there remains very little in the case except the undisputed facts first above stated. On these facts it must be determined whether or not Mrs. Mohn, in the exercise of her right to separate herself from the family domicile, was further entitled to remove therefrom the personal property of her husband which he had placed there for the purpose of establishing a home in that place.

[3] "The husband may choose any reasonable place or mode of living, and if the wife does not conform thereto, it is desertion." Civ. Code, § 103. "If the place or mode of living selected by the husband is unreasonable and grossly unfit, and the wife does not conform thereto, it is desertion on the part of the husband from the time her reasonable objections are made known to him." Civ. Code, § 104. Since in this case there is no competent evidence that the place and mode of living established by the plaintiff at North House were either unreasonable or grossly unfit, we must, for the purposes of the present action, assume that Mrs. Mohn was under obligation to remain in the home so established, or to leave her husband's property there if she chose to go away. Circumstance no doubt might have existed which would have justified her in vacating the house and taking away all its contents, and which would have raised the presumption of agency on her part to act for him and would have further raised the presumption of his consent thereto. But under the only admissible evidence produced at the trial the plaintiff's property was taken away, and his residence placed in an uninhabitable condition upon the mere willful desire of his wife; and the defendant, with complete knowledge of the circumstances, aided her in carrying out that design. The precise question of liability here presented seems to be without precedent in this state, and very few similar cases have been found elsewhere. In Schindel v. Schindel, 12 Md. 108, the plaintiff and defendant were brothers who had married sisters. A separation having occurred between the plaintiff and his wife, the husband went to his father's house and the wife went to her mother's house. A few days later the defendant entered the plaintiff's house and took away certain furniture, claiming that he did so by the direction and in the presence of the plaintiff's wife. The court based its decision upon the fact that the husband and wife were living separate from each other, and held that under those circumstances the wife was not her husband's agent. "The acts, therefore, of the defendant cannot derive a justification from any license or authority conferred by the wife of the plaintiff, while she was living apart from him." In Heyert v. Reubman (Sup.) 86 N. Y. Supp. 797, the defendant was the father of the plaintiff's wife, and the action was for conversion of a quantity of household furniture belonging to the plaintiff. During the plaintiff's absence from home the defendant took away all of plaintiff's furniture therein, and sought to justify upon the ground that plaintiff's wife had come to his house and said that she had trouble with her husband, and asked that the defendant take the furniture. The court, in affirming judgment in favor of the plaintiff, said:

"We may infer that plaintiff and his wife had trouble. The plaintiff's ownership of the property, however, and the defendant's exercise of dominion and control over it, is undisputed, as is its value. Clearly, the wife had no authority, express or implied, to authorize the defendant to enter plaintiff's home and take possession of the property and remove it. * * *"

[4] The provisions of the Civil Code, to which we have referred, would have very little force or effect, and the right of a man (even though married) to retain possession of his personal property, placed by him in his own house, would be a right of no substance or value, if it were held that the wife, whenever a shadow of discord falls upon them, may, without just cause, change the domicile and remove her husband's property to some distant place without his consent. Since she has not that right, any person who, at her mere request, and with knowledge of the circumstances as they were known to this defendant, takes part in the seizure and removal of the husband's goods, should be held liable for the resulting damage if he is unable to prove facts establishing her special authority and justifying his conduct under the circumstances.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

48 Cal. App. 257

PEOPLE v. BAY SIDE LAND CO. et al.

(Civ. 3088.)

(District Court of Appeal, Second District, Division 2, California. June 21, 1920. Rehearing Denied July 21, 1920; Hearing Denied by Supreme Court Aug. 19, 1920.)

1. Nuisance ⟸84—Complaint under Redlight Abatement Act held sufficient.

A complaint for the abatement of a nuisance under the Redlight Abatement Act, which alleged that the building was used for purposes of lewdness, prostitution, and assignation, and that certain named lewd persons occupied the premises and then and there solicited sexual intercourse, is sufficient, though it does not allege that sexual intercourse was committed on the premises.

2. Nuisance ⟸84—Testimony of detective held proper.

In an action to abate a nuisance under the Redlight Abatement Act, a judgment of abatement will not be reversed because of the evidence given by stool pigeons employed by the district attorney, where those witnesses had not solicited any of the acts testified to, but merely related to acts they observed by others.

3. Nuisance ⟸65—Place used for "lewdness" may be abated, though no prostitution is there committed.

A place used for acts of lewdness may be abated as a nuisance under the Redlight Abatement Act, though no prostitution committed therein; "lewdness" including prostitution and assignation and other immoral or degenerate conduct or conversation between persons of opposite sexes.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Lewdness.]

4. Nuisance ⟸65—Ignorance of owner no defense to abatement of disorderly house.

Premises may be ordered closed under the Redlight Abatement Act, though the owner had no knowledge of the improper use thereof, since the object of the act is not to punish, but to reform the property.

5. Nuisance ⟸65—Knowledge by employés of café of immoral acts imputable to proprietor.

The knowledge or gross negligence of the employés of a café where immoral acts were openly committed is imputed to the proprietor, so that his ignorance thereof is no defense to abatement of the café as a nuisance.

6. Appeal and error ⟸1050(1)—Admission of evidence held not prejudicial in view of other evidence.

In an action to abate a disorderly house, the admission in evidence of acts committed at another place by parties who had met at the place in question and there agreed to go to the other place for the purpose of committing those acts does not require reversal, where there was other competent testimony as to immoral acts in the place in question sufficient to sustain a judgment of abatement.

7. Nuisance ⟸84—Evidence of reputation of disorderly resort held competent.

In an action under the Redlight Abatement Act, the admission of evidence of the reputation of the place in surrounding localities, all situated within 20 miles of the place in question, and from which the visitors frequently went to the place where defendant's premises were located, is competent.

8. Nuisance ⟸84—Evidence held to show that disorderly house had not been abated.

Where there was evidence that defendant's premises had been conducted as a disorderly house, and there was no evidence of any change in its conduct, but the proprietor himself testified that it was managed at the time of the trial as it always had been, there was sufficient evidence to justify a finding that the nuisance was not abated on a stated date before the trial.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by the People of the State of California against the Bay Side Land Company and others to abate a nuisance under the Redlight Abatement Act. Judgment for the plaintiff, and defendants appeal. Affirmed.

Bordwell & Mathews, of Los Angeles, for appellant Bayside Land Co.

G. M. Spicer, of Long Beach, for appellant White.

L. A. West, Dist. Atty., and W. F. Menton, both of Santa Ana, and Alex P. Nelson, of Los Angeles, for the People.

WELLER, J. Action to abate a nuisance under the provisions of the Redlight Abatement Act (St. 1913, p. 20). The court rendered judgment in favor of plaintiff, ordered the building closed for the period of one year, and directed the personal property located therein to be sold and applied as provided in the act.

Separate appeals were taken by Louie White, the proprietor of the place and owner of the furniture, and by Bayside Land Company, the owner of the real property and building. For convenience, these appeals will be considered together.

The complaint alleges that defendants "have used said premises, said building, the furniture, fixtures, and musical instruments in their possession, for the purpose of lewdness, assignation, and prostitution, * * * and during all of said times said premises and said café in said building has borne the reputation in the community in which it is situated as a house of lewdness, assignation, and ill fame, and a place where lewdness, prostitution, and assignation are encouraged and allowed; that on the 30th day of November, 1918, said building and premises were occupied by Beatrice Swanner, Viola Johnson, and Irene Fucha as lewd and disso-

lute persons, and then and there solicited acts of sexual intercourse."

[1] It is claimed that there is "an utter absence of any allegation that any acts of lewdness, prostitution, and assignation occurred on the premises." It was held in People v. Arcega, 28 Cal. App. Dec. 1188,[1] that the allegation that the building was used for the purpose of prostitution was sufficient. Here we have an additional averment that certain named lewd and dissolute persons occupied the premises and then and there solicited acts of sexual intercourse. We think these allegations sufficiently clear and explicit to inform the defendants of the character of the charge against the property, and to tender an issue.

[2] Counsel indulge in considerable vituperative criticism of the action of the district attorney in employing "stool pigeons" to obtain evidence in regard to the conduct of the café, and cite cases in which the use of such methods has been condemned by the courts. Suffice it to say that in no instance was any of the "soiled doves" decoyed by the "stool pigeons" into committing any of the many acts of lewdness testified to by the latter on the witness stand. The investigators related what they saw with reference to the actions of other guests, and only once did any of them participate in the dissolute practices which were indulged in by the guests of the place, and then only by acquiescence in the proposal of one of the alleged occupants of the building.

[3] The principal contention of appellants appears to be that the decision is not justified by the evidence for the reason that no acts of prostitution or assignation were actually committed on the premises. The finding on this issue is as follows:

"That at all times mentioned in the plaintiff's complaint the defendant Louis White, whose true name is Louie White, has used the premises and the building thereon located, commonly known as the Tower Café, and the furniture, fixtures, and musical instruments therein and in his possession and under his control, for the purpose of lewdness, and in conducting a place where lewdness, assignation, and prostitution were and are encouraged; that the evidence shows, and the court finds, that no acts of prostitution or assignation were actually committed on said premises; that the building located on the premises hereinbefore described, commonly known as the Tower Café, and said premises occupied by him as aforesaid, and the said furniture, fixtures, musical instruments therein were, and now are, by reason of such use, a public nuisance under the statutes of the state of California known as the Redlight Abatement Act."

While the court finds that no acts of prostitution or assignation were actually committed on the premises, it does find that the premises were used for the purpose of lewdness, which was permitted and encouraged thereon.

This finding is challenged as being inconsistent and unjustified. It is insisted that the words "lewdness," "assignation," and "prostitution" are synonymous. With this we cannot agree. "Lewdness" is of much broader significance than the other two words, and includes their meaning as well as all other immoral or degenerate conduct or conversation between persons of opposite sexes, such as were practiced by the frequenters of the café, as related by the witnesses. The lewdness and licentiousness disclosed by the record here as having occurred on the premises is not only disgusting and revolting in itself, but leads inevitably to illicit intercourse, and, undoubtedly, was in the contemplation of the Legislature when it adopted the statute, and was intended to be included within the terms of the act.

[4, 5] Counsel for both the owner of the premises and the proprietor of the business complain that knowledge of the vicious propensities of the guests was not brought home to either of them, and that therefore neither should be made to suffer because of some unknown and unauthorized acts of others. It is unfortunate that such drastic punishment must be inflicted on the innocent to prevent similar occurrences; but the evil sought to be remedied demands harsh treatment, and the owner whose premises are used for immoral purposes must suffer the consequences. As was said in People v. Casa Co., 35 Cal. App. 194, 169 Pac. 454, the object of the act is not to punish; its purpose is to effect a reformation in the property itself. Much of the lewd conduct of visitors was committed openly and brazenly, without any attempt at concealment; and it is inconceivable that it should have escaped the eyes of some of the employés of the management. It is in evidence that one of the waiters, when asked if it was permissible to accost an unattended girl, informed his interrogator that he "might go as far as he liked, so he didn't tip the tables over." The knowledge or gross negligence of his employés must be imputed to the proprietor.

[6] The action of the court in admitting testimony of acts of prostitution at a neighboring hotel is assigned as error. It appears from the record that a party of some nine persons, among whom were the investigators from the office of the district attorney, were at the Tower Café (the premises involved in this suit), and while there made an assignation to repair to the other place where rooms might be obtained, and where, as stated by one of the women, "they could have a real party." Pursuant to the assignation made on the premises, they did go to the Seal Inn, and there rented rooms, and some of them indulged in lewd acts. Probably the court admitted this testimony for the purpose of ascertaining whether or not the purpose of

[1] Rehearing granted.

the assignation so made was consummated. It was error to receive testimony of conduct elsewhere, but, as there was ample evidence aside from that erroneously admitted to sustain the findings, we do not consider that the ruling prejudicially affected the defense.

[7] The act provides that "evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of said nuisance." One witness testified on cross-examination to conversations regarding the reputation of the Tower Café had with persons residing in Santa Ana, Anaheim, Long Beach, and in the southwest part of Orange county. These places are all within a radius of 20 miles from Seal Beach, and consequently may be said to be in the vicinity of the premises in question. Many of the visitors to this resort came from the places mentioned and would be in a position, from their experiences, to form an opinion as to its character, and from their statements, based on observation, would result the foundation for the reputation of the premises. There were other witnesses who testified to the bad reputation of the place in the city of Seal Beach, where the café is situated, which would justify the court in finding that its general reputation was unsavory. As above mentioned, the statements regarding conversations with persons in the other cities mentioned were elicited on cross-examination, and at most would go only to the weight of the testimony of the witness, and not to its admissibility.

[8] Appellants attack the finding that the nuisance was not abated on the 1st of December, 1918, as not justified by the evidence. There is nothing in the record to show that it was managed in any different manner after that date, and the proprietor testified that at the time of the trial it was still being conducted in the same way as before. This was ample justification for the finding.

We have considered all the points urged by appellants, and find no error in the record.

Judgment affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

48 Cal. App. 253

PEOPLE v. SMITH et al. (Civ. 3089.)

(District Court of Appeal, Second District, Division 2, California. June 21, 1920. Rehearing Denied July 21, 1920; Hearing Denied by Supreme Court Aug. 19, 1920.)

1. Appeal and error ⟹1011(1)—Court's finding on conflicting evidence cannot be reviewed.

On appeal from a judgment abating a nuisance under the Redlight Abatement Act, where there was sufficient evidence by the plaintiff to sustain the findings by the trial court, though there was a sharp conflict between that evidence and that of defendant, the appellate court cannot pass on the credibility of the witnesses.

2. Nuisance ⟹84—Evidence held to show a nuisance within Redlight Abatement Act.

In an action to abate a nuisance under the Redlight Abatement Act, evidence of conduct by eight persons assigned to two rooms therein *held* sufficient to sustain the finding that the house was a nuisance, notwithstanding the proprietor's claim that he believed them all to be married.

3. Nuisance ⟹85 — Entire building may be closed under Redlight Abatement Act.

Where building was operated as a café and hotel under one management, the whole building may be closed under the Redlight Abatement Act, though certain parts of it, such as the kitchen and restaurant, were not shown to have been used for immoral purposes.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by the People of the State of California against Doc Smith and others to abate a nuisance under the Redlight Abatement Act. Judgment for the plaintiff, and defendants appeal. Affirmed.

G. M. Spicer, of Long Beach, for appellants Smith and Blankenship.

Bordwell & Mathews, of Los Angeles, for appellant Stanton.

L. A. West, Dist. Atty., and W. F. Menton, both of Santa Ana, and Alex P. Nelson, of Los Angeles, for the People.

WELLER J. This action was commenced under the Redlight Abatement Act (St. 1913, p. 20) against the owners and proprietors of a place in Seal Beach known as the Seal Café and Seal Inn.

The complaint alleges, and the court finds, that the premises were used for the purpose of lewdness, assignation, and prostitution, judgment was entered in favor of the plaintiff, and from that judgment this appeal is prosecuted.

Much of the argument advanced by appellants is disposed of in the opinion this day filed in the case of People v. Bay Side Land Co. et al., 191 Pac. 994, and need not receive further notice here.

The main point urged by appellants as ground for reversal is that the evidence is insufficient to justify the findings regarding the use of the property. The building in question was a two-story structure, the lower floor of which was used as a café where meals and drinks were served, and music furnished that the patrons might dance. In a separate portion of the lower floor was a grillroom, from which a stairway led to the floor above. The second story was divided into sixteen bedrooms, for the accommodation of guests. At the times to which the

testimony refers several of the rooms were occupied by permanent roomers and a few were reserved for transients.

Witnesses for the prosecution related that nine persons, four of them employed by the district attorney, met at the Tower Café, a short distance from the premises in controversy. At the suggestion of one of the women they agreed to visit the Seal Inn for the purpose of obtaining rooms, and, as she put it, "have a real party." Agreeably to this appointment, they repaired to the Seal Café and there partook of liquid refreshments, and some of them danced together. Arrangements were made by this woman for two rooms for the party, and, on ascending the stairs, they were met by defendant Smith, one of the proprietors who asked them to register. One of the men inquired how that was to be done, and another replied: "Oh, just pair off any old way; it doesn't make any difference; we will sign up." This was done, each man registering a woman and himself as man and wife, under assumed names. Eight persons were assigned to the two rooms, but shortly afterward Smith notified them that he had procured another room, which was accepted. Two of the couples then paired off, one pair going to each of two rooms, where they divested themselves of their clothing and went to bed together. The four others, three of whom were the investigators, remained in the third room. Thereupon the woman who had suggested the "party" proposed that she would undress for $2, and, apparently without waiting for an acceptance of her proposal, did so, with the exception of her undergarments. In this condition she proceeded to indulge in what may be termed her idea of a "real party," and raised such a commotion that the housemaid came into the room and told her she should be more quiet. This was the conditions of affairs when the district attorney arrived on the scene and arrested the participants in the revelry.

The maid testified that frequently the rooms were occupied by more than one couple during the night, usually Saturday and Sunday, and that she was sometimes called on to make up rooms which had been used, not infrequently as late as 1 o'clock in the morning, and that they were thereafter occupied by others. Several witnesses stated that the reputation of the place was bad in the immediate vicinity of its location and over a considerable area in addition.

The defendant Smith said that when the nine persons presented themselves for assignment to rooms he inquired if they were all married, and was informed that they were, and upon such assurance he assigned them to the rooms. The defense introduced testimony to the good reputation of the place and the orderly conduct of its patrons.

[1] This sharp conflict of the evidence was resolved in favor of the plaintiff by the trial court. There was sufficient testimony, if believed by it, to justify the conclusion, and we cannot pass upon the credibility of witnesses.

[2] It is asserted by appellants that one act of assignation or prostitution does not constitute a nuisance under the provisions of the act. Conceding this to be the law, nevertheless the deductions to be drawn from a single act, when considered in connection with all the attendant circumstances, may properly form the basis for finding that the practice is habitual. We must assume, in support of the judgment, that the court below believed the statements of the witnesses that it made no difference how they were registered, and that the defendant acquiesced in that assertion. Moreover, he admits that he put eight people in two rooms; and, even though they were all married, it is considered somewhat unconventional, at least, for two married couples to occupy the same bed at the same time. The fact that these people showed a willingness to share the privacy of their sleeping quarters should have aroused his suspicion as to the purity of their intentions. Such laxness of management and disregard of the moral code instanced on one occasion might reasonably lead to the inference that such occurrences were common.

[3] Objection is made to the inclusion in the decree of the Seal Café, or the lower portion of the building, as no acts of lewdness are shown to have taken place there. Entrance to the upper floor was gained through the grill, which was separated from the main dining room by the kitchen, and was accessible to the street through an outside entrance. As we understand the situation, the dining room and grill and the inn above were covered by one roof, under one management and conducted as one business, and we do not believe that the court is required to designate or segregate with particularity the portions of an entire establishment which constitute the nuisance. The kitchen might be innocuous in itself, but is a part of the premises, and accessory to them, and may properly be included in the decree.

After carefully reviewing the record, we are of the opinion that no error was committed by the trial court.

Judgment affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

48 Cal. App. 405

KING v. HARFORD. (Civ. 3223.)

(District Court of Appeal, First District, Division 2, California. July 1, 1920.)

1. **Railroads ⟸152—Bonds secured by mortgage not "negotiable instrument" before amendment of Code.**

Under Civ. Code, §§ 3088 and 3093, defining negotiability as they existed prior to the amendments in 1915 and 1917 (St. 1915, p. 99; St. 1917, p. 1535), a railroad bond payable to bearer and reciting that it was secured by mortgage to trustees was not negotiable.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Negotiable Instrument.]

2. **Principal and agent ⟸160½ — Purchaser from agent selling property as his own cannot rely on power of sale.**

Where an attorney for administratrix and sole legatee sold as his own a bond delivered to him to be listed as property of the estate, a remote buyer of the bond cannot rely on a general power given the attorney to sell property as a defense to recovery of the bond by the legatee.

3. **Executors and administrators ⟸158—Sole legatee administering estate cannot sell personalty without order.**

Under Code Civ. Proc. § 1517, before its amendment in 1919 (St. 1919, p. 1178), making invalid sale of any property of a decedent unless under order of the superior court, an administratrix who was sole legatee could not sell without a court order a bond belonging to the estate, and therefore a buyer of such bond from the attorney of the estate could not rely on the legatee's power of sale to the attorney.

4. **Principal and agent ⟸183(1) — Owner of bond sold by agent held not guilty of laches.**

Where an attorney, who sold as his own a bond delivered to him by the administratrix and sole legatee of an estate, paid the interest on the bond to the legatee, who did not discover the sale until 4 months before her death, an action by the executor of the legatee begun within 3½ months after her death was not barred by laches.

5. **Estoppel ⟸54—Reliance by buyer on settlement with agent wrongfully selling bond necessary to estop owner.**

The remote buyer of a bond wrongfully sold by an attorney cannot defeat recovery of the bond by the former owner on the ground of estoppel based on transactions between the owner and the attorney of which the buyer had no knowledge, and on which, therefore, she did not rely.

6. **Mortgages ⟸38(1)—Evidence held to sustain finding that deed was taken as security, not as settlement.**

In an action to recover a corporate bond wrongfully sold by the attorney for the owner, evidence that deeds given by the attorney to the owner contained a clause that they were executed as security is sufficient to sustain a finding that the owner accepted the deeds as security, and not as settlement of her claim to the bonds.

7. **Principal and agent ⟸183(1)—Restriction of remedies to foreclosure not applicable in suits against strangers.**

Code Civ. Proc. § 726, making action for foreclosure the only remedy to enforce an obligation secured by mortgage, is not available as a defense to an action to recover a bond wrongfully sold by an agent who had given a mortgage to secure the owner, where the action was against a buyer of the bond not a party to the mortgage, and especially where it appeared that all value of the equity conveyed by the mortgage had been lost through no fault of the owner.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by George L. King, as executor of the last will and testament of Elizabeth Maguire, deceased, against Mary I. Harford. Judgment for plaintiff, and defendant appeals. Affirmed.

Nathan Moran, of San Francisco (Chas. S. Wheeler, John F. Bowie, and A. A. Heer, all of San Francisco, of counsel), for appellant.

Frank D. Stringham and Beverly L. Hodghead, both of San Francisco, for respondent.

NOURSE, J. This is an action based upon a bond and interest coupons of the Southern Pacific Railway Company. Judgment was rendered in favor of plaintiff and against defendant for the return of the bond and coupons, or their value in case delivery thereof could not be had. Defendant appeals from the judgment under the alternative method.

[1] The bond in suit is one issued by the Southern Pacific Railroad Company, having semiannual coupons attached, known as a first refunding mortgage gold $1,000 bond. It is made payable to bearer and secured by a mortgage on certain real and personal property of the Southern Pacific Company, as set forth upon the face of the bonds. As the transactions involved herein occurred in 1914, prior to the amendments in 1915 and 1917 (St. 1915, p. 99, St. 1917, p. 1535) of sections 3088 and 3093, Civil Code, the bond was nonnegotiable. Kohn v. Sacramento Elec. Gas & Ry. Co., 168 Cal. 1, 141 Pac. 626; Crocker Natl. Bank v. Byrne & McDonnell, 178 Cal. 329, 173 Pac. 752. Defendant thus took the bond subject to all legal or equitable defenses.

The bond came into the possession of defendant in the following manner: It was part of the assets of the estate of Patrick Maguire, of which estate Elizabeth Maguire, plaintiff's testatrix, was the administratrix

with the will annexed. She was the widow of Patrick Maguire and the sole legatee under his will. She delivered the bond in suit (together with other bonds of like character) to one Shay, her attorney in the administration of the estate, as the court found, for safe-keeping and convenience in preparing the inventory and appraisement. He also collected the amount due on the coupons. Shay included this bond in the inventory which he filed in the estate. But before distribution was had, and on June 29, 1914, without any order or authority of court therefor, and without the knowledge of Elizabeth Maguire, he delivered possession of the bond to stockbrokers, who sold the same, under his instructions, for his account and as his personal property, he retaining the proceeds thereof, amounting to $941. After several successive transfers, and on July 30, 1914, defendant purchased this bond in the open market without knowledge of any equities or claims of the Patrick Maguire estate, or any one else, in respect thereto. She paid $890 therefor, the full market price at that time. Thereafter, and on October 5, 1914, all the estate of Patrick Maguire, including the bond in controversy, was distributed to Elizabeth Maguire in her individual capacity. Elizabeth Maguire first became aware that Shay had parted with possession of the bond about January, 1916, more than a year after distribution of the estate. At that time Shay offered by way of adjustment to have conveyed to Mrs. Maguire, subject to incumbrances thereon, three pieces of property located in Alameda and Santa Cruz counties. In March, 1916, Shay and his wife, in accordance with this offer, executed two deeds covering that property. These deeds were recorded May 20, 1916. Shay and his wife thereafter signed a statement also dated May 20, 1916, reciting that the deeds "were executed for and intended as security for an obligation, and not otherwise." Elizabeth Maguire died testate in the city and county of San Francisco on the 24th day of May, 1916; and plaintiff brought this action as executor of her will on September 11, 1916.

Appellant relies upon four defenses on appeal:

(1) That there was no conversion. The answer sets up the defense, among others, that at the time of the sale of the bond Shay was attorney in fact for Elizabeth Maguire individually, as well as attorney for her as administratrix of the Patrick Maguire estate, and that she had given him, as such attorney in fact, full power to sell or dispose of the bond. Appellant contends that there was no conversion because Shay sold under this power of attorney. With respect to this matter Shay testified that Elizabeth Maguire gave him a general power of attorney to act for her individually shortly after she was appointed administratrix of the Patrick Maguire estate; that it had never been revoked; that it was not recorded, and he could not locate it to produce upon the trial. Appellant thereupon attempted to prove by oral evidence Shay's authority from Elizabeth Maguire under the power of attorney to sell personal property. The court sustained respondent's objection on the ground that evidence of the contents of the instrument was inadmissible because a power of attorney from Elizabeth Maguire to sell property of the estate would be void. Appellant urges, however, that respondent bases his right to maintain this action upon the ownership of the bond by Elizabeth Maguire as a legatee under the will of Patrick Maguire, and not upon her right as administratrix to possession of the bond during the period of administration of the estate of Patrick Maguire; that Elizabeth Maguire, as sole legatee under the will of Patrick Maguire, was the owner and could convey title subject to administration; that, if Elizabeth Maguire, as such legatee, did in fact authorize the sale of this bond by the power of attorney given to Shay, her after-acquired right to possession inured to the benefit of appellant, and there was no conversion; that evidence to show such authorization was competent, and its exclusion constituted prejudicial error.

[2, 3] The difficulty with appellant's argument is that Shay did not sell under any power of attorney. Neither did he attempt to sell Elizabeth Maguire's interest as a legatee in the undistributed estate. He sold the bond as his own property and delivered possession to the purchaser. Moreover, Elizabeth Maguire herself had no authority, either as legatee under the will or administratrix of the estate, to sell its assets (Wickersham v. Johnston, 104 Cal. 407, 412, 38 Pac. 89, 43 Am. St. Rep. 118; Bovard v. Dickenson, 131 Cal. 162, 164, 63 Pac. 162), and therefore could not delegate such authority to another. Her right to convey her share of the estate did not include the right to deliver possession of the property prior to decree of the court. Section 1517, Code of Civil Procedure before its amendment in 1919 (St. 1919, p. 1178), provided that "no sale of any property of an estate of a decedent is valid unless made under order of the superior court, except as otherwise provided in this chapter"; the property herein involved not being one of the exceptions. A valid sale of the bond in suit could have been made only in accordance with the provisions of this section. It is apparent that the alleged power of attorney was not pertinent to the issues herein involved, and that evidence as to its contents was properly excluded.

[4, 5] (2) That respondent is estopped by the conduct of Elizabeth Maguire from asserting title to the bond as against appel-

lant. The estoppel relied upon by appellant is based upon the alleged laches of respondent and his testatrix, during which time appellant contends a cause of action existing in her favor against her immediate vendors upon their warranty of title implied in their sale of the bond to her was barred by the statute of limitations. The trial court found that "neither said Elizabeth Maguire nor the plaintiff herein was guilty of laches in failing to inquire into or investigate as to the whereabouts or possession of said bond." About two years elapsed between the purchase of the bond by appellant and the institution of this action. But respondent's testatrix did not discover the loss of the bond until about eight months prior to commencing suit, and nothing occurred before that time, so far as the record shows, to put her upon inquiry. Shay testified that possibly he continued paying the interest on the bond to Mrs. Maguire for some time after distribution of the Patrick Maguire estate. About four months after discovery of the loss of the bond Mrs. Maguire died, a month later respondent herein was appointed executor of her will, and two and a half months thereafter he commenced this action. It does not appear that either respondent or his testatrix knew who had possession of the bond until the action was commenced; it having been transferred on various occasions before it was purchased by appellant. Under the circumstances respondent was not guilty of laches barring the action. There is nothing in the record to show that appellant's conduct was in any wise affected by the deed transaction, or that, in reliance upon that transaction she permitted any cause of action in her favor to become barred, or that she acted upon such knowledge in any manner. On the contrary she alleged that she had no knowledge of the claims of any person in respect to the bond other than the person making the sale prior to the commencement of this action. The acceptance of the deeds by Mrs. Maguire was not alone sufficient to amount to an estoppel. The court found that the deeds were not in fact taken from Shay in settlement for the bond; and appellant was neither led to believe that they were taken in settlement nor to act upon such belief.

[6] (3) That, if there was a conversion, the settlement with Shay ratified and confirmed his sale. With respect to this defense the court found:

"That on or about the 5th day of March, 1916, Frank Shay executed a conveyance of his interest in certain real property to said Elizabeth Maguire, which consisted of equities in various parcels of land, each of which was subject to prior obligations, but there was no accord or satisfaction executed between said Elizabeth Maguire and said Frank Shay with respect to said controversy arising over the sale and disposition of said bond; and said conveyance was not accepted by said Elizabeth Maguire in satisfaction or settlement of any claim of said Elizabeth Maguire against said Frank Shay arising out of his sale and disposition of said bond, but said conveyance was made by said Frank Shay to said Elizabeth Maguire as security for the redelivery of said bond to said Elizabeth Maguire."

Shay's offer was made by letter to Mrs. Maguire's attorney and contained the following statement:

"All of the properties above referred to belong to Mrs. Shay, her separate property, and she is willing to convey them to Mrs. Maguire in settlement of the lost securities. This might be considered as a final settlement or it might be agreed that upon the delivery to her of the securities within a reasonable time, she will reconvey."

And the statement which he and his wife thereafter signed as above set forth, specifically recited that the deeds "were executed for and intended as security for an obligation, and not otherwise." Shay testified the obligation referred to was "whatever might be due to Mrs. Maguire growing out of this bond transaction." This was sufficient evidence upon which to base the above finding. For this reason it is unnecessary to discuss further contentions of appellant based upon the assumption that the deeds were given in full settlement.

[7] (4) That if the deeds were not taken as settlement they were taken as mortgages to secure the return of the bond, and the action is barred by the provisions of section 726, Code of Civil Procedure, providing that but one action can be maintained for the enforcement of an obligation secured by mortgage—that is, an action to foreclose the mortgage. This action is not one coming within the provisions of that section; the defendant herein not being a party to the mortgage. Moreover, the court found that the equities of Elizabeth Maguire in the properties involved in the deeds "were and are of no value and have been lost to said estate of Elizabeth Maguire," and that they were not lost by reason of any negligence of Elizabeth Maguire or plaintiff herein. This finding was based upon admissions of counsel for appellant on the trial of the action.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

48 Cal. App. 140

HELMER v. SUPERIOR COURT OF SACRAMENTO COUNTY et al. (Civ. 2201.)

(District Court of Appeal, Third District, California. June 10, 1920. Hearing Denied by Supreme Court Aug. 9, 1920.)

1. Municipal corporations ⟸592(1) — Ordinances of chartered cities regulating municipal affairs prevail over state laws.

The Constitution has granted to chartered cities the power to enact ordinances relating to municipal affairs, which ordinances prevail over legislative acts inconsistent therewith.

2. Municipal corporations ⟸592(1)—Regulation of motor vehicle traffic is no longer "municipal affair."

The regulation of motor vehicle traffic has become a matter of state-wide importance in which uniformity is essential, and is no longer a municipal affair, even as to traffic within the streets, so that a chartered city cannot, under Const. art. 11, § 6, pass an ordinance regulating such traffic inconsistent with motor vehicle act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Municipal Affairs.]

3. Municipal corporations ⟸592(2) — State prohibition against driving motor vehicle while intoxicated applies in cities.

Motor Vehicle Act of 1915, § 17, as amended by St. 1919, p. 214, § 11, making it a felony to drive a motor vehicle when intoxicated, is an act for the protection of the lives and property of citizens, not a mere regulation of motor traffic, so that a prosecution for violation thereof may be based on the state law, though the offense occurred in a chartered city having an ordinance making the same act misdemeanor, even if the regulation of motor vehicle traffic is a municipal affair within the jurisdiction of chartered cities.

Application for writ of prohibition by O. H. Helmer against the Superior Court of the County of Sacramento and Hon. Malcolm C. Glenn, as Judge thereof. Petition dismissed.

White, Miller, Needham & Harber, of Sacramento, for petitioner.

Hugh B. Bradford, Dist. Atty., and J. R. Hughes, Asst. Dist. Atty., both of Sacramento, for respondents.

PREWETT, Presiding Judge pro tem. The petitioner is charged in said superior court with the crime of driving a motor vehicle upon a public highway within the city of Sacramento while under the influence of intoxicating liquors. Said offense is made a felony, or, in the discretion of the court, a high grade misdemeanor, by section 17 of the Motor Vehicle Act (St. 1915, p. 406, as amended by St. 1919, p. 214, § 11). Section 20 of Ordinance No. 282 of said city prohibits the same act, but makes of it only a misdemeanor. Said city is governed by a charter adopted in the year 1911. Petitioner insists that the provisions of said ordinance prevail over the Motor Vehicle Act, and that, if he is prosecuted at all, it should be under the provisions of the ordinance. Said respondents have overruled his several objections to the proceedings in said superior court, and propose and intend, unless restrained by this court, to proceed with the trial of the charge against him.

This constitutes the only question to be determined in the case.

[1] 1. The respondent concedes that the Constitution has granted to chartered cities the power to enact ordinances relating to "municipal affairs," which ordinances prevail over acts of the Legislature inconsistent therewith. There are many authorities so holding. City of Los Angeles v. Central Trust Co., 173 Cal. 323, 159 Pac. 1169, and Loop v. Van Loben Sels, 173 Cal. 228, 159 Pac. 600.

[2] 2. The Motor Vehicle Act, so far as it applies to this case, is inconsistent with the ordinance of the city of Sacramento above referred to, since the former makes of the offense a potential felony, while the latter makes of it only a misdemeanor. If the offense in question is a "municipal affair," as that term is used in section 6 of article 11 of the Constitution, it must be conceded at once that the city ordinance is paramount. The regulation of street traffic has usually in the near past been treated as a municipal matter. Until the advent of the automobile, interurban traffic was so small as to be negligible, and, as a result, traffic regulations were a matter of concern only to the inhabitants of the city. But when autos and motor-trucks invaded our highways and streets in tens and hundreds of thousands, a matter that yesterday was local has become of state- and nation-wide importance today. An amendment to the Constitution has in a measure recognized this growth and has authorized the state to establish a system of state highways (section 36, art. 4) to meet its demand.

The term "municipal affairs" is not a fixed quantity, but fluctuates with every change in the conditions upon which it is to operate. Interurban traffic has grown in the past ten years into enormous proportions. It is said that during the past year tens of thousands of autos entered this state from other states. Tabulations made since this case was submitted justify the conclusion that 10,000 or 12,000 motor vehicles enter the city of Sacramento every ordinary business day. It is common knowledge that the number of auto passengers entering some of our cities on special occasions exceeds, in a single day, the entire population of the city. The great

number of autos, their high speed, their use of a nonintelligent motive power, the want of adequate room on roads and streets not laid out for such a congested traffic, and the overwhelming necessity for uniformity in handling the traffic, all have forced the conviction that the proper and orderly handling of this stupendous traffic has become a matter of the gravest concern to the people of the entire state. If the ordinance in question were the paramount law, then the city of Sacramento could provide that the signal for, say, a left-hand turn, should be an uplifted arm. It is needless to say that such a regulation would be a great danger to thousands of residents and nonresidents every day in the year. In short almost every citizen of the state has as great an interest in the traffic regulations of neighboring cities as he has in his rural highways about him, and vastly more concern as to what they are and how they are to be observed. It may be doubted whether any other police problem requires such unfailing uniformity, one city or locality with another, as that of handling the endless procession of motor vehicles on our highways. That the Legislature intended the provisions of the Motor Vehicle Act to be supreme is beyond question. St. 1915, p. 409, § 22, as amended by Stats. 1919, p. 220, § 13.

The earlier cases holding that cities may pass local and police regulations governing motor traffic are of little value in this connection, since it is clear that, in the absence of a motor vehicle act, a city has such power under the provisions of the Constitution.

Since the advent of motor vehicles in such vast numbers and the passage of the Motor Vehicle Act, a number of cases have been decided by our state courts involving traffic regulations of the state and of chartered cities, and it is a persuasive fact that in no case has it been held that the city ordinance is supreme. The contrary assumption appears to have been universal. It is insisted that Ex parte Snowden, 12 Cal. App. 521, 107 Pac. 724, holds that the city ordinance is paramount; but an examination of the case discloses that the court arrived at the conclusion that no conflict existed, hence any observations as to the effect of a conflict were unnecessary to a disposition of the case and are not authoritative. Moreover, the infractions considered in that case took place under the Motor Vehicle Act of 1907 and at a date when autos had not become a matter of such universal interest, and, in addition, the act itself permits municipalities to establish speed limits.

Petitioner cites City of Los Angeles v. Central Trust Co., supra, as sustaining his position. But that case involved neither speed limits nor intoxication and concerned only the opening of a street. The question as to the paramount effect of the Motor Vehicle Act was in no way involved. The case is not authority in this connection. Petitioner relies mainly, however, upon the more recent case of Muther v. Capps, 38 Cal. App. 721, 177 Pac. 882, and he cites this case as showing that a speed ordinance of the city and county of San Francisco, if in conflict with the Motor Vehicle Act, is paramount thereto. But the case does not justify this position. A number of different questions were involved in that case. It was insisted by the appellant that a conflict existed between the ordinance and the state law; but the court expressly held that no ordinance was before it, and it does not decide, and does not purport to decide, the question of supremacy.

The Motor Vehicle Act was devised to meet a new and extraordinary condition, and it demands such a construction in view of the facts which brought it into existence as will maintain its symmetry and integrity unimpaired, if this can be done under established canons of adjudication.

There are, it happens, two California cases, so recent that they have not yet reached the official reports, which, by the strongest implication, if not in direct terms, uphold the position of respondents. The first of these is Mann v. Scott, 182 Pac. 281, decided June 13, 1919. In this case the court says:

"Upon a careful reconsideration of the appellants' contention that the State Motor Vehicle Act of 1913 is the controlling law upon the subject, and that it was error to give an instruction embodying the regulatory provisions of the city ordinance, we are constrained to confirm the opinion of the District Court of Appeal that the municipal ordinance in the respect noted is not inconsistent with the state law, but was valid and operative in the city of Los Angeles at the time of the plaintiff's injury. And this, we think, is so regardless of the question of whether or not the regulation of traffic upon the streets of a city is a 'municipal affair.' Conceding that, if there were in fact a conflict between the ordinance and the State Motor Vehicle Act, the state law would prevail, still we find no conflict or inconsistency between the two enactments."

And the following language, quoted from the same case, is particularly in point and may be cited as a distinct recognition by the court of the turning point in conditions which have made the regulation of auto traffic a matter of state and general concern:

"Upon a careful analysis of the Motor Vehicle Act of 1913 and of its purpose viewed in the light of the traffic conditions upon which it was intended to operate, we are of the opinion that the reasoning of the court in the case last quoted is decisive of the question now presented. In other words, we believe that by extending the operation of the act in terms to the traffic upon city streets the Legislature did no more than to prescribe obviously necessary safeguards for travel upon such streets viewed as part of

the public highways of the state in which all the people of the state are * * * interested, and that it did not thereby intend to prohibit the enactment of such new and additional police regulations in furtherance of the purpose of the act as might appear reasonable and proper in a given locality. It is true that the Motor Vehicle Act of 1915 expressly limited the scope of such police regulations. Stats. 1915, c. 188, § 22d. It may perhaps be open to question whether the ordinance here in controversy falls within the prohibition of that act, but it is sufficient for the purpose of this case to say that the Motor Vehicle Act as in force at the time of the plaintiff's injury did not contain a clause prescribing limitations upon the local regulation of traffic."

In view of this language, it is impossible to avoid the conclusion that the court would have sustained the supremacy of the Motor Vehicle Act of 1915 as against a repugnant city ordinance.

The second case above referred to is that of Ham v. County of Los Angeles, 189 Pac. 462, decided February 14, 1920. The following quotation therefrom will show its assumption of the paramount force of the Motor Vehicle Act:

"Indeed, it seems now to be accepted law that local regulations may be adopted controlling street and highway traffic which are not in conflict with the State Motor Vehicle Act, and that such regulations are not in conflict which merely place additional and more stringent limitations upon the operation of motor vehicles than those prescribed by the state law."

[3] 3. But, viewed from another angle, the supremacy of the provision making the act a felony must be sustained.

Section 17, so far as pertinent, reads as follows:

"17. No person who is under the influence of intoxicating liquor and no person who is an habitual user of narcotic drugs shall operate or drive a motor or other vehicle on any public highway within this state."

It is true that the ordinances of a city are supreme in "municipal affairs." But the act charged against petitioner is not a "municipal affair." This is so even if the claim is sound that ordinances designed to control the use of streets prevail over general laws. The act of driving a motor vehicle while under the influence of intoxicating liquors is of no immediate or special concern to the city as such. It is of general concern to the inhabitants of a city in common with all other residents of the state. There exists a doubtful or twilight zone separating those matters that are clearly of municipal concern from those that are not. This doubtful zone is of greater or less width, according to the viewpoint of the observer, but there seems to be no satisfactory reason for assigning the act in question to this doubtful zone. It is not a "municipal affair." Section 17, although it forms a part of the Motor Vehicle Act, is not a traffic ordinance. It makes no provision of any kind whatsoever as to the method of driving, the rate of speed, the side of the road to be traversed, the giving of proper signals, nor, in fact, any sort of provision or condition having reference to the use of the roadway in any given manner. It relates wholly to the person himself and his then present condition, and without reference to the effect of his acts upon the roadway itself or of other persons making use thereof.

The interdicted act relates to traffic no further than that a person in the prescribed condition may not avail himself of the use of the streets whereon traffic exists. A person discharging firearms or spreading poison gases while driving an auto on the highway would be a menace, much as the drunken driver is, but in no sense would his act be a matter of municipal concern as distinguished from the general concern of the people of the state. Regulations as to speed have reference to both time and place. That which would be a reckless rate of speed in a crowded city during busy hours would entail little or no danger on a remote roadway or during slack hours. The act charged against petitioner has no reference either to time or place.

While it is more dangerous in a crowded street, it is so only because there are more persons to be injured, but as to each person it is but slightly more dangerous than to one of the smaller number in a less crowded locality. Speeding is dangerous because of the locality. The drunken driver is a danger in any locality, if there are persons present to be injured.

The fact that he is a menace to life and to private property justifies the state in prescribing penalties for the act, just as it may do for violations of general sanitary, health and comfort laws. A manslaughter committed by an intoxicated driver in driving his vehicle over a victim is as much punishable by the state when committed on the streets of a city as if committed elsewhere. A vast number of acts are made punishable by the Penal Code because their commission involves a general menace to the public, even though in their commission no person is injured. It is a felony for an intoxicated trainman to run a railroad train. A druggist must take certain precautions in selling poisonous drugs. It is a misdemeanor to carry concealed weapons or to leave a campfire burning and unattended. These cases and dozens of others that could be enumerated demonstrate that the state, in the exercise of its sovereign power and for the protection of its people, has authority to interdict on the public highways in every part of the state the driving of a motor or other vehicle by an intoxicated person. It is

a fundamental rule that the state may by appropriate penalties protect life, liberty, property, and the public peace in every part of its territory; and, except as to matters of purely municipal concern, it may extend this protection to the denizens of crowded cities the same as to those in rural districts.

Our conclusion is that the act charged against the petitioner is punishable under section 17 of the Motor Vehicle Act.

The petition is dismissed.

We concur: HART, J.; BURNETT, J.

48 Cal. App. 72

PEOPLE v. KINGS COUNTY DEVELOPMENT CO. (Civ. 2142.)

(District Court of Appeal, Third District, California. June 5, 1920. Hearing Denied by Supreme Court Aug. 2, 1920.)

1. Dismissal and nonsuit ⟸57—Statute providing for dismissal for want of service mandatory.

Code Civ. Proc. § 581a, providing for dismissal of action unless summons shall be served and return thereon made within three years after commencement of action, is mandatory; the right to dismissal becoming absolute when summons has not been served and returned within the required time.

2. Prohibition ⟸5(2)—Will lie to prevent prosecution of action after failure to serve summons.

Where summons has not been served and return thereon made within three years from the commencement of action, as required by Code Civ. Proc. § 581a, prohibition will lie to prevent the trial court from adopting any other course than to dismiss the action, and from issuing an alias summons.

3. Limitation of actions ⟸11(1)—State not affected by limitations.

A state is not bound by statutes of limitation unless by express words or by necessary implication on such statutes make it subject to their provisions or restrictions.

4. Limitation of actions ⟸1—"Statutes of limitation" are statutes of repose.

Statutes of limitation, in a strict or legal sense, are statutes of repose, and are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims or within which certain rights may be enforced.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Limitation of Actions.]

5. Dismissal and nonsuit ⟸60(1)—Unreasonable delay in prosecution ground for dismissal.

Courts, in the exercise of a power inhering in courts of justice, may dismiss an action for unreasonable delay in its prosecution, even independently of any express statutory warrant therefor.

6. Dismissal and nonsuit ⟸60(1)—Statute requiring dismissal for delay in prosecution held applicable to action by state.

Code Civ. Proc. § 581a, requiring dismissal of action on failure to serve summons and make return thereon within three years after commencement of action, *held* applicable to a suit by the state to annul patent to state lands in view of sections 315 and 345; the former statute not being a statute of limitations in the strict legal sense, but one main object of which is to require all litigants commencing actions to press actions to issue and trial with reasonable diligence.

7. Statutes ⟸225, 239—All laws on subject to be read together in construing statute in derogation of common law.

Where the Legislature has established a particular policy with respect to a particular subject of legislative cognizance which policy is in derogation of that of the common law, all the law or sections of the Code bearing upon or pertaining to that particular subject should be read and considered together, or as a whole, or by the light of each other, if the language of any one section or part of the law is so dubious or uncertain as to render its meaning or the legislative intent at the bottom of it lacking in clearness or certainty.

8. States ⟸190—Bound by rules of procedure applicable to other litigants in its action.

The state, when it voluntarily becomes a suitor in its courts and brings an action for relief of any character, is subject to or bound by the same rules of procedure or practice as to the prosecution of such action as govern and apply to litigants suing in their individual capacities.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by the People of the State of California against the Kings County Development Company. From order granting motion to dismiss action, plaintiff apeals. Affirmed.

U. S. Webb, Atty. Gen., John T. Jones and C. F. Culver, both of Los Angeles, R. Justin Miller, of Hanford, and Wheaton A. Gray, of Los Angeles, for the People.

T. T. C. Gregory and D. Hadsell, both of San Francisco, and Gibson, Dunn & Crutcher, of Los Angeles, for respondent.

HART, J. This is a suit in equity and was commenced by the state of California, through its Attorney General, by the filing of a complaint on the 21st day of November, 1914, for the purpose of obtaining a decree annulling a patent to certain state lands; the defendant having acquired title to said patent through certain mesne conveyances coming down from the original patentee. The patent in question was issued on November 23, 1904. Summons in the action was issued June 14, 1915, and was served on September 10, 1918. A notice of motion to dismiss the

action was served on the Attorney General on the 25th day of September, 1918. The ground of the motion was:

"That the summons and the complaint in said action were not served upon the defendant until more than three years after the commencement of said action, and that also on account thereof the above-entitled court no longer has jurisdiction over said action."

The court below granted the motion, and from the order granting said motion the people prosecute this appeal.

The order dismissing the action was based upon section 581a of the Code of Civil Procedure. The particular provisions of said section which are material to the inquiry presented by this appeal read as follows:

"No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced must be dismissed by the court in which the same shall have been commenced, on its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have issued within one year, and all such actions must be in like manner dismissed, unless the summons shall be served and return thereon made within three years after the commencement of said action. But all such actions may be prosecuted, if appearance has been made by the defendant or defendants, within said three years in the same manner as if summons had been issued and served."

[1, 2] The provisions of said section are mandatory, and, if the section applies to the state, then the trial court lost jurisdiction of the action and could proceed no further therein, except to dismiss the action. In fact, the right to a dismissal becomes absolute where the summons has not been served and returned within the time prescribed by the said section (Sharpstein v. Eells, 132 Cal. 507, 64 Pac. 1080), and prohibition will lie to prevent the trial court from adopting any other course than to dismiss the action (Modoc Land, etc., Co. v. Superior Court, 128 Cal. 255, 60 Pac. 848), and such writ will lie to prohibit the issuance of an alias summons after the lapse of three years after the commencement of the action (White v. Superior Court, 126 Cal. 245, 58 Pac. 450).

The contention of counsel for the appellant is, however, that section 581a "is nothing more nor less than a statute of limitations, and does not bind the state, and that it was not the purpose or intention of the Legislature in adopting it that it should bind the state."

[3] The section, it will be observed, contains no express provision that the state shall be bound thereby. It is well settled and well understood that a state is not bound by statutes of limitation, unless by express words or by necessary implication such statutes make the state subject to their provisions or restrictions.

[4] Statutes of limitations are, in a strict or legal sense, statutes of repose, and "are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims, or within which certain rights may be enforced." Wood on Limitations (3d Ed.) § 1. The same author further observes:

"Those statutes which merely restrict a statutory or other right do not come under this head (i. e., under the head of "statutes of limitations"), but rather are in the nature of conditions put by the law upon the right given. Thus a statute that prescribes the term of court at which an indorsee of a note is required to sue the maker in order to hold the indorser liable (McDaniel v. Dougherty, 42 Ala. 506; Davidson v. Peticolas, 34 Tex. 27), or the time within which writs of error shall be brought (Pace v. Hollaman, 31 Tex. 158; Trim v. McPherson [Tenn.] 7 Coldw. 15), or a statute which fixes the time within which lands sold at execution may be redeemed (Reynolds v. Baker [Tenn.] 6 Cold. 221), or within which a judgment or other lien shall be enforced (Battle v. Shivers, 39 Ga. 405), or which merely postpones a claim unless enforced within a certain time (Chandler v. Westfall, 30 Tex. 475), or which provides that a certain class of evidence shall be admissible if action is brought within a certain time, are not statutes of limitation within the legal sense of the term. But statutes which provide that no action shall be brought, or right enforced, unless brought or enforced within a certain time, are such statutes of limitation, even when they do not extinguish the claim."

The general legislative policy of California is that the state shall be bound by its statute of limitations with respect to the bringing of actions for the enforcement of any and all such rights as may accrue to the state. Code Civ. Proc. § 345, and sections immediately preceding in the same chapter; also Id. § 315. The last-named section fixes the period of limitation within which the state may bring an action for or in respect to real property, or the issues or profits thereof, by reason of the right or title of the people to the same, at ten years; and, in passing, we may observe, although the observation is not germane to the discussion called for herein, that it has been held that said section applies to an action by the state where, as here, the purpose of the action is to procure a cancellation of a patent issued by the state for a parcel of its land, such action being "in respect to real property." People v. Kings County Development Co., 177 Cal. 529, 534, 171 Pac. 102.

[5] The object intended to be attained by section 581a of the Code of Civil Procedure is, obviously, to compel reasonable diligence in the prosecution of an action after it has been commenced, and thus afford the party or parties against whom it is brought an opportunity to present such evidential support to

any defense he or they may have thereto as may be available at the time the action is instituted, but which may be lost or destroyed through the death of witnesses or otherwise before the action is brought to issue by reason of an unreasonably long delay in serving the defendant or defendants with appropriate legal process notifying him or them of the pendency of the action. It is settled in this state that, even independently of any express statutory warrant therefor, the courts may, in the exercise of a power inhering in courts of justice, dismiss an action for unreasonable delay in its prosecution.

In the early case Dupuy v. Shear, 29 Cal. 238, the proposition that the courts were possessed with the inherent power of dismissing actions because their prosecutions by the plaintiff had been inexcusably delayed after their commencement was laid down, and the court there said:

"We see no good reason why the court after the commencement of a suit may not dispose of it by striking the complaint from its files when the plaintiff has failed for many years to take any effective measure to procure a service, and give the court jurisdiction of the person of the defendant. Certainly it was never contemplated that a party may file a complaint and issue a summons, and then wait an indefinite period of time till the witnesses of the other party are dead, or his evidence destroyed, before he takes any effectual steps to procure a service of process. We do not think such a case is provided for in sections 148 and 149 of the Practice Act; but the court, having got possession of the case by the commencement of a suit, must have some power to dispose of it, when the plaintiff declines or neglects to proceed."

See, also, People v. Jefferds, 126 Cal. 296, 58 Pac. 704; Bernard v. Parmelee, 6 Cal. App. 537, 92 Pac. 658.

It was obviously upon precisely the same theory or for the identical reason which it is declared in the above excerpt supports the inherent power of the court to dismiss actions because of inexcusable delay in their prosecution that section 581a was founded, thus expressly vesting in the courts the right to exercise a power which was theretofore, and indeed still is, an inherent attribute of their constitution as judicial tribunals and specifically fixing the period of time which shall be deemed to constitute an inexcusable delay; and, as above indicated, the question here to be determined is whether said section is, in the true legal sense, a statute of limitations by the terms of which the state is not bound, since the section contains no express provision that it shall apply to the state.

[6] We have not been able to persuade ourselves that any other but a negative reply to that question may reasonably be returned. We are of the opinion rather that the section involves only a condition to which all litigants, including the state itself, must conform to entitle them, after they have commenced an action, to proceed further with the prosecution thereof. The provisions of the section, in other words, involve merely a matter of procedure—that is the regulation of the conduct of the parties plaintiff with respect to actions after the commencement thereof for the same reason or purpose which is at the bottom of many other provisions of the code as to procedure, to wit, to facilitate or bring about a final or as speedy a disposition of the litigation as possible or as is deemed by the Legislature to be consistent with the rights, not alone of the plaintiff, but also of the adversary party or parties, and also to clear court calendars of cases as expeditiously as possible, thus and thereby preventing an accumulation upon such calendars of actions in which, by reason of long delays in their prosecution, it may become difficult, if not in some instances impossible, to adjudicate the issues according to the real merits or justice of such causes. Indeed, the terms of the section are, in their nature and purpose, analogous to the provisions of the Code of Civil Procedure which prescribe a time limit within which a bill of exceptions, or a notice of appeal, or a notice of intention to move for a new trial, or petition for a hearing in the Supreme Court after a cause has been heard and decided by a District Court of Appeal, must be filed. It surely will not be contended by counsel for the state that these last-mentioned provisions are not alike applicable to the state, as a litigant, as to private individuals likewise invoking the power or aid of the courts or who are compelled to appear therein to contest rights asserted against them.

The above view or construction of section 581a is sound in principle and in harmony with reason, in confirmation of which proposition we need go no further for an example than the case now before us, involving, as it does, an action which impeaches the title of the respondent to the lands in question. The effect of an action brought in the courts to determine the ownership of or title to real property is in a measure to put a cloud upon the title to such property, which will exist during the pendency of the action or until the latter is entirely disposed of. It thus can readily be perceived that if the state, in such a case, may postpone, in infinitum, the issuance or the service and return of summons, the defendant, who may have a meritorious defense to the action—who indeed, may be able to show an impregnable title to the land in dispute—would not be able to alienate or transfer the property during the pendency of the action, for no one would purchase property the title to which thus stands challenged. The defendant would not, under such a condition as to the title to his property, enjoy that unrestricted dominion over

the property which would enable him to do with it as he pleased. Indeed, the effect of the pendency of such an action, in almost all instances, would probably be to prevent the permanent improvement of the property and the full use of it for the purposes to which it may be peculiarly adapted, and the policy of the state is, of course, that its public lands shall be disposed of to private individuals so that they may be utilized to the highest advantage to which they can be put, and thereby enhance the general welfare of the citizens and consequently the general prosperity of the state.

We do not believe that the Legislature intended that any such situation should arise with respect to litigation inaugurated by the state for the purpose of determining whether title to its lands has been legally acquired by those who have at least a color of title to such lands or a paper title upon its face perfectly valid. In this immediate connection we may appropriately consider for a moment the asseveration of the Attorney General that "it was not the purpose or intention of the Legislature, in adopting it [section 581a], that it should bind the state."

[7] It will be observed that the section is in such sweeping language as to admit of no other construction than that the Legislature intended not to except from its operation any litigant or any action by whomsoever commenced. It reads: "No action heretofore or hereafter commenced shall be further prosecuted," etc. This means, of course, that all actions, regardless of who the party plaintiff may be, shall not be further prosecuted, etc. If the question as to the legislative intent were important in the solution of the problem herein submitted, we are prepared to say that our construction of the section for the purpose of ascertaining that intent would lead us to the reverse position of the Attorney General upon that proposition. The state has, through its Legislature, bound itself in express language to the terms of many of the provisions of our statute of limitations, and it is proper and indeed a cardinal rule of statutory construction that a particular provision of a statute which may be in ambiguous phraseology should, to get at its purpose and intent, be read and considered in the light, not only of other provisions of legislative enactments upon the same subject, but in view of the legislative policy affecting the subject as established by the statutory law generally. Thus viewing the section, the conclusion would seem to be reasonable, if not irresistible, that had the Legislature intended that the state should be exempt from the operation of its terms, there would have been incorporated into the section express language or words to that effect. To be more explicit, we thus formulate the proposition now in our minds: That, where the Legislature has established a particular policy with respect to a particular subject of legislative cognizance, which policy is in derogation of that of the rule of the common law, all the law or sections of the Code bearing upon or pertaining to that particular subject should be read and considered together, or as a whole, or by the light of each other, if the language of any one section or part of the law is so dubious or uncertain as to render its meaning or the legislative intent at the bottom of it lacking in clearness and certainty. Of course, the proposition here suggested merely goes to the question of the intention of the Legislature, and would be wholly without force or merit if the state were not in any case made by express legislative mandate subject to or bound by the statute of limitations. But, in considering the nature or purpose of a statute such as the one with which we are here dealing, the question of the intention of the Legislature in enacting it is not controlling, or, indeed, of very great importance. The legal nature of the condition or restriction prescribed by the statute as affecting the primary right or the remedy to enforce such right is the all-controlling factor in determining the legal nature of the disabilities which the statute imposes upon litigants. We therefore fall back and wholly rely upon the proposition first above declared that the section merely involves a matter of procedure as to the conduct of an action after it has been commenced.

[8] That the state, when it voluntarily becomes a suitor in its courts and so brings an action for relief of any character, is subject to or bound by the same rules of procedure or practice as to the prosecution of such actions as govern and apply to litigants suing in their individual capacities, is well settled.

In Commonwealth, etc., v. Helm, 163 Ky. 69, 75, 173 S. W. 389, 392, it is said:

"It may be also confidently affirmed that, when the commonwealth comes into court to prosecute a suit, it occupies, in the absence of some controlling statute on the subject, the attitude of any other litigant, and is subject to the same rules of practice and procedure."

See, also, Moore v. Tate, 87 Tenn. 725, 11 S. W. 935, 10 Am. St. Rep. 712, 715; State v. Holgate, 107 Minn. 71, 119 N. W. 792, 793; Port Royal, etc., Co. v. South Carolina (C. C.) 60 Fed. 552, 553; State v. Zanco's Heirs, 18 Tex. Civ. App. 127, 44 S. W. 527, 529; State v. Pinckney, 22 S. C. 484, 488; State v. Pac. Guano Co., 22 S. C. 50, 74.

In State v. Board of Commissioners, 101 Ind. 69, 74, it is said:

"Not having taken an appeal from either of the former adjudications of its claim within the time limited by law, the state of Indiana, like any other claimant, must be held, we think, to be concluded and bound by such former judgments. When the state becomes a suitor in any of the courts it is as much bound by the laws

of the land, by the rules of pleading and practice, and by the decisions and judgments of the courts, inferior or superior, as any other suitor."

The Supreme Court of the United States, in Louisiana v. Jumel, 107 U. S. 728, 2 Sup. Ct. 128, 27 L. Ed. 448, stated the principle as follows:

"When a state submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the state has by its act of submission allowed to be done."

While expressing no definite opinion on the question, the appellate court of the First district, in Anderson v. Nawa, 25 Cal. App. 151, 157, 143 Pac. 555, 558, seemed to be in very much doubt as to the soundness of the contention in that case that the section in question does not apply as well to the state as to other suitors. Note the language of the opinion therein:

"It is insisted that the action was instituted by the plaintiff upon behalf of the state in its sovereign capacity, and that, inasmuch as laches as a matter of law cannot ordinarily be imputed to the state, the motion to dismiss should have been denied for that reason alone. We are not prepared to say that the general rule in this behalf would operate to excuse an unreasonable delay in the service of summons, in an action instituted by the state in its sovereign capacity, for the purpose of asserting a public right or protecting a public interest; but we are satisfied that the present action does not involve in the slightest degree any such capacity, right, or interest."

The Supreme Court denied a hearing in that case without comment.

In his reply brief the Attorney General declares:

"The question in this case is not, as announced by respondent, whether the state may proclaim that rules of procedure do not apply to it, but rather the question before this court is: Can the state be held liable for the negligence of its agents, because those agents failed to comply with rules of procedure relating to the time within which acts must be done?"

But as has already been indicated herein, the real question here is not whether the state may be bound by the negligence of its agents, but whether the state, having commenced an action to enforce a claimed right against a citizen, may unreasonably postpone bringing it to issue and a final disposition according to the procedure prescribed by the law. Of course, every litigant who has committed his case to the care of a lawyer must suffer from the negligence or default of his attorney in complying with procedural rules required to be observed to preserve the rights of parties in actions pending before the courts, but the negligence of an attorney in the management of a case in court whereby his client suffers some loss or injury is imputable to the client himself, since the legal relation existing between client and attorney is that of a principal and agent. No less is true of the legal relationship existing between the state and its attorney, and, while it may be that there is negligence involved in the omission of the state's attorney to proceed with the prosecution of this case according to the diligence or requirements pointed out by the statute in question, we can see no less reason for holding that such ngligence or default is not to be imputed to the state itself than that similar negligence or default by an attorney representing a private suitor in a pending action should not be imputed to the latter. But, be that as it may, the simple question here is, as stated, whether the state is or is not bound by a matter of procedure or practice in the conduct of litigation instituted by it after it has commenced an action in court to enforce some right, and, as above indicated, our conclusion is that it is.

The Attorney General, in support of his position on this appeal, cites a large number of cases, of which we need name the following only: Vrooman v. Li Po Tai, 113 Cal. 303, 306, 45 Pac. 470; White v. Superior Court, 126 Cal. 245, 58 Pac. 450; Russ & Sons v. Crichton, 117 Cal. 695, 49 Pac. 1043; People v. Melone, 73 Cal. 574, 15 Pac. 294; Whittaker v. Tuolumne Co., 96 Cal. 100, 30 Pac. 1016; Skelly v. School Dist., 103 Cal. 652, 37 Pac. 643.

We have found nothing in those cases which has led us from the conclusion above indicated. None of the cases named is directly in point here nor is any such claim made by the Attorney General. Most of them merely declare the following rules: That there is no presumption that the state is barred, and therefore that the statute of limitations must be construed, if possible, so as not to apply to the state; that the state is not bound by a statute of limitations unless there are words in the statute or some other statute clearly making the state subject to the limitations prescribed by the statute; that the state is not bound by general words of a statute which would operate to establish a right of action against it; that "the state is not bound by general words in the Political Code upon the subject of taxation, which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it." Reclamation Dist. No. 551 v. County of Sacramento, 134 Cal. 477, 66 Pac. 668. The principles thus stated are well established and have never been gainsaid; but they have no application to the present case, either directly or by analogy. As we have above tried to show, we are here dealing, not with a statute of limitations in the strict legal sense in which such a statute is juridically understood, but

with a statute whose main or central object is to require all litigants, after commencing actions against others to establish judicially some right to which they claim to be entitled as against those they have proceeded against, to press the actions to issue and trial with reasonable and proper diligence, and this because it is in the interest of justice to do so.

We conclude that the order appealed from should be affirmed; and it is so ordered.

We concur: NICOL, Presiding Judge, pro tem.; BURNETT, J.

48 Cal. App. 795

PEOPLE v. KINGS COUNTY DEVELOPMENT CO. (Civ. 2144.)

(District Court of Appeal, Third District, California. June 5, 1920. Hearing Denied by Supreme Court Aug. 2, 1920.)

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by the People of the State of California against the Kings County Development Company. From order dismissing action, plaintiff appeals. Affirmed.

U. S. Webb, Atty. Gen., John T. Jones, and C. F. Culver, both of Los Angeles, R. Justin Miller, of Hanford, and Wheaton A. Gray, of Los Angeles, for the People.

T. T. C. Gregory and D. Hadsell, both of San Francisco, and Gibson, Dunn & Crutcher, of Los Angeles, for respondent.

PER CURIAM. This is a companion case to civil No. 2142, 191 Pac. 1004, between the same parties, this day decided. The patents herein were issued on December 22 and December 30, 1904, the action was begun December 17, 1914, summons was issued June 14, 1915, and was served September 10, 1918.

For the reasons stated in our opinion in Civil No. 2142 the order appealed from is affirmed.

48 Cal. App. 221

EATON v. YOUNT. (Civ. 3202.)

(District Court of Appeal, Second District, Division 2, California. June 18, 1920. Hearing Denied by Supreme Court Aug. 16, 1920.)

1. Brokers ⟸43(1)—Broker's agreement for sale of real estate must be in writing.

A broker employed by a stockholder of a corporation to sell corporate property is not entitled to recover on an oral contract of employment in view of Civ. Code, § 1624, subd. 6, providing such agreements or a memorandum thereof must be in writing.

2. Brokers ⟸43(1)—A person acting only in one transaction held to be a broker within statute requiring written contracts.

A person whose business is to bring buyer and seller together, though he act as such in but a single transaction, is a "broker" within Civ. Code, § 1624, subd. 6, requiring broker's contracts to sell real estate or some memorandum thereof to be in writing.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Broker.]

3. Brokers ⟸43(1)—Broker's contract with officer and stockholder of corporate owner must be in writing.

Civ. Code, § 1624, subd. 6, requiring broker's agreement for sale of real property to be in writing, is applicable whether made with the owner or with an officer and stockholder of a corporation owner.

4. Brokers ⟸43(1)—Stockholder held not liable for commission on parol agreement for sale of corporation's land on theory of advantage to him.

A stockholder owning a large part of a corporation's stock is not liable for broker's commission on his agreement for sale of the corporation's land, which was invalid because resting in parol, in contravention of Civ. Code, § 1624, on the theory that it was an agreement between him and the broker to share an advantage where there was no evidence that the land was not worth the selling price, though the purchaser's first payment was forfeited to the stockholder's advantage, since plaintiff's rights were based on facts existing when making the broker's agreement or at least not later than purchaser's first payment.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Annette Eaton against Samuel E. Yount. Judgment for plaintiff, and defendant appeals. Reversed.

F. R. McNamee and Leo A. McNamee, both of Los Angeles, for appellant.

Lewis Cruickshank and Vincent B. Vaughan, both of Los Angeles, for respondent.

FINLAYSON, P. J. This is an action to recover upon an oral contract for services in the sale of real estate—certain mining properties owned by the Boss Gold Mining Company, a corporation. Plaintiff recovered judgment for $5,000, and defendant appeals.

Defendant, who was president of the Boss Gold Mining Company, the owner of the property, held and owned a little less than three-eighths of all the stock issued by that corporation. According to the findings of the trial court, defendant entered into an agreement with plaintiff whereby it was agreed that, if plaintiff would procure a person or persons to enter into a contract with the Boss Gold Mining Company to purchase its real property for the sum of $150,000, and such person or persons would make a first payment of $50,000 on account of the purchase price, defendant would pay plaintiff, in consideration of her services, 10 per cent. of such purchase price, her services to be paid for as and when payments should be

made by such person or persons. The lower court further found that, under and pursuant to the terms of the agreement between plaintiff and defendant, the former did procure a person or persons who entered into a contract with the Boss Gold Mining Company for the purchase of its real property at the price and on the terms aforementioned; that said person or persons paid the Boss Gold Mining Company the sum of $50,000 as first payment on account of the agreed purchase price; and that thereupon, and under and by virtue of the terms of the agreement between plaintiff and defendant, there became due plaintiff from defendant a sum equal to 10 per cent. of such first payment, namely, $5,000.

Defendant, in his answer, denied that he ever made any contract with plaintiff to procure a purchaser for the property of his corporation. The only contract with defendant that plaintiff sought to prove at the trial was an oral contract of employment. Defendant objected to the evidence on the ground that the sixth subdivision of section 1624 of the Civil Code requires such contract, or some note or memorandum thereof, to be in writing and subscribed by the party to be charged, or by his agent. The court, subject to defendant's objection, received evidence of the oral contract, and gave judgment for plaintiff, as already stated.

[1-3] It is clear to our minds that respondent was not entitled to recover on the oral contract of employment. Section 1624 of the Civil Code provides in express terms that "an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission" is "invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent." The oral agreement testified to by plaintiff and her witnesses was clearly within the terms of this Code section. The agreement, if its terms were as testified to by plaintiff and her witnesses, was "an agreement * * * employing" plaintiff "as agent or broker to * * * sell real estate for compensation or a commission." Within the meaning of this Code provision, a person whose business it is to bring buyer and seller together is a "broker," though he act as such in but the single transaction. Stout v. Humphrey, 69 N. J. Law, 436.[1] "The duty assumed by a broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made." Shanklin v. Hall, 100 Cal. 29, 34 Pac. 637. And that is precisely what plaintiff was employed to do, and precisely what she asserted she did do. Under the terms of the agreement, as testified to by plaintiff and her witnesses, "the party to be charged" was the defendant here, a stockholder in and president of the corporation that was selling the property. Defendant had no authority from the owner, written or oral, to sell the property.

The theory advanced by respondent to sustain her asserted right to a recovery on defendant's oral agreement employing her to sell real estate owned by the Boss Gold Mining Company is that section 1624 is designed for the protection of "owners" only, and that, moreover, because defendant owned stock in the corporation he necessarily benefited by the sale and by plaintiff's services, and therefore plaintiff is entitled to recover under the rule enunciated in a line of cases wherein it is held, in substance, that an oral agreement by one person to share with another his advantage on a sale of real estate is a valid agreement. We can find no merit whatever in this argument.

To support her claim that she can recover for her services under the oral agreement because the property was owned, not by appellant, but by the Boss Gold Mining Company, respondent seizes upon that portion of the opinion in Gorham v. Heiman, 90 Cal. 358, 27 Pac. 289, where it is said that subdivision 6 of section 1624 was "designed to protect owners of real estate against unfounded claims of brokers." This language of the opinion in the Gorham Case, wrenched from its context to support respondent's theory, was never intended to put without the pale of the statute of frauds one who, though the "party to be charged," does not happen to be the owner. The language of the Code is that the agreement is invalid unless it, or some note or memorandum thereof, be in writing, "and subscribed by the party to be charged, or by his agent." As said in Aldis v. Schleicher, 9 Cal. App. 373, 99 Pac. 526, the section is "equally applicable to any contract whereby one, whether owner or not, employs another to effect a sale of real estate and agrees unconditionally to pay a stipulated sum for the performance of such services." This emphatic and terse statement of the law has never been questioned in any of the many later decisions dealing with this Code provision, and to it we give our unqualified approval.

[4] Equally without merit is the contention that, because appellant owns almost three-eighths of all the stock issued by the Boss Gold Mining Company, he necessarily was benefited by the sale, and therefore respondent is entitled to her judgment for $5,000. In the brief filed in her behalf, respondent says that the instruction given in Jenkins v. Locke-Paddon Co., 30 Cal. App. 56, 157 Pac. 538, "clearly enunciates plaintiff's theory." The instruction given in that case, and to which respondent refers when she says it clearly enunciates her theory, was as follows:

"You are further instructed that, while a parol agreement by the owner of real property to pay

[1] 55 Atl. 281.

an agent a commission for the sale of real property is not valid because it rests in parol, nevertheless an agreement by one person to share his advantage on a sale of real estate with another person, though not in writing, is valid; and if you find that some advantage was to be derived to this defendant from the exchange, *and that the defendant was to share its advantage with plaintiff*, and that plaintiff consummated the exchange, and that defendant actually received some advantage from the exchange, the verdict should be for the plaintiff." (The italics are ours.)

There are at least two reasons why the doctrine enunciated in this instruction does not aid respondent here:

(1) There is no evidence that a consummation of the sale of the property of the Boss Gold Mining Company, as contemplated by the agreement between it and the persons whom respondent produced as purchasers, would have benefited appellant in any wise or to any extent, even though he did own a large block of the stock of that corporation. Respondent assumes that because $50,000 was paid to the corporation on the sale of its property, appellant, merely because he was a stockholder, necessarily was enriched by the payment in an amount equal to $17,000. It is true that the purchasers, after making the first payment, refused to go on with the sale, and that, under the terms of their contract with the mining company, they forfeited all of this first payment of $50,000. But respondent's rights are to be determined from the facts existing at the time when the oral agreement of employment was made, or at any rate from the facts existing at a time not later than the payment of the $50,000, at which time, if ever, she became entitled to the commission of $5,000. Her claim here is that there was an executed contract of sale for $150,000, binding upon both vendor and vendees. Had the contract of sale been fully performed, as contemplated when it was executed, the purchasers would have received the mining properties and the corporation the $150,000. But there is no evidence that the properties that the mining company contracted to sell were not worth all of the selling price—$150,000. Had the properties been worth that sum or more, as is quite possible, and had the sale gone through, appellant would not have been enriched merely because the corporation in which he happened to hold stock had $150,000 in its treasury in lieu of valuable mining properties the title to which it had conveyed.

(2) In the second place, and this is a decisive answer to respondent's contention, the contract of employment, as testified to by respondent and her witnesses, was an agreement to pay, as compensation or commission, a definite sum of money, namely, $15,000, or ten per cent. of the selling price. It was not an agreement to share any advantage that, as a result of an advantageous sale, might indirectly accrue to appellant as a stockholder in the vendor corporation.

In Sellers v. Solway Land Co., 31 Cal. App. 259, 160 Pac. 175, the court enumerates three classes of contracts wherein one who employs or receives the co-operation of another to sell real estate is liable though the contract be oral. The first class comprises cases where the agreement is purely and simply one of partnership; the second comprises cases where the agreement is to divide between the parties thereto, either equally or in a stated proportion, the commission or compensation to be received by one of them from the owner of the land to be sold; and the third class consists of cases in which one of the parties to the oral agreement, having a valid contract with the owner to sell the property, has agreed with the other party to pay him for his services either in procuring a buyer or in assisting toward that end. The instant case does not fall within any of these three classes. There was no partnership between plaintiff and defendant; there was no agreement between them to divide any commission or compensation to be received by defendant from the owner, or to divide or share any advantage of any kind that might accrue to defendant as a result of the sale; and defendant had no valid and enforceable contract with the owner.

Our conclusion is that respondent's oral agreement to find a purchaser is not within any of the recognized exceptions to the rule that "an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission" is "invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent."

Judgment reversed.

We concur: THOMAS, J.; WELLER, J.

47 Cal. App. 730

PEOPLE ex rel. BRADFORD, Dist. Atty., v. GODDARD. (Civ. 2136, Sac. 2810.)

(District Court of Appeal, Third District, California. May 25, 1920. Opinion of Supreme Court in Bank, Denying Hearing, July 26, 1920.)

1. Evidence ⟸87—Presumption of continuation of condition may be overcome by other evidence.

The presumption that a thing once proved to exist continues as long as is usual with things of that nature (Code Civ. Proc. § 1963, subd. 32) is a mere rule of evidence, and will stand as evidence, where applicable, only where it is not overcome by other evidence.

2. Evidence ⟸89—Presumption that immoral acts continued held overcome.

In an action under the Red Light Abatement Act, the presumption, under Code Civ. Proc. § 1963, subd. 32, that immoral acts testified to were continued until the time of the commencement of the action *held* overcome by evidence that the persons having committed such immoral acts were evicted prior to the commencement of the action, especially in view of subdivision 33 of such section, and the fact that the nuisance constituted a crime under Pen. Code, § 372.

3. Nuisance ⟸65—Disorderly house held not nuisance.

A disorderly house did not continue to be a nuisance under the Red Light Abatement Act, after the eviction of the immoral tenants, merely because the furniture used by such tenants was not removed.

4. Trial ⟸404(2)—Finding that building was nuisance a mere conclusion of law.

A finding, in an action under the Red Light Abatement Act, that the building "now is a nuisance" was a mere conclusion of law, and not a finding of fact.

5. Nuisance ⟸84—Conclusion that building was nuisance not supported by finding.

A conclusion of law, in an action under the Red Light Abatement Act, that the building "now is a nuisance," was not supported by a finding that the building was on and prior to a certain day used for purpose of lewdness, etc.

6. Trial ⟸398—Cannot be based on inconsistent finding.

Where there are inconsistent findings on a particular ultimate fact, a judgment or decree predicated upon such fact cannot be upheld.

7. Nuisance ⟸84—Want of good faith held not established.

In an action under the Red Light Abatement Act to abate a nuisance, a finding that the owner did not act in good faith in causing the place to be vacated and closed to the immoral purpose for which it had been previously used prior to the action *held* not sustained by the evidence.

8. Nuisance ⟸84—Degree of proof stated.

In an action under the Red Light Abatement Act to abate a nuisance, a finding of want of good faith in vacation of premises prior to the commencement of the action should be supported by evidence, clear, satisfactory, and convincing.

9. Nuisance ⟸84—Abatement by parties bars action.

Where a nuisance, to abate which an action under the Red Light Abatement Act has been commenced has been abated or suppressed by the parties charged with maintaining the nuisance, or otherwise, prior to the commencement of the action, and the abatement is not a mere sham, the action should be dismissed.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by the People of the State of California, on the relation of Hugh B. Bradford, District Attorney of Sacramento County, State of California, under the Red Light Abatement Act, to abate a nuisance, alleged to be maintained on premises owned by Fannie H. Goddard. From a judgment of conviction, the defendant appeals. Reversed.

R. Platnauer, of Sacramento, for appellant.

Hugh B. Bradford, Dist. Atty., of Sacramento, in pro. per.

HART, J. The action was brought under the Red Light Abatement Act (St. 1913, p. 20) to abate a nuisance alleged to have been maintained in premises in the city of Sacramento owned by the defendant. It was decreed that defendant be perpetually enjoined from conducting said premises "for the purpose of acts of lewdness, assignation, and prostitution" and the premises were ordered closed for the period of one year. Defendant appeals from the judgment.

The contention of appellant that the judgment is not sustained by the findings, and that the evidence is insufficient to sustain the findings, may be considered together.

The court found (finding 3):

"That on, and for a long time prior to, the 13th day of September, 1917, said real property herein described, together with the upper story of the building situate and erected thereon, was, during all of said time, used for the purpose of lewdness, assignation, and prostitution, and the said upper story of said building was and now is a nuisance under the laws of the state of California. * * *

"(3) That on or about the 17th day of September, 1917, said respondent was informed, through a newspaper, said premises were being used for immoral purposes, and she caused the persons so occupying the same to remove therefrom on September 25, 1917, but that the furniture in said premises still remained therein, and had been in said premises for a period of nearly two years prior to the commencement of this action. That said complaint in this action was filed on the 28th day of September, 1917. At the time of filing said complaint there was no tenant or other person whatsoever occupying said premises.

"(6) That the removal of the tenant from said premises was not made in good faith by said respondent for the purpose of permanently abating said nuisance."

The evidence may be briefly summarized as follows: Edwin E. Grant, executive officer of the State Law Enforcement and Protective League, an organization formed for the purpose of aiding officers in the enforcement of the law, particularly the laws against commercialized vice, and S. C. Barker, an employé of said league, testified that on the evening of September 13, 1917, they visited the premises in question; that they saw three girls there who were dressed in loose-fitting house dresses, and there were three or four drunken men lolling around; that beer was being served, and witnesses bought some; that they asked two or three different girls "what their price was, and in each case the girl answered $1.50 a trick"; that Barker said, "We are interested in staying all night; what is your price for all night?" to which one of the girls answered, "Ten dollars," and further said, "Don't come back before 1 o'clock, as we are busy right up until then." Witness Barker said that the word "trick" was "a polite term for sexual intercourse." Two police officers testified that the general reputation of the premises was that it was used as a house of prostitution.

A. E. Goddard, a son of the defendant, testified that he acted for his mother in connection with her property; that he read an article in the Sacramento Union of September 17, 1917, regarding an affidavit made by Grant to the effect that the property in question was used as a house of prostitution; that he immediately notified Mr. George Locke, the tenant of the property, to have the people vacate if it was used for purposes of that kind, and that he visited the district attorney and told him that their instructions to their agent had been under no circumstances to rent the premises as a house of prostitution; that the people occupying the premises immediately moved out; that he visited the premises that evening, and found only a Chinese caretaker there; that he saw Mr. Locke several times after that, and that Mr. Locke assured him the place was closed. George Locke testified that immediately after Mr. Goddard called upon him he told the tenants to vacate, and that they did vacate the premises before September 25, 1917. The witness owned the personal property on the premises, and testified that, on the date of the trial, November 15, 1917, it was still there. A witness who had charge of the renting of the premises testified that they were occupied from September 7th until September 25th, and that they became vacant on the latter date.

[1, 2] The people presented no testimony showing or tending to show, other than the inference which might be drawn from the testimony that acts of prostitution and lewdness were carried on in the building in question on and prior to the 13th day of September, 1917, that subsequent to the date just mentioned acts prohibited by the abatement act were committed in said building, or that the building was used subsequent to said date for purposes of assignation or prostitution, or that acts of lewdness were practiced therein. But it is the position of the people that, inasmuch as it would be practically impossible in most of such cases as the one here to show that acts of prostitution or of assignation or of lewdness were practiced in a building at the very instant that the complaint is filed, the presumption "that a thing once proved to exist continues as long as is usual with things of that nature (subdivision 32, § 1963, Code Civ. Proc.) applies, and that it was therefore not necessary to make affirmative or direct proof, or for the court to find that at the time of the commencement of the action the immoral acts mentioned were carried on in the building. See People v. Macy, 184 Pac. 1008. The presumption referred to is a mere rule of evidence, and will stand as evidence, where applicable, only where it is not overcome by other evidence, and, conceding that it applies in such a case as this, or does not run counter to the presumption declared in subdivision 33 of section 1963, Code of Civil Procedure, to wit, "That the law has been obeyed," the answer to the contention is that there was introduced by the appellant testimony which appears to have been, in the judgment of the court, of sufficient probative power to overcome the force or effect of the presumption relied upon by the people. The uncontradicted testimony of the agent and the original lessee of the building is that they, having read on September 17, 1917, in the Sacramento Union, a morning newspaper, of an affidavit filed with the district attorney of Sacramento county by the executive officer of the State Law Enforcement and Protective League, charging that the premises in question were being used for the immoral purposes prohibited by the Abatement Act, immediately proceeded to take steps looking to the closing of the place, and that, on the 25th day of September, 1917, they succeeded in causing, and did cause, the inmates of the building to be evicted and closed the place, and that from and after that date down to the date of the trial of this action, which was commenced on the 15th day of November, 1917, the building or the upper portion thereof complained of by the said executive officer had not been occupied or used for any purpose, except for the storing of the furniture used by the parties charged with conducting the premises in contravention of the mandates of the statute. The trial court evidently believed the testimony of the witnesses, Goddard and Locke, the

agent of the owner and the original lessee, respectively, of the building, for it found that the owner of the building, having been informed on the 17th day of September, 1917, that the upper story was being used for immoral purposes, caused the persons so occupying the same to remove therefrom on September 25, 1917, three days before the complaint invoking the injunctive power of the court against the building as a nuisance was filed, and that "at the time of the filing of said complaint there was no tenant or other person whatever occupying said premises." And it is upon this finding that we base the above declaration that the presumption "that a thing once found to exist continues as long as is usual with things of that nature," if it applies at all to the fact that a nuisance such as the one complained of here, which is itself a crime (Pen. Code, § 372), has been proved to have existed or to have been maintained at some time in the past, was dispelled or overcome by "other evidence." Code Civ. Proc. § 1963.

Of course, we are not to be understood as holding that in all cases brought under the Abatement Act it is necessary, to sustain the complaint, that immoral acts which constitute the nuisance under said statute must be directly or affirmatively shown to have been committed in the place down to the very time of the filing of the complaint. We simply hold here that there is a positive finding that, before the filing of the complaint, the place had been closed to immoral practices.

[3] We are now brought to the consideration of the question whether the findings support the decree. As we have seen, the action was commenced by the filing of a complaint on the 28th day of September, 1917, and finding No. 3 is the only finding which contains anything respecting the commission of acts of lewdness, etc., in and upon the premises. Said finding is:

"That on, and for a long time prior, to the 13th day of September, 1917, said real property herein described, together with the upper story of the building situate and erected thereon, was, during all of said time, used for the purpose of lewdness, assignation and prostitution, and the said upper story of said building was and now is a nuisance under the laws of the state of California."

On the other hand, as has been shown, the court found, in finding No. 5, that having been informed on the 17th day of September, 1917, that said premises were being used for immoral purposes, the owner caused the persons so occupying and using the same to remove therefrom on September 25, 1917, etc. It is very clear that the finding that "the said upper story of said building was and now is a nuisance under the laws of the state of California," taken alone or by itself, is a conclusion of law, and does not involve a finding of fact; but, if it were deemed necessary to concede that, in the connection in which it is employed, it might justly be held to constitute a finding of an ultimate fact, it is nevertheless plainly manifest that it is wholly inconsistent with finding No. 5. It is obvious that if, as the court found, the owner of the building, on receiving information that the upper story thereof was being used for immoral purposes, caused the persons so using it to be removed therefrom before the filing of the complaint herein, the nuisance complained of was abated by the act of the owner herself before legal proceedings against her and the building under the Abatement Act were instituted. This is at least necessarily, and, indeed, the only rational inference following from said finding. That portion of said finding that the furniture in said building at and during the time the nuisance was being maintained therein was not removed from said premises at the time those using them for immoral purposes were compelled by the owner to vacate the building possesses no significance. Neither the furniture nor the building itself constituted the nuisance complained of. It was the manner in which and the purpose for which both were used that constituted the nuisance, and if those using the furniture and the building for immoral purposes were evicted therefrom, and the upper story, where the nuisance was being maintained, was closed to those persons and all other persons desiring or intending to use them for the same purposes, how could the nuisance be further maintained? The answer to this question is too obvious to require further consideration of the proposition.

[4, 5] But we are still of the opinion that the alleged finding that the building "now is a nuisance" is a conclusion of law, notwithstanding the connection in which it is used. In the initial portion of the finding (and, as stated, said finding is the only one of the several findings which finds that acts of lewdness, etc., had been practiced on and in the premises), it is found that the upper story of the building was not down to the filing of the complaint, but "on, and for a long time prior to, the 13th day of September, 1917, used for the purpose of lewdness, assignation, and prostitution," etc. This finding does not support the conclusion or the finding, if such it might properly be called, that the place "now is a nuisance under the laws of the state of California."

[6] It follows that, in any view of the findings, the decree cannot stand. Where there are inconsistent findings upon a particular ultimate fact—that is, where the findings are irreconcilably inconsistent, as would be true here as between finding No. 5 and that portion of finding No. 3 to the effect that the building is now a nuisance, assuming that the latter is a finding of fact and not a conclusion of law—a judgment or decree, so predicated, cannot be upheld.

It cannot in such case be determined upon which of the findings it was intended that the judgment should rest. The judgment may safely rest on one or the other, taken alone, if it be consistent with the finding, but it is very clear that it cannot rest on two findings in irreconcilable opposition to each other as to the same fact. And with the conclusion, stated as a finding, that the building "now is a nuisance," eliminated as a finding of fact, there is left no finding upon which the decree can rest.

It is contended, however, that the finding that the act of the owner of the building in evicting therefrom the parties who were using it for immoral purposes was not done "in good faith for the purpose of permanently abating said nuisance" destroyed whatever force there may be in the finding, which we hold establishes or finds the fact that the nuisance had been abated by the owner prior to the filing of the complaint, that the females who were conducting the premises for immoral purposes were evicted therefrom as indicated in said finding. This contention would no doubt possess much force if there was any evidence to support the finding of want of good faith on the part of the owner in causing the female inmates of the building to vacate it. As seen, the only testimony presented by the people is to the effect that the building, or the upper story thereof, was used for immoral purposes on and prior to the 13th day of September, 1917. The testimony introduced by the defense (and it is not contradicted, so far as the face of the record discloses) is that the son and agent of the owner, upon learning of the complaint made against the building, immediately went to the office of the district attorney, and stated to that officer that, "Our instructions to our agent had been under no circumstances to rent it for a house of that kind; that I told him the people moved out immediately—we had ordered to have it vacated;" that he went to the premises after the order to vacate was made, and that the women had all left the house and that there was no one remaining in the upper story but a caretaker in the person of a male Chinese. He further testified that he met a police officer, whose "beat" embraced the district in which the building is situated, and said to the officer "that if there is anything like that going on, we had given instructions that the house be cleaned out, be closed, just as soon as they could get their things out of there. As I understand, Mr. Locke said it had been closed, because I went to see Mr. Locke several times after that, and he assured me the place was closed." The witness, Locke, for the defense, corroborated Goddard as to the instructions given to him by the latter that the building should not be used for immoral purposes and as to the eviction of the female inmates and the closing of the place as above indicated.

[7] It would thus seem very clear that the owner and her agent acted in perfect good faith in causing the place to be vacated and closed to the immoral purposes for which it had previously been used. This proposition becomes the more clearly apparent from the fact that the people introduced no testimony tending to show that the closing up of the place by the owner was not done in good faith—that is, that there were any act or acts on the part of the owner or the agent or lessee of the building to permit it to be reopened for use for immoral purposes. The case of State v. Jerome, 80 Wash. 261, 141 Pac. 753, cited by the district attorney on the question of good faith, is not in point here. In that case the female who had conducted a house of prostitution on the premises there in question and another female prostitute were still occupying the premises, not owned, but under lease, by one of them, when the action to suppress the nuisance was commenced, although there was no proof of actual acts of prostitution having been practiced in the house from the 29th day of June, 1913, when both women were arrested for practicing acts of prostitution, and the 30th day of June, 1913, when the complaint that the house was being maintained as a nuisance by the women was filed. Quite clearly, the fact that the women themselves remained in the house after it was claimed that they had ceased carrying on the business of prostitution therein constituted a circumstance from which the court could well draw the inference that immoral acts were still being committed in the place subsequent to the time that it was claimed that the nuisance was abated by the female inmates themselves. And the court, in that case, with apparent justness, held that, although some of the furniture had been removed from the building and the conditions therein generally changed to some extent, it was for the trial court to determine upon the whole evidence whether the house in good faith had been closed as one of prostitution, and refused to disturb the decree authorizing the sale of the furniture and enjoining the further use of the premises for any purpose for the period of six months. It is hardly necessary to repeat that in this case the women were all driven out of the place by the owner of the building through her agents before the complaint was filed, although, as seen, the furniture, which was not the property of the owner of the building, but belonged to Locke, the original lessee, had not then been removed therefrom.

[8] The decree herein enjoins the use of the building for any purpose for the period of one year, and it seems to us that in a case of this character, where, as here, the ques-

tion whether so severe and drastic a penalty should be visited upon the owner of real property turns upon the proposition of good faith—that is, whether the owner himself has in good faith abated the nuisance, with the intention that it shall remain abated for all time, before a complaint looking to the suppression of the nuisance theretofore maintained in and on the premises has been filed—a finding of want of good faith in such case should be supported by evidence clear, satisfactory, and convincing. The testimony presented by the people does not, in our opinion, make out such a case, while that of the defendant, as we have before said, appears to disclose perfect good faith in closing the place as it had been immorally maintained and an intention of permanently closing it as a house of assignation and prostitution or in which lewd conduct is practiced. The uncontradicted testimony of the owner's son, who was acting as the agent of the building, that he told a police patrolman of the particular district in the city in which the house is located that he desired that a stop should be put to any attempt to use the premises for immoral purposes is very strong evidence of the good faith of the owner in causing the building to be vacated by the women who had previously used it for purposes of prostitution and assignation, etc.

[9] It is, of course, well settled—indeed, it is but the statement of a rule necessarily following from the very logic of such a situation—that, where a nuisance to abate which an action has been commenced has been abated or suppressed by the parties themselves charged with maintaining the nuisance or otherwise prior to the commencement of the action the further prosecution of the action cannot be maintained, and the action should be dismissed, for the very obvious reason that there is then nothing existing against or upon which the injunctive process of the court can or will operate. Joyce on Nuisances, § 486, p. 704; 2 Wood on Nuisances (3d Ed.) § 864; McCarthy v. Gaston Ridge Mill Co., 144 Cal. 542, 547, 78 Pac. 7; Gilbert v. Peck, 162 Cal. 54, 55, 121 Pac. 315, Ann. Cas. 1913C, 1349. And this rule, of course, applies as well to cases arising under the "Red Light Abatement" Act as in other cases of nuisances. See People v. Dillman, 37 Cal. App. 415, 174 Pac. 951; People v. Burch, 189 Pac. 716; State v. Jerome, 80 Wash. 261, 141 Pac. 753.

We conclude that the judgment should be reversed, but do not feel justified in ordering, as the counsel for the appellant requests us to do, the court below to enter judgment in favor of the appellant upon the findings as they appear in this record. Another trial might bring forth other and additional proof upon the question whether the nuisance was in good faith abated by the owner of the building, which would support a finding of want of good faith.

The judgment is reversed.

We concur: NICOL, Presiding Judge pro tem.; BURNETT, J.

Opinion of Supreme Court in Bank, Denying Hearing.

PER CURIAM. A majority of the Justices not having assented to the granting of a hearing of the above-entitled cause in this court after decision by the District Court of Appeal of the Third Appellate District, it is deemed proper to say that the view of those opposed to the granting of such petition is that the District Court of Appeal opinion recognizes that a mere sham abatement of the nuisance prior to action would not be a defense, and that in so far as this feature of the case is concerned, the reversal was for want of evidence to sustain the finding of lack of good faith, and that upon the face of the opinion no error appears in this regard.

The application for a hearing stands denied.

LAWLOR, J., and OLNEY, J., voted for rehearing.

48 Cal. App. 289

ANDERSON v. WILLSON. (Civ. 2683.)

(District Court of Appeal, Second District, Division 2, California. June 22, 1920. Hearing Denied by Supreme Court Aug. 19, 1920.)

1. Vendor and purchaser ⇐231(1)—Record is constructive notice to subsequent purchasers.

Every conveyance of real property, acknowledged or approved, and certified and recorded as provided by law, is constructive notice of the contents thereof to the subsequent purchasers (Civ. Code, § 1213), and such presumption of notice is conclusive and incontrovertible.

2. Vendor and purchaser ⇐231(1) — Registration act protects owner of legal title.

The primary purpose of registration acts is to protect the true owner of the legal title to land, who may not be in possession against subsequent purchasers, by conclusively imputing to the latter notice of all previously recorded conveyances, so that one subsequently purchasing from vendor is not an innocent purchaser.

3. Vendor and purchaser ⇐144(1)—Vendor need not be owner of all the property at making of agreement.

Where defendant vendor had sold parts of lots to a canal company by a conveyance duly recorded, he could contract to sell all of such lots to the plaintiff, since it was not necessary that vendor should be the absolute owner of the property when agreeing to sell it.

4. Vendor and purchaser ⊜144(1)—Vendor need have no inchoate or other title when contracting to sell land.

A vendor need not have even an inchoate title, but may sell land to which he has no title, and the agreement will be valid and enforceable if when the time for performance arrives he is able to furnish the title he contracted to convey, and the contract will not be held fraudulent or void because vendor did not have the title when agreeing to pass it.

5. Specific performance ⊜10(1)—May be enforced in part, or purchaser may waive right to rescind for fraud.

Where vendor fraudulently represents himself as owner of more land than he has title to, his purchaser may waive the fraud and his right to rescind and sue for specific performance; and, if the court finds itself unable to enforce conveyance of all the agreed land, it will compel vendor to convey such title as he has, on being paid therefor at the rate agreed.

6. Vendor and purchaser ⊜68—Meaning of words "right of way for a canal" depends upon intent and circumstances.

Whether the words "right of way for a canal" used in contract mean a mere easement in the land for canal use, or the strip of land over which the canal runs, is purely a question of intention, and the sense in which the words are employed in the instrument by the contracting parties will depend upon the contract language, aided by reference to the attendant circumstances.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Right of Way.]

7. Vendor and purchaser ⊜176—Where represented easement was in fact lack of title, purchaser was entitled to rebate "on and over."

The representation in a contract of sale of land that the lots were subject to a right of way of a canal company "on and over" a strip of land four rods wide was equivalent to a representation that the lots were subject to an easement only in such strip; and, where plaintiff purchaser believed and relied upon such representation, neither the vendor who made such representation nor his grantee can be heard to say that plaintiff's understanding of the words "rights of way" was not that intended by both parties, so that, where the canal company in fact owned the fee of, and not merely an easement in, the four-rod strip, plaintiff was entitled to have deducted from the purchase price he was to pay an amount equal to the value of the part of the land to which defendant could not give title.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action for specific performance by John P. Clark against A. D. Willson, trustee, in which plaintiff died while appeal was pending, and Arthur Anderson was substituted as his administrator. Judgment for plaintiff, and defendant appeals. Affirmed.

Bradley & Bradley, of Visalia, for appellant.

D. E. Perkins, of Visalia, and Frank Kauke, of Fresno, for respondent.

FINLAYSON, P. J. Defendant, on the judgment roll alone, appeals from an adverse judgment. While this appeal was pending, the original plaintiff and respondent, John P. Clark, died, and the administrator of his estate, Arthur Anderson, was substituted in the suit. Notwithstanding this substitution, we shall, for convenience, refer to the original plaintiff, Clark, as the plaintiff in the action and the respondent on this appeal.

From the findings it appears that on March 5, 1908, the plaintiff, John P. Clark, and Thomas H. Thompson, defendant's grantor, entered into a written contract whereby Thompson, as vendor, agreed to sell and convey, and plaintiff, as vendee, agreed to purchase, for $4,800, payable in installments, four lots in Tulare county. The property that Thompson thus agreed to convey to plaintiff is described in their contract as follows:

"Lots one, three, six and seven of Riverside Colony, as shown and delineated on the map of said colony on file in the office of the county recorder for the said county of Tulare, save and except some rights of way granted to the Consolidated Canal Company."

Prior to this contract, namely, on October 28, 1905, the California Savings & Loan Society, the then owner of the lots, had deeded to the Consolidated Canal Company a strip of land, four rods wide, on and along the north and east sides of lot 3, on and along the east side of lot 6, and on and along the south side of lot 7. So that, when plaintiff entered into his written agreement with Thompson to purchase the lots, the latter did not own the title, in fee, to every part of each of the four lots, free of all incumbrances, save a mere right of way or easement in favor of the Consolidated Canal Company for a canal, but the canal company owned the fee to all of a strip of land, four rods wide, along the north and east sides of lot 3, along the east side of lot 6, and along the south side of lot 7. The deed to the canal company was duly recorded on November 6, 1905, in the office of the county recorder.

At the time when plaintiff and Thompson entered into their written agreement, the latter represented to plaintiff that he then owned all of the four lots, and that he held the fee-simple title to the whole thereof, "free and clear of all incumbrances, save and except a right of way for a canal theretofore granted to the Consolidated Canal Company, a corporation, to wit, a right of way on and over a strip of land four rods wide on and along

the north and east sides of lot 3, on and along the east side of lot 6, and on and along the south side of lot 7." Plaintiff believed this representation, and relied upon it in making the contract to purchase the lots, and had no actual notice that there had been conveyed to the canal company the fee to a strip of land, four rods wide, on and along the sides of the lots.

Under the terms of the agreement between plaintiff and Thompson, the last installment of the purchase price was payable March 5, 1911, when, if all payments were made as they fell due, plaintiff, under the terms of his contract, would be entitled to a deed to the land for which he had bargained. Plaintiff, prior to March 5, 1911, promptly paid the several installments that had previously accrued, and, on March 5, 1911, offered to make payment of the final installment if Thompson, his vendor, would convey to him title to the lots, incumbered only with a right of way or easement for a canal or canals. This Thompson was unable to do, for the canal company owned the fee to a part of the lots, namely, the fee to a strip four rods wide on and along the sides of the lots, instead of a mere easement or right of way on and over the lots, as represented to plaintiff when he bargained for the property. Though unable to comply with plaintiff's offer, Thompson, nevertheless, demanded that plaintiff pay him the full amount of the balance of the purchase price as a condition precedent to a conveyance of the lots with the strip four rods wide excepted therefrom. This plaintiff declined to do; instead, he offered to pay Thompson the balance of the purchase price, less a certain amount found by the court to be the value of the title that Thompson was unable to convey by reason of the previous conveyance of the four-rod strip to the Consolidated Canal Company. Thompson thereafter conveyed the property to defendant, who took with knowledge of the contract previously made by his grantor with plaintiff.

Plaintiff brought this action to compel specific performance of Thompson's contract to convey to him the four lots, subject only to a right of way for a canal, on payment of the balance of the purchase price, or, in the event that defendant could not give all the title which plaintiff claimed he had bargained for in his contract with defendant's grantor, that defendant be ordered to convey to plaintiff title to such portion of the land as he owned, and that there be deducted from the purchase price an amount equal to the value of the part of the land to which defendant could not give title. The court found that defendant could not give title to the strip four rods wide, and that, at the rate agreed upon by plaintiff and Thompson in their contract, the amount already paid by plaintiff on the purchase price exceeded the value of the land to which defendant could give title. The decree adjudges that, without any further payment by plaintiff, defendant forthwith convey to the former title to the land, excepting that portion, four rods wide, running on and along the sides of the lots, previously conveyed to the Consolidated Canal Company. From this judgment defendant has appealed, contending that the constructive notice of the deed to the canal company, afforded by its registration in the county recorder's office, raises a conclusive presumption that, at the time when he contracted with Thompson for the purchase of the lots, plaintiff had notice of the prior deed to the canal company, that therefore plaintiff is bound thereby, and that consequently payment of the full amount of the agreed purchase price is a condition precedent to any right to a conveyance.

[1] Every conveyance of real property, acknowledged or approved and certified and recorded as provided by law, is "constructive notice of the contents thereof to subsequent purchasers." Civ. Code, § 1213. Without doubt, the presumption of notice thus raised by this Code provision is conclusive and incontrovertible. 39 Cyc. 1719, 1720. Says the court in Fair v. Stevenot, 29 Cal. 488:

> "A recorded deed is an instance of constructive notice, and upon proof being made that it has been duly recorded, the presumption of notice to the subsequent purchaser arises, and the presumption is a conclusive presumption of law, and no opposing evidence is admissible."

Plaintiff, therefore, could not have taken a conveyance of the lots from Thompson, or from defendant as Thompson's successor in interest, and have claimed that he was a bona fide purchaser without notice, and that, therefore, he, and not the canal company, owned the strip four rods wide on and along the sides of the lots.

[2] The primary purpose of registration acts is to protect the true owner of the legal title, who may not be in possession, against the claims of subsequent purchasers, by conclusively imputing to the latter notice of all previously recorded conveyances. And, of course, the recording of the deed to the canal company would secure its title from defeat by any subsequent sale of the land to plaintiff as an alleged innocent purchaser.

[3] But, though plaintiff could not defeat the title of the canal company under any claim that he was an innocent purchaser without notice of the prior deed to that company, he, nevertheless, could contract with Thompson for title to all the land contained within the boundaries of the four lots, and the latter could contract to give title thereto. It is not necessary that a vendor should be the absolute owner of the property at the time he enters into the agreement of sale. One in good faith may sell land which

he does not own, and yet, when the time for performance arrives, be able to furnish a good title.

[4, 5] It is the settled rule in this state that the vendor need not have even an inchoate title at the time of the contract; that he may sell land to which he has no title, and the contract will be valid and enforceable if, when the time for performance arrives, he is able to furnish the title he contracted to convey. His contract will not be held fraudulent or void by virtue of the mere fact that, when he made it, he did not have the title that he agreed to pass to his vendee. Hanson v. Fox, 155 Cal. 106, 99 Pac. 489, 20 L. R. A. (N. S.) 338, 132 Am. St. Rep. 72; Backman v. Park, 157 Cal. 607, 108 Pac. 686, 137 Am. St. Rep. 153; Brimmer v. Salisbury, 167 Cal. 522, 530, 140 Pac. 30. And even where the vendor fraudulently represents himself to be the owner of more land than he has title to, his vendee, nevertheless, may waive the fraud and his right to rescind the contract, and may sue to enforce specific performance; and, if in enforcing the contract the court finds itself unable to enforce conveyance of all the land the vendor agreed to convey, it will compel compliance with the agreement, so far as possible, by compelling the vendor to convey such title as he has on being paid therefor at the rate agreed upon between the contracting parties; the compensation allowed for the deficiency in quantity being at the rate of the average price agreed to be paid for the entire tract. Quarg v. Scher, 136 Cal. 411, 69 Pac. 96; Butte Creek, etc., Co. v. Olney, 173 Cal. 697, 707, 161 Pac. 260. This is precisely what was done by the trial court here.

[6] As we view the case, the real question here is one respecting the intention of the contracting parties, Thompson and Clark. What did these two intend when, in their written agreement, they excepted from the conveyance to be made by Thompson "some rights of way granted to the Consolidated Canal Company"? What did they mean by these words, "some rights of way"? Technically, a right of way is an easement; and a right of way for a canal is, properly speaking, nothing more than a mere easement in the land of another. Civ. Code, § 801, subd. 4; Blake v. Boye, 38 Colo. 55, 88 Pac. 470, 8 L. R. A. (N. S.) 418, 422; 34 Cyc. 1767. As generally used, however, the term "right of way," when applied to railroads, canals, and similar instrumentalities, has no exact, well-defined meaning, but often is susceptible of a twofold signification. It is used indiscriminately to describe, not only the easement, or special and limited right to use another person's land, but as well the strip of land itself that is occupied for such use. This, at any rate, is the case when the term is used with respect to railroads. Kansas City, etc., R. Co. v. Littler, 70 Kan. 556, 79 Pac. 114; Central Trust Co. v. Wabash, etc., Ry. Co. (C. C.) 29 Fed. 555. And we see no reason why it should not be equally true when the words are used with respect to a canal. So that, whether, in any particular case, the words "right of way for a canal" mean a mere easement in the land of another for the use of a canal or the strip of land over which the canal runs, is purely a question of intention; and the sense in which the words are employed by the contracting parties in any given case will depend upon their intention as disclosed by the language of their contract, aided, when proper, by reference to the attendant circumstances.

The question, therefore, that confronted the court below was this: In what sense did plaintiff and his vendor, Thompson, use the words "save and except some rights of way granted to the Consolidated Canal Company"? Did they intend thereby to except from the grant to be made by the vendor a mere easement for the use of the canals of the Consolidated Canal Company? Or, did they intend to except a strip of land, occupied, or to be occupied by the canals of that company? It is no answer to this question to say that plaintiff was conclusively charged with constructive notice of the prior recorded deed to the canal company. Intention is a state or condition of the mind. And while a concept, or state of mind, may depend upon or be influenced by facts of which the person has actual knowledge—facts of which he actually is or has been conscious—it cannot be engendered or in any wise conditioned or influenced by facts of which he always has been ignorant, even though they be facts notice of which the law imputes to him constructively for the purpose of protecting the title of the real owner against the claims of subsequent purchasers. In arriving at the intention of the contracting parties, we can derive no aid from the fact that section 1213 of the Civil Code raises a conclusive presumption of constructive notice. Unless the parties to a contract have actual notice of a fact, knowledge of which may be useful in arriving at a conclusion respecting their intention or how they understood the language of their contract, no amount of merely constructive notice will aid in solving the question as to their intention or their understanding of their agreement. The sense in which the parties to this contract used the words "some rights of way" is to be determined, therefore, from what they actually knew, not from what the law says they must be deemed to have known, in order that the title of a former grantee, the Consolidated Canal Company, may be secured against defeat by the subsequent sale to the plaintiff

here. As against the canal company, plaintiff cannot successfully claim that he is a bona fide purchaser for value and without notice. But there is nothing in the registry provisions of the Civil Code that prevents him from saying how he understood the words "some rights of way" were employed in his contract, or that prevents him from claiming that they were used to describe mere easements, or rights of way in the true and technical sense of the term.

[7] There is no finding that plaintiff actually knew that the "rights of way" of the canal company consisted of a four-rod strip of land that had been conveyed to it in fee in 1905 by a duly recorded deed. On the contrary, the court found that, at the time when plaintiff entered into his contract with Thompson to purchase the lots, his vendor represented to him that he owned the whole of each lot, and "that he held the fee-simple title thereto, free and clear of all incumbrances, save and except a right of way for a canal theretofore granted to the Consolidated Canal Company, a corporation, to wit, a right of way on and over a strip of land four rods wide on and along" the sides of the lots. The representation that the lots were subject to a right of way "on and over" a strip of land four rods wide was equivalent to a representation that the lots were subject to an easement only—an easement in the strip of land four rods wide along the sides of the lots. The court found that plaintiff believed and relied upon this representation. It is clear, therefore, that the parties to the contract, or, at any rate, one of them, the plaintiff here, understood the words of the contract to mean that there was excepted from the property to be sold an easement only, to wit, a certain right of way "on and over" a strip of land four rods wide. Neither the vendor, whose representations induced plaintiff's understanding of the contract, nor his grantee, the defendant here, can now be heard to say that plaintiff's understanding of the words "rights of way" was not the meaning intended by both parties to the agreement.

It is of no consequence that defendant finds himself unable to give all the title that plaintiff understood he had bargained for and purchased. As already shown, a person who has agreed to convey more title than he has, or can acquire, may be compelled to convey to his vendee such title as he possesses, upon being paid therefor at the rate agreed to be paid for all the property bargained for by the vendee. That is precisely what this judgment does, and it is, we think, supported by the facts found by the trial court.

Judgment affirmed.

We concur: THOMAS, J.; WELLER, J.

48 Cal. App. 336

FREDERICK et al. v. SAN FRANCISCO-OAKLAND TERMINAL RYS. et al.

(Civ. 3315.)

(District Court of Appeal, First District, Division 1, California. June 28, 1920. Hearing Denied by Supreme Court Aug. 26, 1920.)

1. Appeal and error ⇐1010(1)—Findings supported by substantial proof conclusive.

If there is any substantial proof in the record to support the findings and decision of the lower court, the Court of Appeals is bound by such findings, and the judgment will not be disturbed.

2. Carriers ⇐318(4)—In action for injuries from overturning car evidence held to show no negligence.

In a passenger's action for injuries sustained from the overturning of street car in taking a curve after the air brakes were injured in collision with an automobile, evidence *held* to justify findings that there was no negligence in the operation of the car, as charged in the complaint.

3. Appeal and error ⇐1008(1) — Motorman's negligence in emergency held for trial court sitting without a jury.

In a passenger's personal injury action, the question whether or not defendant street railway's motorman was negligent in attempting one of several courses open to him in an emergency is a question for the trial court, when sitting without a jury.

4. Carriers ⇐322 — Findings as to freedom from negligence held sufficient.

In a passenger's personal injury action against a street railway company, where the court sitting without a jury found that defendant was free from all the acts of negligence charged against it in the complaint, outside agencies contributing to the cause of accident were immaterial and need not be found, where the findings made adequately cover the issues pleaded.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action by Tillie Frederick and husband against the San Francisco-Oakland Terminal Railways and others, which abated as to the defendant motorman, A. Stewart, on account of his death. Judgment for defendants, and plaintiffs appeal. Affirmed.

Ostrander, Clark & Carey, of Oakland, for appellants.

W. H. Smith, of Oakland, and A. L. Whittle, of San Francisco (Chapman & Trefethen, of Oakland, of counsel), for respondents.

KNIGHT, Judge pro tem. This is an appeal by plaintiffs from a judgment rendered in favor of the defendant San Francisco-Oakland Terminal Railways, a corporation, in an action brought by plaintiff Tillie Frederick and her husband, Frank Frederick, to recover

damages for personal injuries claimed to have been sustained by Mrs. Frederick through the negligence of the defendants while she was riding as a passenger on the street car of said defendant corporation in the city of Oakland. The action was tried by the court sitting without a jury. The street car on which Mrs. Frederick was injured was at the time in charge of the defendant A. H. Stewart, as motorman, and of William J. Morehead, as conductor. The action abated as to the defendant Stewart on account of his death, which occurred prior to trial.

The accident occurred on the evening of October 22, 1916, at about the hour of 9:40. The street car at the time was traveling eastwardly along East Sixteenth street and had just crossed the intersection of Twelfth avenue, which runs at right angles with East Sixteenth street, when it was struck by an automobile which had approached at a rapid rate of speed up Twelfth avenue, and, being unable to make the crossing at East Sixteenth street without colliding with the street car, had cut across the corner and attempted to make the turn around and down East Sixteenth street and run parallel with the car, but was unable to do so, and crashed into the side of the street car, breaking the air pipe line controlling the air brakes. There is a descent in the grade on East Sixteenth street eastwardly from Twelfth avenue, and, finding that the air brakes were out of commission, the motorman and conductor applied the hand brakes; but the speed of the car was not sufficiently checked to prevent it from overturning when it reached a sharp curve at the corner of East Sixteenth street and Fourteenth avenue. The plaintiff Tillie Frederick was injured when the car overturned.

Many witnesses were sworn on behalf of appellants, but all of them except one gave evidence concerning the character and extent of the personal injuries sustained by Mrs. Frederick. In view of the fact that the lower court held the respondent free from all negligence, those injuries, however serious, become unimportant on this appeal. The only witness for appellants whose testimony related to the cause of the accident was Mrs. Frederick herself.

In presenting their case to the lower court appellants relied upon the doctrine of res ipsa loquitur and the presumption of negligence carried with it. Bonneau v. North Shore R. R. Co., 152 Cal. 406, 93 Pac. 106, 125 Am. St. Rep. 68; Sellars v. Southern Pacific Co., 33 Cal. App. 701, 166 Pac. 599; Patterson v. San Francisco & San Mateo Railroad Co., 147 Cal. 178, 81 Pac. 531. And it is contended by appellants on this appeal that the evidence offered by respondent was not only insufficient to rebut the presumption of negligence but, on the contrary, showed that respondent was negligent in the following particulars: That the motorman failed to slacken the speed of the car when he saw the approach of the automobile up Twelfth avenue; that he failed to apply the hand brakes immediately upon learning that the air brakes were rendered useless; and that he failed to reverse the motor in order to check the speed of the car.

[1] There are no questions of law presented so far as the evidence or its admissibility is concerned. The appeal in the main merely presents the question of the sufficiency of the evidence. According to the well-settled rule, if there is any substantial proof in the record to support the findings and decision of the lower court, we are bound by such findings, and its judgment will not be disturbed. Smith v. Gaylord, 179 Cal. 106, 175 Pac. 449; Newman v. City of Alhambra, 179 Cal. 42, 175 Pac. 414; Lutz v. Merchants' National Bank, 179 Cal. 401, 177 Pac. 158; Union Colonization Co. v. Madera Canal & Irr. Co., 179 Cal. 774, 178 Pac. 957; Holroyd v. Gray Taxi Co., 179 Pac. 709; Covel v. Price, 179 Pac. 540; Badger v. San Francisco, 182 Pac. 978.

[2] After a careful examination of the record before us, we are of the opinion that ample proof exists to support the decision of the lower court. All of the testimony offered by respondent to rebut the presumption of negligence is in substantial accord, and we find nothing in it or in the entire record, which indicates that the conclusions reached by the lower court were not justified by the evidence. The street car was in charge of an experienced crew, who were thoroughly familiar with this particular run. The intersection of Twelfth avenue with East Sixteenth street marks the top of a grade on East Sixteenth street, after passing which there is a descent until Fourteenth avenue is reached. The car tracks there take a sharp curve into Fourteenth avenue. As the car crossed Twelfth avenue it was traveling at the rate of speed of from 17 to 19 miles an hour. Stewart the motorman, testified in his deposition that as he crossed Twelfth avenue he threw off the electric current and applied the air brakes in the ordinary and customary manner, preparatory to making a stop at Thirteenth avenue. He saw the approaching automobile as he passed Twelfth avenue, but, believing that it would clear the rear end of his car made no special effort to stop more than he had already done. The application of the air brakes reduced the speed of the car to about 15 miles an hour. As he crossed the east property line of Twelfth avenue he noticed the automobile cutting across the curb and making the turn to go down East Sixteenth street, parallel with the street car. The front end of the street car had proceeded no farther than about 27 feet east of the

east property line of Twelfth avenue when the automobile struck the side of the car. He immediately applied a greater force of air to the brakes and continued to manipulate the air brake controller in an effort to stop the car, until he reached the intersection of Thirteenth avenue, when he realized that the air brakes were of no avail. The speed of the car had increased in the meantime to about 24 or 25 miles an hour. Just as he crossed Thirteenth avenue he applied the hand brakes and, with the assistance of a passenger named Robbins, who had been standing near him, the hand brakes were applied to the limit. The conductor also applied the hand brakes from the rear platform, and the speed of the car was slackened to about 22 miles an hour, but not enough to prevent it from turning over on its side when it took the curve at Fourteenth avenue. The testimony of the motorman was fully corroborated by the witness C. E. Robbins, a passenger, who as above stated, had been standing close to the motorman and who assisted in applying the hand brakes. The conductor, Morehead, testified that he saw the rapid approach of the automobile as it came up Twelfth avenue, and that as it turned to go down East Sixteenth street he realized that a collision was inevitable and that he "gave three bells to the motorman, which is the emergency stop"; that the automobile struck the car and he waited for a return signal from the motorman, but, receiving none, he immediately jumped to apply the hand brakes; that as he was pulling the lever of the hand brakes he observed a woman passenger starting to jump off the platform, and he left the brakes temporarily to restrain the woman from jumping; that he then again applied the hand brakes with as much force as he could; and that he was thus applying the hand brakes when the car overturned.

W. P. Jackson, the master mechanic of the respondent company, was also a witness. He testified that on the night of the accident, after it had occurred, he examined the hand brakes and found nothing wrong with them, and on the next morning examined the air brake system and found that it was in perfect order, except that the "nipple in the main reservoir line" was cracked in two places which he explained was not an old break, and that it was also dented on the bottom side. He also explained that enough air would have been left in the air brake cylinder and air pipe line after the automobile ran into the car to give some indication of air brake control, and that the motorman would not realize at once that the air pipe line was broken, because his air brake equipment would for a few seconds function in part. He further testified that in putting on the air brakes the brake shoes will lock and the car slide, and that the practice to test this is to release and reset the brake shoes until a reduction in speed indicates that the brake shoes are taking hold properly; that the release is always accompanied by a hissing of escaping air; and that there was enough air left in the air pipe line and cylinder to give the motorman the impression that the air brake would take hold properly and stop the car.

On the point that the motorman should have reversed the motor appellants rely upon the printed rules of the company, wherein it is stated that under certain emergency conditions the motor should be reversed; but those printed rules also state that reversing a moving car is a very serious strain on the mechanism, especially if running at a high rate of speed, and must never be resorted to except to avoid accident, and that in every case where a car or train is reversed a prompt report should be made to the station foreman, so that examination can be made of the controllers and motor and the motorman explained in his deposition that under the conditions present that night it would have been dangerous to reverse the motor, because, he stated, "It would have blown my overhead (fuse) and it would have had no effect."

[3] The evidence narrated shows sufficient justification for the findings of the lower court that respondent was not negligent in the operation of the car in the manner charged in the complaint, which brings the case within the rule that the conclusions of the lower court cannot be disturbed. Whether or not a motorman is negligent in adopting one of several courses open to him in an emergency is a question for the trial court. Thomson v. Pac. El. Co., 177 Cal. 728, 171 Pac. 956.

[4] Appellants' final point is that the findings do not cover the material issues, the two principal objections urged being that, while the court negatives the specific acts of negligence charged in the complaint, it fails to find the facts which would explain the real cause of the overturning of the car, and that the court fails to affirmatively find that respondent at the time of the accident was exercising the highest degree of care in the operation of the car. There is no merit in these objections. The court did find that respondent was free from all of the acts of negligence charged against it in the complaint. The negligence pleaded in the complaint was the ultimate fact, and, having negatived the acts of negligence pleaded, the court was compelled to go no further. Todd v. Orcutt, 183 Pac. 963. Whatever outside agencies may have contributed to the cause of accident was immaterial, so far as the findings are concerned. Neither was there any prejudice to appellants because the court did not find on those facts about which there was not dispute, such as the fact that the

car actually overturned, particularly in view of respondent's failure to deny that said car did overturn. Tolbard v. Cline (Sup.) 180 Pac. 610. Nor is there anything objectionable in the court's findings as to the injuries of Mrs. Frederick. The court merely found to the effect that such injuries were not caused by the negligence of respondent. There was no attempt to find that she had not been injured at all as a result of the accident, and we do not so construe the findings. Taken in their entirety the findings adequately cover all of the issues raised by the pleadings, and are sufficient in form and in substance. In Cooley v. Brunswig Drug Co., 30 Cal. App. 58, 157 Pac. 13, it is said:

"It is an established rule of law that the findings of the trial court are to receive such a construction as will uphold rather than defeat its judgment thereon; and whenever from the facts found other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court. Warren v. Hopkins, 110 Cal. 506, 512, 42 Pac. 986; Gould v. Eaton, 111 Cal. 639, 645, 52 Am. St. Rep. 201, 44 Pac. 319; Breeze v. Brooks, 97 Cal. 72, 22 L. R. A. 256, 31 Pac. 742."

We find no error in the record, and the judgment is therefore affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

48 Cal. App. 162

POTTER v. SMITH et al. (Civ. 3323.)

(District Court of Appeal, First District, Division 1, California. June 12, 1920. Hearing Denied by Supreme Court Aug. 9, 1920.)

1. Husband and wife ⊜258—Improvements made with community funds belong to spouse owning land.

Where a house was improved with community funds, the improvements belong to the spouse owning the land.

2. Husband and wife ⊜262(1)—No presumption that gift is community property.

While, prior to the amendment of 1889 (St. 1889, p. 328) to Civ. Code, § 164, property conveyed to either husband or wife after marriage was presumed community property, such presumption does not arise in case of the conveyance by one spouse to the other, and where a husband conveys real or personal property to his wife, whether it be his separate or the community property, there is a presumption that it becomes her separate property.

3. Husband and wife ⊜248—Whether property is community to be determined by mode of acquisition.

Whether property is community or separate is to be determined by proof showing the mode of acquisition, rather than by declarations of one of the parties that the property was or was not community.

4. Husband and wife ⊜262(1)—Court bound by presumption as to status of property only when there is no other evidence.

The presumption that property conveyed by a husband to his wife is her separate property is binding in a controversy between the husband and the wife's legal representatives only when there is no evidence, direct or indirect, controverting it.

5. Appeal and error ⊜1010(1)—Findings of trial court, supported by evidence, conclusive.

The fact findings of the trial court are conclusive on the appellate court, unless they are manifestly without sufficient support in evidence.

6. Husband and wife ⊜262(1)—Presumption that property conveyed to wife became her separate estate disputable.

The presumption that property, whether real or personal, conveyed to a wife became her separate property, is disputable.

7. Husband and wife ⊜262(2)—Burden on husband to establish that property in wife's name was community.

Where, after the death of a wife, the husband asserted that property standing in her name was community property, and it appeared that it was purchased with funds delivered by the husband to the wife, the husband has the burden of rebutting the presumption that such funds became the wife's separate property, and to sustain the presumption that the property was community property, which arose by reason of its conveyance being before the amendment of 1889 (St. 1889, p. 328) to Civ. Code, § 164.

8. Husband and wife ⊜264—Evidence held to warrant finding that property was wife's separate estate.

In an action by the husband to quiet title to property standing in the wife's name, evidence *held* to warrant finding that the property, which was acquired with moneys delivered by the husband to his wife, was her separate property, on the theory that the delivery of the money was a gift.

9. Evidence ⊜273(3)—Declaration in wife's will that property was separate property inadmissible.

Declaration in the will of a wife that property, the title to which was in her name, was separate property, is inadmissible in an action by the husband against the devisees to quiet title.

10. Appeal and error ⊜926(4)—Presumption that trial court struck out improper evidence.

Where the trial court reserved the right to strike out evidence, concerning the admissibility of which it was doubtful, it will be presumed on appeal, the action having been tried without a jury, that the improper evidence was stricken.

11. Appeal and error ⊜1031(3)—No presumption of prejudice.

Prejudicial error is not presumed, and it cannot be assumed that the improper admission

of evidence was prejudicial, where it did not add anything to the weight of the other facts on which the court decided.

12. Evidence ⊂=123(2)—Letters showing relations between spouses many years after conveyance inadmissible as res gestæ.

Letters passing between spouses many years after the husband delivered moneys to his wife, with which she purchased property, are not admissible in an action by the husband against the wife's legal representative, etc., to quiet title, on the theory that the property was community, for they in no way related to the transaction and formed no part of the res gestæ.

13. New trial ⊂=108(2)—Newly discovered evidence, having little weight, no ground for new trial.

Where judgment was rendered against a husband, who sought to quiet title to property purchased by the wife with moneys which he delivered her, newly discovered evidence that the wife referred to the property as the marital home, and stated that the husband's earnings paid for it, was no ground for new trial.

14. Appeal and error ⊂=977(1)—Grant of new trial rests in discretion of lower court.

The granting or refusing of new trial rests so largely in the discretion of the lower court that its action will not be disturbed, except in case of a manifest abuse.

Appeal from Superior Court, Humboldt County; Geo. D. Murray, Judge.

Action by Henry Potter against Charles Henry Smith, Emma Gertrude Smith, and Charles Henry Smith, as executor of the last will and testament of Martha R. Potter, deceased. From a judgment for defendants, plaintiff appeals. Affirmed.

Pierce H. Ryan, of Eureka, for appellant.

Puter & Quinn, of Eureka, for respondent Emma G. Smith.

W. F. Clyborne and J. H. G. Weaver, both of Eureka, for other respondents.

WASTE, P. J. This is an action to quiet title. The plaintiff contends that the land, consisting of two lots with a dwelling house thereon, situated in the city of Eureka, the title to which stood of record in the name of his deceased wife, Martha R. Potter, was community property, and upon her death vested absolutely in him. The defendants claim under the will of the deceased wife. Judgment was entered for the defendants, from which the plaintiff appeals.

Prior to the acquisition of the lots in question, the plaintiff had intrusted the accumulation of his earnings to his wife, and had assigned, indorsed, and delivered to her two notes, representing other portions of his earnings and his wife's savings. The lot was paid for out of this fund. The lower court found that the consideration paid for the land was the separate property of the wife, and that from the date of the conveyance in 1885 the land was her separate property. The sufficiency of these findings presents the serious question on this appeal. A solution of the controversy depends largely upon the nature of the transaction between the plaintiff and his wife, by which, so the respondents contend, all the prior earnings of the plaintiff, including two promissory notes, became the separate property of the wife.

Plaintiff and his wife were married in Michigan in 1872. Neither of them at that time had any property. They came to Humboldt county to reside five years later. They had then accumulated some $400 or $500 and owned a house in Michigan. The plaintiff opened a merchant tailoring establishment in Eureka, and, having no bad or expensive habits, was soon in possession of a lucrative business. According to the testimony of the plaintiff, he gave his wife all his earnings from the time they were married. They occasionally loaned money on notes in the name of plaintiff, but the wife kept the notes in her possession. Plaintiff later began drinking and gambling. What then occurred is best told in his own words:

"When I was about 40 years old I acquired the habit of gambling to some extent; that was about 1885 or 1886, along there, I should judge; *it was before the property was bought from Pratt.* The deed is dated in 1885, and my wife and I picked out the lot. At one time I had some money loaned out on notes; I couldn't say the exact amount, but to my best knowledge it amounted to something as near as I can remember between $1,500 and $1,600, approximately. I do not remember whose notes they were; one was Dunlap, who had a ranch on Eel River Island. I gave those notes—I assigned them over, or had them assigned over—to my wife because she requested me to do so. She said one morning to me; I had been upon a spree, and she said, 'Henry, better put what you have in my name, as I save it for you;' and I hesitated a few moments, and I said, 'I will let you know at noon.' She said, 'No, don't wait till noon; do it right now;' and I said, 'All right.' She also had a paper, and put here how much I had. I don't know what I had. I said, 'Go to Ernest Sevier (he did my little work) and have them assigned over to you;' and I guess she did. I never asked her whether she had done it, or whether she had not. I never asked her, but I gave her this with that understanding, to save it for us for our old days, so that, if anything happened, there would be something left."

[1] Some time after the transfer of the property by plaintiff to his wife was effected, the lots in question were purchased, that "they might have a home and avoid paying rent." The plaintiff seems to have had but little to do with the transaction, his wife attending to the details. The purchase price of $600 was paid out of the money in the

wife's possession. Some time later the plaintiff and his wife purchased a block of land, paying $1,550 for it, out of the same fund. This land was sold a few months later for $3,300, and the money was used in the erection of a house, costing that sum, on the lots which had been purchased for the home. It thus appears without contradiction that the premises, which are the basis of this action, were purchased and improved with funds turned over by the plaintiff to his wife, in the manner indicated, and the accumulation thereof. It was furnished in the same manner. The plaintiff testified that he spent some $480 in the doing of some additional work on the place, which "did not pass through his wife's hands." Assuming that this last amount was community property, the owner of the lots was the owner of the house, and the improvements made with that money belonged to the spouse owning the property. Shaw v. Bernal, 163 Cal. 262, 267, 124 Pac. 1012. The plaintiff's expenditure of that sum of money does not enter into the consideration of the case.

According to the plaintiff, there was never any friction between his wife and him; she exercising "a great deal of patience" with him during his lapses from the straight and narrow path of sobriety. They lived together on the premises in question for nearly 20 years, during the latter 10 years of which period plaintiff's business "ran down pretty bad." During the entire period all his earnings, other than what he spent in his business or for himself, he gave to his wife. In 1903, in order to get away from the old influences, which lured him into evil ways and spendthrift habits, plaintiff left Eureka and went to the state of Idaho, where he established a business and acquired a home. When he went away, he took $2,500, which, he testified, he realized from the sale of a timber claim. He does not appear to have ever solicited his wife to join him there, for she told him she preferred to remain in California. He visited her but once during the 15 years, remaining for about 2 weeks. He never sent her any money during that time, and appears to have once written to her for financial assistance.

For the purpose of tending to offset plaintiff's contentions in this action, it was shown by various witnesses that subsequent to the death of the wife, and after plaintiff's return to California, he made declarations and admissions, the effect of which, respondents claim, was to destroy his present claim. When he was informed by the witness Rotermund that his wife had willed the property to the defendants, he remarked:

"That he was sorry that he gave the property to her, that it was his hard-earned money that bought it; that if Mrs. Potter had left him part of it he would have been satisfied."

The same witness testified that during the trial the plaintiff had stated to him:

"I have given this to Mrs. Potter, and it was my hard-earned money."

In two conversations with the defendants, plaintiff said:

"The property belonged to Mrs. Potter [his wife]. * * * It is my own hard earnings that bought this property. I gave it to her, but it is mine now."

On these facts the respondents defend the conclusions and judgment of the lower court upon the theory, as stated by them:

"That when the plaintiff delivered the money and notes to the wife, and gave the possession of them to her, and in addition transferred and conveyed the same from his name to hers, the presumption immediately arose that said money and notes thereupon became and were thereafter to be treated as her separate property. This is the presumption," they contend, "that applied to the consideration for the lots. Unless the presumption was overcome, the court was justified in finding that the consideration paid for the property was the separate property of the wife, and that the lots were her separate property. The controversy on this phase of the case then resolves itself," they say, "into a question of what the intention of the plaintiff was when he transferred the money and notes from himself to his wife."

[2] Prior to the adoption of the amendment of 1889 (Stats. 1889, p. 328) to section 164 of the Civil Code, the prima facie presumption was that property conveyed to either husband or wife, after their marriage, was community property. Nilson v. Sarment, 153 Cal. 524, 527, 96 Pac. 315, 126 Am. St. Rep. 91, and cases cited. But it has never been held that such a presumption arises in case of a conveyance by one of the spouses to the other. Estate of Klumpke, 167 Cal. 415, 423, 139 Pac. 1062. A husband may convey real or personal property to his wife, and whether the property conveyed be his separate or the community property, the presumption is that it thereby becomes, and is thereafter treated as, her separate property. Carter v. McQuaide, 83 Cal. 274, 278, 23 Pac. 348. The presumption of community property cannot apply, where the transaction was in effect a gift from the husband to the wife. In the absence of evidence of a contrary intent, the transfer will vest the property in the wife as her separate property and estate. Hamilton v. Hubbard, 134 Cal. 603, 606, 65 Pac. 321, 66 Pac. 860.

[3-6] The Supreme Court has on several occasions expressed the view that the character of the ownership of property, whether separate or community, is to be determined by the proof showing the mode of acquisition, rather than by any declarations of one of the parties that the property was or was not community property. Bias v. Reed, 169 Cal. 33, 42, 145 Pac. 516; Hammond v. Mc-

Collough, 159 Cal. 639, 649, 115 Pac. 216; Estate of Granniss, 142 Cal. 1, 4, 75 Pac. 324. The court will decide the question of the alleged donor's intention from his acts, declarations, and conduct at the time of the transaction. Killian v. Killian, 10 Cal. App. 312, 319, 101 Pac. 806; Woods v. Whitney, 42 Cal. 358. When the controversy, under such circumstances, is between the husband and the legal representative of the wife, the presumption may be controverted by other evidence, direct or indirect, and it is only where it is not so controverted that the court is bound to find in accordance with the presumption. Whether or not it is so controverted, or is sustained, is a question of fact, for the trial court, and the conclusions of that tribunal are conclusive upon an appellate court, unless it be manifestly without sufficient support in the evidence. Fanning v. Green, 156 Cal. 279, 282, 104 Pac. 308. The presumption, one way or the other, although disputable, is itself evidence, and it is for the trial court to say whether the evidence offered to support or overthrow the presumption has sufficient weight to effect that purpose. Gilmour v. North Pasadena Land, etc., Co., 178 Cal. 6, 171 Pac. 1066; Pabst v. Shearer, 172 Cal. 239, 242, 156 Pac. 466.

[7, 8] The burden was on the plaintiff to rebut the presumption, on the one hand, that he did not intend to make a gift to his wife of the money and notes transferred to her and from which the home was purchased and furnished, and to sustain, on the other hand, the presumption arising from the acquisition of the real property before the amendment to the Code section, that it was community property. Alferitz v. Arrivillaga, 143 Cal. 646, 648, 77 Pac. 657. From all the circumstances, the trial court may well have concluded, as it did, that the transfer of the money and notes in the first instance was a gift from the plaintiff to his wife, and that the subsequent purchase of the lots from that fund was a further consummation of a like intent. It requires no unreasonable or strained interpretation of the evidence to so hold. Auener v. Suiter, 189 Pac. 120. While the plaintiff testified that there was no intent or purpose on his part to give any of the money or any of the notes to his wife, to be hers absolutely, his evidence, competent and admissible as bearing upon the intent of the plaintiff in the transaction, was not conclusive. Gilmour v. North Pasadena Land, etc., Co., supra. The court was not bound to believe the plaintiff when he testified he did not have such intent. Fanning v. Green, 156 Cal. 285, 104 Pac. 308.

[9-11] Defendants offered the will of Mrs. Potter, devising the property in question to defendants Smith. Plaintiff objected generally to its introduction, and particularly to a portion of the will which stated:

"I hereby declare that all the property, both real and personal, of which I may die, constituted my sole and separate estate."

The objection was overruled pro forma, and the will admitted. When the evidence was all in, plaintiff moved to strike out the portion of the will to which he had objected. The motion was submitted, but was never ruled upon, and the objectionable matter remains in the record. The declaration of the deceased wife in the will was not competent proof that the property in question was her separate property, and should not have been admitted. Rowe v. Hibernia S. & L. Socy., 134 Cal. 403, 407, 66 Pac. 569; Estate of Granniss, supra; Estate of Learned, 156 Cal. 309, 311, 104 Pac. 315; Crowley v. Savings Union Bank & Trust Co., 30 Cal. App. 144, 151, 155, 157 Pac. 516. The lower court seemed to be in doubt upon the matter and expressed the opinion that the declaration in the will was not competent to prove ownership or a separate interest in the property in Mrs. Potter, and, in admitting the document, reserved to itself the right to strike it out, without motion, if it saw fit. In this condition of the record we may assume that it did so, and that the declaration was disregarded. Furthermore, prejudicial error will not be assumed. Estate of Angle, 148 Cal. 102, 107, 82 Pac. 668. We are unable to see that any prejudicial result followed the court's error. The declaration did not add anything to the weight of the other facts upon which the court has decided against the plaintiff. With or without its consideration we feel the result must have been the same.

[12] The plaintiff offered in evidence two letters—one written by himself and received by his wife during her lifetime; the other written and mailed some time after her death—as tending to show a friendly relation between himself and his wife. They were properly excluded. They formed no part of the res gestæ, and were in no way connected with the circumstances surrounding the transactions involved in the action.

[13, 14] The plaintiff moved for a new trial below, basing his motion upon alleged newly discovered evidence, the purport of which was that the witnesses would testify that Mrs. Potter in her lifetime frequently referred to the property as "our home; Henry's [plaintiff's] earnings paid for it, and it is in my name for us both." As we have already pointed out, such declarations, if made, would have little weight, in the face of the controlling circumstances under which the property was acquired. The granting or refusing of a new trial rests so largely in the discretion of the court that its action in that regard will not be disturbed, except upon the disclosure of a manifest and unmistakable abuse. Harrison v. Sutter St. Ry. Co., 116

Cal. 156, 161, 47 Pac. 1019. No abuse of that discretion appears in the instant case.

The consideration for the purchase and improvement of the lots in question having been paid by the wife of the plaintiff from her separate funds, it follows that the lots themselves did not become a part of the community property of the spouses. No error appearing in the record requires a reversal.

The judgment is affirmed.

We concur: KNIGHT, Judge pro tem.; RICHARDS, J.

48 Cal. App. 185

W. P. FULLER & CO. et al. v. McCLURE. (Civ. 3190.)

(District Court of Appeal, Second District, Division 2, California. June 15, 1920, as Modified by Order, July 16, 1920, Denying Rehearing.)

1. Appeal and error ⊂=694(1)—Particulars of insufficiency of evidence must be specified in bill of exceptions.

The sufficiency of the evidence to sustain the findings cannot be considered on appeal, based on bill of exceptions, where the bill contains no specification of the particulars wherein the evidence is claimed to be insufficient, as required by Code Civ. Proc. § 648.

2. Mortgages ⊂=151(3)—Priorities as to mechanics' liens, stated.

A mortgage given to secure future advances has priority over mechanics' liens subsequently arising to the extent of the full amount advanced, including what is advanced after, as well as before, the accrual of mechanics' liens, where the making of such advances was obligatory upon the mortgagee under the terms of his contract with the mortgagor, but as to mere voluntary advances, made after the mechanics' liens accrued, and with notice thereof, the mortgage is postponed.

3. Bills and notes ⊂=167 — Note secured by mortgage on land not negotiable in law if purchaser has notice.

If a note is secured by a mortgage on land, and both are executed at the same time, or as parts of one transaction, the note, though negotiable in form, is not negotiable in law, if the purchaser takes it with knowledge of the existence of the mortgage.

4. Mortgages ⊂=151(3) — Priorities between mechanics' liens and mortgage under which optional advancements are made, stated.

Where advances under a mortgage are optional after the payment of a certain fixed amount, and material is being furnished to the mortgagor by which mechanics' liens may attach, the mortgagee having notice thereof as to each advancement made under the mortgage, the mortgage is to be regarded as a fresh mortgage, subject to the liens of such of the materialmen as had commenced furnishing material prior to the time when the advancement was made, in view of Code Civ. Proc. § 1186.

5. Evidence ⊂=441(5) — Parol evidence that advances under mortgage were optional held admissible.

In a suit to foreclose mechanics' liens, where the question of the priority of the mortgage under which the advancements had been made was raised, parol evidence *held* admissible to show that, though the note and mortgage were made for a definite sum, they were executed as part of an oral agreement that the mortgagee should be obligated to advance a lesser sum merely, and that any additional payments should be optional and not obligatory.

6. Evidence ⊂=419(1)—Recitals of written instrument as to consideration not conclusive.

The recitals of a written instrument as to the consideration are not conclusive, and it is competent to inquire into the consideration, and show by parol what the real consideration was, provided the legal effect or operation of the instrument is not thereby altered or defeated.

7. Mortgages ⊂=50—Nature of debt intended to be secured need not be truly set forth.

It is not necessary to the validity of a mortgage that it should truly set forth the nature and character of the debt that it is intended to secure.

8. Evidence ⊂=419(10) — True consideration for mortgage admissible in suit to foreclose mechanic's lien.

In a suit to foreclose mechanics' liens, where the question of the priority of a mortgage under which optional payments had been made was raised, parol evidence as to the true character of the consideration for the mortgage *held* admissible, not to defeat the mortgage, as such, but to show when the mortgage lien attached.

9. New trial ⊂=153—Affidavits, not filed within 30 days after notice of intention, too late.

On motion for new trial, where notice of intention was served July 6, 1917, and the affidavits upon which movant relied were not served until August 7, 1917, nor filed until August 8th, the motion must be denied, since the affidavits were not filed within 30 days after notice of intention, as required by Code Civ. Proc. § 659.

10. New trial ⊂=153—Failure to file affidavits held not cured by notice of intention to party not interested.

Where in a suit to foreclose mechanics' liens, decree adjudged that a trust deed was prior to a mortgage held by an assignee, and the assignee moved for new trial on ground of want of consideration given for trust deed, but failed to file affidavits within 30 days after notice of intention of motion, as required by Code Civ. Proc. § 659, the failure was not cured by service of notice of intention on a mechanic lien claimant, not interested in priority issue, at a later date, which would make affidavits in time.

11. Mortgages ⊂=25(2)—Agreement whereby purchaser of mortgage was authorized to foreclose at profit held sufficient consideration.

Where a mortgagor found a purchaser of the note and mortgage under an agreement with

the mortgagee whereby the purchaser was to be entitled to foreclose the mortgage in an amount greater than the amount actually advanced, thereby allowing the purchaser a profit, such agreement constituted sufficient consideration as between the mortgagor and the purchaser.

12. Mortgages ⟸159—Mortgage held prior to trust deed for fixed amount, although less than such amount had been actually advanced.

Where a trust deed was expressly made subject to a mortgage for a stated amount, but under which a lesser sum only had been advanced, the holder of the trust deed took the instrument subject to the right of the holder of the mortgage to enforce it to the extent that it was enforceable against the mortgagor.

13. Mortgages ⟸159—Trust deed subject to mortgage held not subject to mechanics' liens to which mortgage was subject.

Where a trust deed, reciting that it was subsequent to a previously recorded mortgage, was recorded before any work had been done or materials furnished, forming the basis for a mechanic's lien, and the mortgage authorized the mortgagee to pay all liens or incumbrances that were prior to the mortgage, and alleged that it was given to secure all sums that might be paid by the mortgagee to satisfy prior liens, such recitals *held* not to make the trust deed subject to the mechanic's lien to which the mortgage was subject, where the mortgage on its face did not indicate that the payment of the whole mortgage indebtedness was not obligatory upon the mortgagee.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Consolidated actions by W. P. Fuller & Co. and others against John Q. McClure, with cross-complaint by defendant. Decree for plaintiffs, and defendant appeals. Modified and affirmed.

Charles Robert McCarty, of Los Angeles, Frank C. Sherrer, for appellant.

Schweitzer & Hutton, of Los Angeles, for respondent W. P. Fuller & Co.

Sheldon Borden and Richard J. O. Culver, both of Los Angeles, for respondents Simons Brick Co., Frank Wilson Young, and Title Guarantee & Trust Co.

E. S. Williams, of Los Angeles, for respondent L. W. Blinn Lumber Co.

William Hazlett and Glenn M. Ely, both of Los Angeles, for respondent Lawyer and others.

Kenton A. Miller, of Los Angeles, for respondent Simons Brick Co.

R. L. Horton, of Los Angeles, for respondent Hammond Lumber Co.

Kemp, Mitchell & Silberberg, of Los Angeles, for respondent Weaver.

Robert W. McDonald and Edward R. Milliken, both of Pasadena, for respondents Hart and Graver.

FINLAYSON, P. J. The defendant and cross-complainant, John Q. McClure, the holder of a mortgage, appeals from a decree of foreclosure given in several actions for the foreclosure of mechanics' liens. The actions were consolidated and tried as one action. The sole question is one of priority as between appellant, the holder of the mortgage, the defendant Young, who is the beneficiary under a trust deed, and the mechanics' lien claimants.

[1] The case comes to us on a bill of exceptions. The bill contains no specification of the "particulars" wherein the evidence is claimed to be insufficient. By a long line of decisions it is settled that the question of the sufficiency of the evidence to sustain the findings cannot be considered on an appeal based upon a bill of exceptions, where, as here, the bill contains no specification of "particulars," as required by section 648 of the Code of Civil Procedure. Millar v. Millar, 175 Cal. 797, 167 Pac. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184; Regoli v. Stevenson, 179 Cal. 257, 176 Pac. 158. We shall therefore accept as true the facts as found by the trial court.

The case, as shown by the findings, is substantially as follows: The lot cumbered by the liens originally was owned by Lillian Young, who, on April 27, 1916, conveyed it to A. T. Storch. On May 9, 1916, Storch executed to the Title Guarantee & Trust Company, as trustee, for the benefit of Lillian Young, the beneficiary of the trust, a trust deed securing the payment of a promissory note for $2,500, payable two years after date, and executed by Storch to Lillian Young as payee. The trust deed contains a recital to the effect that it is given as a part of the purchase price due to Lillian Young on her conveyance of the premises to Storch. Meanwhile, namely, on April 27, 1916, Storch had executed a promissory note, for the principal sum of $6,500, to one Fred H. Richman, as the payee, payable three years after date, and had secured its payment by a mortgage of even date, duly recorded May 9, 1916. The trust deed, recorded May 10, 1916, referring to the mortgage to Richman, contains this recital:

"This trust deed is subject to a first mortgage of $6,500, at eight per cent. for three years, in favor of Fred H. Richman. This trust deed is second and is given as part of the purchase price of the above-described premises."

The trust deed is now held by the defendant and respondent Frank Wilson Young. By assignment of the mortgage, appellant, McClure, has become the owner of the mortgage and of the note for $6,500 secured thereby. No mechanic's lien claimants commenced to perform labor or furnish materials before May 11, 1916, on which day two of

them commenced furnishing materials. The mechanic's lien claimant last to commence furnishing materials did so on June 5, 1916.

When Storch purchased the lot from Lillian Young it was unincumbered. At the time when Storch executed the note to Richman for $6,500, and gave the latter the mortgage to secure its payment, the mortgagee paid Storch the sum of $1,600. That payment was made, and the note and mortgage executed, pursuant to an oral agreement between Storch and Richman that the latter would advance and loan the former $1,600. At the same time Storch told Richman that he intended to erect buildings upon the lot, and that, in order to get money to carry on the building, he would endeavor to find some one who would purchase the note and mortgage and pay therefor such an amount as might be agreed upon by himself and such purchaser of the mortgage; and the $1,600 was paid by Richman, and the note and mortgage executed, pursuant to an oral agreement between the mortgagor and mortgagee whereby the latter agreed that if the former found a purchaser for the note and mortgage, he, the mortgagee, would transfer the note and mortgage to such purchaser upon the repayment to him of the total amount that he might actually have advanced to Storch in the meantime. At the same time the mortgagee told the mortgagor that if, in his opinion, there should be sufficient security afforded by the mortgage after the building was in progress, he, the mortgagee, would advance, from time to time, further sums until the mortgagor should succeed in selling the note and mortgage, but that all loans or advances that he might make, over and above the first payment of $1,600, should be entirely optional on his part, and that the only amount that he should be obligated to loan or advance, on account of the note or mortgage or otherwise, was to be said sum, $1,600, and no more. Richman had actual knowledge of the construction work from the time of its commencement, and personally inspected the work every time he made an advancement. About June 20, 1916, Storch found a purchaser for the note and mortgage in the person of McClure, the appellant here. On that date the note and mortgage were assigned to McClure. Up to that time, Richman, in addition to the $1,600 paid by him at the date of the execution of the note and mortgage, had made four payments to the mortgagor, aggregating $1,300, making, with the original payment of $1,600 a total of $2,900 paid or advanced by Richman to Storch before the assignment of the note and mortgage to McClure. The respective mechanic's lien claimants commenced furnishing material on dates intermediate the time when Richman made the initial payment of $1,600 to his mortgagor and the time when he made the last advancement on the mortgage loan. When the note and mortgage were assigned to McClure, the latter paid $5,000, a part of which was used in repaying to Richman the $2,900 that he had theretofore paid to the mortgagor. The balance was received and kept by Storch. It was agreed by Storch and McClure that, though the latter should pay not more than $5,000, the note and mortgage should stand as an obligation on Storch's part for $6,000, with interest thereon. This was done in order that McClure might thus make a profit of $1,000. McClure took the note and mortgage and paid his money with notice of the agreement that Storch and Richman had made, and of the optional nature of all the payments that had been made by Richman after the payment of the first sum of $1,600, and also with notice of the amounts of these several optional payments. When he bought the note and mortgage, McClure had actual notice that the construction work was going on. No part of the $5,000 has been repaid.

As already stated, the several mechanics' liens accrued, respectively, on dates intermediate the first payment of $1,600 by the mortgagor and the date when he made his last advancement on the mortgage loan. And in fixing the order of priority of the several liens, the foreclosure decree adjudges, in substance and effect, that the liens attach to the property in the following order: (1) That the holder of the mortgage, appellant, has a first lien to secure the original payment of $1,600; (2) that the liens of the mechanics' lien claimants and the lien of the mortgage to secure the optional payments that were made thereunder after the initial payment of $1,600, attached, respectively, as of the time when the several mechanics' lien claimants commenced to furnish materials and when the several optional payments were made under the mortgage—the lien of each optional advancement made by the mortgagee being deferred to the liens of such of the mechanics' lien claimants as had theretofore commenced furnishing materials for use in the building; and (3) that the lien of the mortgage, to the extent of the amount actually paid thereunder, namely, $5,000, is prior to the lien of the trust deed.

Because the mortgage was recorded before the building was commenced or materials were commenced to be furnished, appellant contends that he has a lien on the premises prior to all the other liens to secure the payment of the full amount of the principal and interest of the note that the mortgage secured, $6,500, citing in support of this contention, among other cases, Valley Lumber Co. v. Wright, 2 Cal. App. 293, 84 Pac. 58. In that case it was held that where the owner of a building executes a promissory note for a definite amount, in consideration of the loan of all of that amount by the payee, the amount so loaned to be used

in the construction of the building, a deed of trust, given to secure the payment of the note and recorded before the building is commenced or materials are commenced to be furnished, will take precedence over the mechanics' liens, though no part of the agreed loan be paid until after the commencement of the work. In that case the payee was under an enforceable obligation to furnish a sum equal to the principal of the note. The execution of the note and trust deed was therefore a sufficient consideration for the payee's binding obligation to advance the full amount. In the instant case the mortgagee was under no obligation to pay anything beyond the initial payment of $1,600. All payments over and above the first payment were optional with the mortgagee. This distinction is vital, and is recognized in the Wright Case, where the court said:

"There is a marked distinction recognized by the cases between advances which are optional with the mortgagee and advances which are agreed to be made, i. e., obligatory, and the amounts definitely fixed. This distinction is stated in Savings, etc., Socy. v. Barrett, 106 Cal. 514, 532, 533, 39 Pac. 922, where the court seems to regard Tapia v. Demartini, 77 Cal. 383, 11 Am. St. Rep. 288, 19 Pac. 641, as stating the rule as to optional advances, as also does Hall v. Glass, 123 Cal. 500, 11 Am. St. Rep. 288, 56 Pac. 336." 2 Cal. App. 291, 84 Pac. 59.

[2] Where a mortgagee has obligated himself to make advances, such advances tack, and the mortgage, when recorded, is a valid lien for all the advances actually made, although they may have been made after notice of a subsequent mortgage or incumbrance of the property. Where, however, the mortgagee is not obligated to pay the full amount of the sum named or to make all the advances mentioned in the mortgage, but it is optional with him to do so or not, and he makes advances or payments after having notice that a lien has attached in favor of a third party, his lien for payments or advances made after such notice will be postponed to that of the junior incumbrance, and each of such advances will be deemed the equivalent of a new mortgage. In such cases the mortgage lien attaches as and when the optional advancements are made. The rule is stated in Cyc. as follows:

"A mortgage given to secure future advances has priority over mechanics' liens subsequently arising to the extent of the full amount advanced, including what is advanced after, as well as before, the accrual of the mechanics' liens, where the making of such advances was obligatory upon the mortgagee under the terms of his contract with the mortgagor; but as to mere voluntary advances made after the mechanics' liens accrued, and with notice thereof, the mortgage is postponed." 27 Cyc. 239, 240.

This statement of the rule is, we think, substantially correct, and is either sustained or recognized by the following authorities: Finlayson v. Crooks, 47 Minn. 74, 49 N. W. 398, 645; Gray v. McClellan, 214 Mass. 92, 100 N. E. 1093; Davis v. Carlisle, 142 Fed. 106, 73 C. C. A. 330; Ladue v. Detroit, etc., R. Co., 13 Mich. 380, 87 Am. Dec. 759; Boswell v. Goodwin, 31 Conn. 74, 81 Am. Dec. 169; Brinkmeyer v. Browneller, 55 Ind. 488; Blackmar v. Sharp, 23 R. I. 412, 50 Atl. 852; Erickson v. Ireland, 134 Minn. 156, 158 N. W. 918; Savings & L. Socy. v. Burnett, 106 Cal. 532, 533, 39 Pac. 922; Hall v. Glass, 123 Cal. 504, 56 Pac. 336, 69 Am. St. Rep. 77; Valley L. Co. v. Wright, supra; 1 Jones on Mortgages, § 369.

[3] The note, of which appellant, who was conversant with all the facts, became the owner by assignment, is not negotiable in the hands of appellant. He has none of the rights peculiar to the ownership of negotiable paper. He stands in the shoes of Richman, the original mortgagee. This is so because the rule in this state is that if the note is secured by a mortgage on land, and both are executed at the same time or as parts of one transaction, the note, although negotiable in form, is not negotiable in law, if the purchaser takes it with knowledge of the existence of the mortgage. National Hardware Co. v. Sherwood, 165 Cal. 1, 130 Pac. 881.

[4] According to the findings of the trial court, all advancements made on the mortgage after the original payment of $1,600 were optional with the mortgagee and his assignee, this appellant. Neither was obligated to make any further payment. Prior to making any of the optional payments, the mortgagee and his assignee, appellant, had actual notice that material had been furnished by some of the mechanics' lien claimants. Each, therefore, being charged with knowledge of the law, had actual notice that the liens of the mechanic's lien claimants had attached. Finlayson v. Crooks, supra; Allen Co. v. Emerton, 108 Me. 221, 79 Atl. 905. As to each advancement so made, therefore, the mortgage is to be regarded as a fresh mortgage, subject to the liens of such of the materialmen as had commenced furnishing material prior to the time when the advancement was made. The liens provided for in the chapter on mechanics' liens "are preferred to any lien, mortgage, or other incumbrance which may have attached subsequent to the time when the building, improvement or structure was commenced * * * or materials were commenced to be furnished." Code Civ. Proc. § 1186.

The foreclosure decree accords with the principles thus far announced, and we find no error in the decree in so far as it gives to the mechanics' liens priority over the mortgage.

[5-8] Parol evidence was admissible to show that, though the note and mortgage

were made for a definite sum, $6,500, they were executed as part of an oral agreement that the mortgagee should be obligated to advance but $1,600, and that any additional payments should be optional and not obligatory. The note and mortgage were by their terms the unilateral obligations of the mortgagor, executed by him to the mortgagee for a consideration. The consideration for the note and mortgage is that which the mortgagee did or agreed to do. As a general rule, the recitals of a written instrument as to the consideration are not conclusive, and it is competent to inquire into the consideration and show by parol what the real consideration was, provided the legal effect or operation of the instrument is not thereby altered or defeated. It is not necessary to the validity of a mortgage that it should truly set forth the nature and character of the debt that it is intended to secure. Shirras v. Caig, 7 Cranch (U. S.) 34, 3 L. Ed. 260. The evidence was not introduced to defeat or alter the legal effect and operation of the mortgage, but to show the times at which the mortgage lien attached. Therefore, on the issue of priority as between the holder of the mortgage and the mechanic's lien claimants, parol evidence as to the true character of the consideration for the mortgage was admissible, not to defeat the mortgage as a mortgage, but to show when the mortgage lien attached. For this purpose, it is permissible to show by parol that a mortgage, which upon its face appears to be for the payment of a specified sum of money, was in fact given as security for future optional advances. Moreover, the note and mortgage being in the usual form and containing no indication of the purpose for which they were given, the parol evidence does not tend to vary their terms, but to show the whole agreement in which they originated and of which they constitute but a part. McKinster v. Babcock, 26 N. Y. 381; Shirras v. Caig, supra; Kaphan v. Ryan, 16 S. C. 352; McAteer v. McAteer, 31 S. C. 313, 9 S. E. 966; Louisville Banking Co. v. Leonard, 90 Ky. 106, 13 S. W. 521; Hall v. Tay, 131 Mass. 192; Wilkerson v. Tillman, 66 Ala. 532; 1 Jones, Mtgs. § 384. See, also, Vogan v. Caminetti, 65 Cal. 438, 4 Pac. 435.

[9] Appellant moved for a new trial in the court below. His motion was denied. In support of his motion he filed affidavits intended to show that there was no consideration for the trust deed that had been executed for the benefit of Lillian Young, and now held by the respondent Frank Wilson Young. The sole purpose of the affidavits was to show that the trust deed should not be given priority over appellant's mortgage. The bill of exceptions shows that on July 6, 1917, the attorneys for all the respondents acknowledged, in writing, service upon them of appellant's notice of intention to move for a new trial. The affidavits upon which appellant relied for a new trial were not served until August 7, 1917, nor filed until August 8, 1917, which, if the notice of intention was served on July 6, 1917, was too late. Where a motion for a new trial is to be made upon affidavits, the moving party must serve and file his affidavits not later than 30 days after serving his notice of intention. Code Civ. Proc. § 659.

[10] There would, therefore, be no question as to the failure of appellant to serve his affidavits within the time provided by the Code, were it not that the bill of exceptions also states that, as shown by a certain affidavit of service, the notice of intention was served on the attorneys for one of the mechanic's lien claimants on July 9, 1917. But the mechanics' lien claimants are not interested in any issue of priority as between the mortgage and the trust deed. The affidavits upon which appellant relied pertained to an issue in which none of the respondents is interested, except Young, the holder of the trust deed. The record shows without doubt that the notice of intention was served on the attorneys for Young, the holder of the trust deed, on July 6, 1917. The affidavits, therefore, were not served in time to entitle appellant to a new trial of any issue affecting the rights of Young as the holder of the trust deed. For this reason the motion for a new trial was properly denied.

Though the foreclosure decree conforms with the views we have thus far expressed, we think that in the particular about to be noticed it is not justified by the findings, and that it should be modified to accord with what is said infra.

[11] The facts disclosed by the findings show that the mortgage was entitled to priority over the trust deed to the extent of $6,000—not merely $5,000, as adjudged by the trial court. The trust deed, it will be remembered, expressly recites that it is subject to the mortgage of Richman for $6,500. The trial court gave effect to this declaration of the trust deed by allowing to the mortgage priority over the trust deed to the amount actually advanced or loaned under the mortgage, namely, $5,000, but held that the mortgage was subordinate to the trust deed as to so much of the mortgage as was not advanced, $1,500. Of this sum of $1,500, $500 was voluntarily deducted by appellant from the face of the mortgage when he bought it, and the balance, $1,000, represents the amount that Storch agreed should be allowed appellant as a profit or discount. That is, when Storch sold the mortgage to McClure, pursuant to the agreement that Storch theretofore had made with the mortgagee, Richman, it was agreed between Storch and McClure that if the latter would credit $500 on the mortgage, thus reducing it to $6,000, Storch would sell it to him for

$5,000, thus allowing McClure a profit or discount of $1,000. Therefore, when Storch, the mortgagor, sold the note and mortgage to McClure, he, in effect, agreed that, though the latter was to pay but $5,000, nevertheless he should be entitled to foreclose the mortgage to the extent of $6,000; in other words, that the mortgage should be a lien on the land to the extent of $6,000. It is probable that it was only by allowing McClure this profit of $1,000 that Storch was able to secure the $5,000. There was therefore ample consideration, as between Storch and McClure, to support a lien to secure the full amount agreed upon, $6,000. When the beneficiary under the trust deed declared therein that that instrument should be subject to the mortgage, she declared, in effect, that it should be subject to what, apparently, was the amount secured thereby, $6,500. If the trust deed had been recorded before the mortgage, and if the court had found that the beneficiary in the trust deed had agreed that that instrument should be subject to the mortgage if all the moneys to be advanced under the mortgage were used in the construction of the building, it would have been proper to adjudge that the mortgage was entitled to priority to the extent, and only to the extent, that the moneys furnished by the holder of the mortgage were used in the construction of the building, which could not exceed the $5,000 actually paid. Joralmon v. McPhee, 31 Colo. 26, 71 Pac. 419. But there was no such understanding. By accepting the trust deed with the clause that it is subject to the mortgage, the beneficiary under the trust deed agreed that it should be subject to the mortgage to the extent of any indebtedness that might be owing by the mortgagor on the note and mortgage, not exceeding the face of the note, which indebtedness was, as we have seen, the amount agreed upon by the mortgagor and McClure when the latter bought the mortgage, namely, $6,000.

[12] Under the circumstances of this case we think that the holder of the trust deed took that instrument subject to the right of the holder of the mortgage to enforce it to the extent that it is enforceable against the mortgagor. Without doubt, a junior incumbrancer may always allege and show that the claim of a prior mortgagee is exaggerated. But here the claim of the holder of the mortgage that $6,000 is the amount secured thereby is not exaggerated. That is the amount that the mortgagor, for a valuable consideration, agreed should be paid to the purchaser of the note and mortgage if he should purchase and pay $5,000 therefor. There are circumstances under which it is proper for the holder of a mortgage to enforce it to the full extent of the amount named therein, though but a part thereof has been paid. Freeman v. Auld, 44 N. Y. 50. See, also, Crawford v. Edwards, 33 Mich. 355. In Freeman v. Auld, supra, it was held that, as against the grantee of a lot who purchased subject to a prior mortgage, an assignee of the mortgage can enforce the mortgage to the full extent expressed therein, although he purchased the mortgage with knowledge that but one-half of that sum had actually been loaned thereon, and he himself had paid the mortgagee only that amount as consideration for the assignment. It is possible that there are material points of dissimilarity between that case and this. We only cite it to show that there are cases where it is proper to give priority to a mortgage for the full amount named therein, though less than that amount has actually been loaned by the mortgagee or his assignee. And we think that this is just such a case, except that here the assignee of the mortgagee is entitled to priority over the trust deed only to the extent that he agreed to take the mortgage as security, namely, $6,000.

[13] Though subject to the mortgage lien to the extent of $6,000, we do not think the trust deed is subject both to the mechanics' liens and the mortgage, thus making it subordinate to liens that, in the aggregate, exceed $6,000. Though recorded after the mortgage was recorded, and though it recites that it is subject to the mortgage, the trust deed was recorded before any work was done or materials were commenced to be furnished. In the ordinary course of things, therefore, the trust deed would be prior to any of the mechanics' liens. But the mortgage, which the trust deed says it is subject to, declares that the mortgagee may pay all liens or incumbrances that are prior to the mortgage, and that it is given to secure all sums that may be paid by the mortgagee to satisfy any prior liens. Because of these provisions in the mortgage it is suggested by the mechanic's lien claimants that the trust deed, which is declared to be subject to the mortgage, must also be subject to the mechanics' liens to which the mortgage is subject. We think, however, that this argument gives to the clause in the trust deed declaring that it is subject to the mortgage a meaning never intended by the trustee or by the beneficiary named in the trust deed. It may be conceded, for the purpose of this decision, that by reason of these provisions in the mortgage and the trust deed the latter is subordinate to all liens that are prior to the mortgage, and which were within the contemplation of the parties as possible prior liens when the trust deed was executed. But we do not think that the mechanics' liens are within that category. Neither the trustee nor the beneficiary under the trust deed could have anticipated, when it was agreed that the trust deed should be subject to the mortgage, that the latter would ever

be subordinate to any mechanics' liens in any particular or to any extent whatever. The mortgage was recorded before any work was done or materials furnished, as was also the trust deed. The mortgage, upon its face, gives no inkling that the advancement of the whole mortgage indebtedness, $6,500, was not obligatory upon the mortgagee. Neither the trustee nor the beneficiary under the trust deed knew aught of the oral agreement between Storch and Richman, or between Storch and McClure. So far as the trustee and the beneficiary are concerned, the agreement that the trust deed should be subordinate to the mortgage was not made in contemplation of the mortgagor's oral agreement with his mortgagee that all advancements that the latter might make over and above the initial payment of $1,600 should be optional only. If that oral agreement had not been made, the mortgage never would have been subordinate to any of the mechanics' liens, and consequently the trust deed would not be subordinate to any of them either. Our conclusion is that the security afforded by the trust deed should in no wise and to no extent be impaired by reason of the secret oral agreement between Storch and his mortgagee, whereby there was created a situation not contemplated by the trustee or the beneficiary under the trust deed when the latter instrument was executed.

For the foregoing reasons we conclude that the foreclosure decree should provide that the trust deed is subordinate to an amount equal, in the aggregate, to said sum of $6,000, together with any unpaid and accrued interest on such sum of $6,000, at the rate provided for in the mortgage, and a reasonable attorney's fee to be fixed by the trial court and based upon said sum of $6,000 and said interest thereon.

There are no other assignments of error that merit discussion.

The result of our conclusions is that the judgment is correct, except in the particular above mentioned. The facts appear with sufficient certainty in the findings to authorize the entry of a judgment modified to accord with these conclusions. There is, therefore, no necessity for remanding the case for another trial. The proper result can be reached by directing a modification of the judgment. This will necessitate a recasting of the entire judgment—a task that should devolve upon the court below, where the trial judge, if he please, may avail himself of the assistance of counsel for the respective parties in drafting the modified judgment.

It is adjudged that the cause be, and it is, remanded, with directions to the court below to modify the judgment in the particular indicated, and to re-enter the judgment as thus modified. And as so modified, the judgment will stand affirmed. Appellant will recover his costs of appeal against the respondents Frank Wilson Young and Title Guarantee & Trust Company.

We concur: THOMAS, J.; WELLER, J.

183 Cal. 585

HARDIMAN et al. v. CHURCH, Judge.
(S. F. 9394.)

(Supreme Court of California. Aug. 20, 1920.)

1. Wills ⟸225, 249—Objection to jurisdiction not ground for contest, but for opposition to probate.

Want of jurisdiction in the superior court because deceased was not a resident of the county is not a proper ground for contesting the will (Code Civ. Proc. § 1312), but contestants may object to the court's jurisdiction to entertain the application for probate on that ground.

2. Wills ⟸384—Review of conclusions on jurisdictional question of residence allowable.

On appeal from a judgment or order admitting a will to probate, contestants are entitled to have reviewed the conclusions of the court on the residence of deceased, which is essential to jurisdiction, and such rulings receiving or excluding evidence on that issue as may be complained of.

3. Exceptions, bill of ⟸36(3)—Wills ⟸364—Attempted appeal in will contest and service of bill of exceptions held made within time.

In a will contest neither the objection that the attempted appeal was not taken within the time allowed, or that the proposed bill was not served in time, was well grounded, where there was a proceeding on motion for new trial allowed by Code Civ. Proc. § 1714, and decision thereon and bill and appeal were served and taken, respectively, within proper time thereafter, under sections 630, 939, regardless of the merits of the motion.

4. Exceptions, bills of ⟸55(4)—Mandate to compel settlement not to be taken as intimating Supreme Court's view on merits.

A decision, granting a peremptory writ of mandate to compel settlement of bill of exceptions, is not to be taken as intimating any view as to the merits of the appeal in the light afforded by the proposed bill.

In Bank.

Application by Mary Hardiman and others for writ of mandate, directed to the Superior Court of Alameda County, and Hon. Lincoln S. Church, judge thereof, to compel a settlement of a bill of exceptions for appeal from a judgment admitting to probate the will of Jane O'Neil. Writ granted.

W. F. Stafford and Wm. M. Stafford, both of San Francisco, for petitioners.

Dixon L. Phillips, of Oakland, for respondent.

ANGELLOTTI, C. J. This is a proceeding in mandate to compel the settlement of a bill of exceptions for use on an appeal from a judgment or order of the superior court of Alameda county, admitting to probate the will of one Jane O'Neil. The will was contested, petitioners here, who were heirs of deceased, being the contestants, the grounds of contest stated in the written opposition to probate filed being: First, want of jurisdiction of the superior court of Alameda county, for the reason that deceased was not a resident of that county at the time of her death; second, incompetency of deceased to make a will; third, want of proper execution, and, fourth, undue influence.

[1] The first ground stated was not a

proper ground of contest of the will (section 1312, Code Civ. Proc.), but the contestants did have the right to object to the jurisdiction of the court to entertain the application for probate on that ground, and the statement in the opposition to probate filed of the alleged facts in this regard constituted such an objection. Answer to the opposition was filed by the proponent of the will, and, a trial having been had, judgment was given, admitting the will to probate. Within the time prescribed by law therefor the contestants duly initiated a proceeding on motion for a new trial of the contest, the grounds therefor specified therein being limited, however, to the issue of the residence of the deceased at the time of her death, and the matter of the jurisdiction of the superior court of Alameda county, dependent on the residence of deceased in said county at such time, to admit said will to probate, or to hear said contest. The motion for a new trial was denied on November 15, 1919, the order of denial being entered that day, and the appeal of contestants from the judgment was taken within 30 days thereafter, viz. on November 24, 1919, but not within 60 days after the entry of the judgment or order admitting the will to probate. Within the time allowed by law, assuming the time commenced to run upon notice of the order denying a new trial, and the further time granted by the court, contestants served their proposed bill of exceptions, this proposed bill containing only matters relative to the residence of deceased at the time of her death, including the rulings of the trial court in regard to evidence offered on this question and its determination on the evidence that the deceased was a resident of Alameda county.

[2] It cannot be disputed that upon an appeal from the judgment or order admitting the will to probate the contestants are entitled to have reviewed the conclusion of the trial court on the question of the residence of the deceased, a matter essential to the jurisdiction of the court to try the contest, and such rulings in the matter of receiving or excluding evidence on that issue as may be complained of. See Estate of Latour, 140 Cal. 414, 425, 73 Pac. 1070, 74 Pac. 441.

[3] The learned judge of the trial court refused to settle the bill solely on the ground that the attempted appeal was not taken within the time allowed by law, and the further ground that the proposed bill was not served in time. Neither of these objections was well grounded if there was a proceeding on motion for a new trial, for the appeal, while taken more than 60 days after the entry of judgment, was taken within 30 days after the order denying a new trial was entered (section 939, Code Civ. Proc.), and the proposed bill of exceptions was served within the time allowed by law as extended by the court after the entry of such order. Section 650, Code Civ. Proc. We have seen that a proceeding for a new trial was duly instituted, and terminated by an order denying the motion. The law allows such a proceeding in the case of "contests of will." Section 1714, Code Civ. Proc.

The claim in this connection is, in the last analysis, that in view of the fact that no ground upon which a new trial of the contest could properly be granted was stated in the notice of intention to move for a new trial, there was in fact no proceeding on motion for a new trial within the meaning of our statutory provisions relative to the time of taking appeals, with the result that the appeal should have been taken within 60 days after the entry of the judgment or order. We are satisfied that it cannot fairly be so held. There was in fact a proceeding on motion for a new trial in a case where the statute expressly allows such a proceeding. The motion was more obviously devoid of merit perhaps than such motions usually are, but the objection was one going to the merits of the motion and not to the jurisdiction of the court to entertain it. See in this connection Estate of Nutt, 57 Cal. Dec. 512, and cases there cited. As a matter of right the petitioners were entitled to have the bill of exceptions settled for use on their appeal from the judgment or order.

[4] We see no ground upon which it may fairly be held that petitioners are not entitled to a writ of mandate as prayed. Of course, our decision is not to be taken as intimating any view as to the merits of the appeal in the light afforded by the proposed bill. So far as this application for mandate is concerned, that is a matter that may properly be decided only upon the hearing of the appeal, or upon a motion to affirm for obvious want of merit in the appeal.

Let a peremptory writ of mandamus issue in accord with the prayer of the petition.

We concur: SHAW, J.; LAWLOR, J.; LENNON, J.; WILBUR, J.; OLNEY, J.

183 Cal. 537

McNUTT v. HANNON. (L. A. 5337.)

(Supreme Court of California. Aug. 12, 1920, as Modified by Order of Sept. 10, 1920, Denying Hearing.)

1. Partnership ⊂=258(8)—Evidence held to show that fees and services by a surviving law partner were firm assets.

In an action for an accounting against the surviving partner of a law firm, evidence *held* to sustain finding that the fees for which an accounting was asked for the foreclosure of mortgages due an estate for which the partners were attorneys and for final settlement of the estate, were firm assets, though the services were rendered by the surviving partner after the death of the other.

2. Partnership ⊂=255(4)—Final settlement is included in employment as attorneys for administrator.

An employment of a firm of lawyers for the administrator of an estate includes their employment to procure the final settlement of the estate, so that the fees for such settlement are firm assets, though one of the partners died before the services were rendered.

3. Partnership ⊂=255(4)—Surviving partner bound to apply part payment of fee to partnership claim.

Where a firm of lawyers was employed in a case at an agreed fee, and after death of a member the survivor prosecuted an appeal, and received less than the agreed fee for all services, he was bound to apply the entire amount received to the payment of the agreed fee due the partnership, though the appeal was not included in the employment of the firm, so that the fee therefor would not be firm assets.

Department 2.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Finlay A. McNutt, executor of the last will and testament of Cyrus F. McNutt, deceased, against Joseph E. Hannon. Judgment for plaintiff, and defendant appeals. Affirmed.

J. Vincent Hannon, of Los Angeles, for appellant.

Haas & Dunnigan, of Los Angeles, for repondent.

WILBUR, J. Cyrus F. McNutt and J. E. Hannon, the defendant, were law partners from 1897 until the death of the former, May 31, 1912. The plaintiff, as executor of the will of the deceased partner, brought this action against the surviving partner for an accounting and recovered judgment for $9,292.70, being one-third of the fees that the trial court found resulted from the partnership. Defendant appeals from the judgment on a bill of exceptions, and the plaintiff, while claiming that there should have been an equal division of the $27,878.10 fees received by the surviving partner, does not appeal. The court found that the plaintiff is "equitably entitled to receive one-third" thereof.

[1] The defendant claims that the evidence is insufficient to sustain the finding that the partnership existed at the time of the death of plaintiff's testator and the finding that the fees defendant was required to account for were received for the partnership, and, even if they were for partnership business, that the decision of the trial court was inequitable, inasmuch as most of the work for which the fees were paid was done by defendant after the death of his partner. The first claim of the defendant is that the partnership was dissolved about 30 days before the death of McNutt. It is sufficient upon this point to say that the evidence abundantly supports the conclusion of the trial court that the partnership continued until his death. The partners continued to occupy the partnership office and transact partnership business until McNutt became too ill to continue in an important trial then in progress. The fees divided by the decree were largely for services rendered in the estate of Andrew Glassell, which had been in probate from 1901 until finally distributed after the death of plaintiff's testator. The estate was appraised at about $1,000,000. The fees were partly from mortgage foreclosures begun for the administration of said estate after the death of McNutt. One foreclosure proceeding, No. 94486, in the superior court, was begun September 18, 1912, and the attorney fee collected therein was $8,000. In another, No. 94487, begun the same day, the fee received was $4,833, and in action No. 97715, begun January 11, 1913, the fee was $4,000, and in action No. B6406, begun November, 1913, the fee allowed was $500. The defendant claims that each foreclosure resulted from a separate and distinct employment after the death of his partner.

We will only state the evidence that tends to support the findings. The partnership represented Hugh Glassell and Andrew Glassell, executors of the last will and testament of Andrew Glassell, deceased, from February 16, 1901, to January 10, 1912, when, upon their resignation, the Southern Trust Company was appointed as their successor at the instance of the partnership acting for the heirs, and thereafter the partnership continued to act for the successor in all matters pertaining to the estate, but without any express contract so to do. The foreclosure of the above-mentioned mortgages, as well as other work for which fees were claimed by the defendant, was an essential part of the work of preparing the estate of Andrew Glassell for distribution, and the fees therefor were properly allowable to the adminis-

trator in its account as such, and not otherwise. There is other evidence supporting the conclusion that the foreclosures were partnership business. On January 20, 1912, the defendant wrote to the newly appointed administrator as follows:

"Replying to yours of January 18, in re mortgages of Lawrence, Hamilton, Cary, Pixley, Rankin, and Brown. * * * We may also observe in this connection that, before the resignation of Hugh and Andrew Glassell as executors, the other heirs of the estate insisted most strenuously that the mortgages should be foreclosed for the failure of the mortgagees to make the payments as they became due. We have not been advised of any change of attitude of the heirs, and understand that they still insist on that course being pursued. Referring to your request for the address of the parties whose notes you hold, we have some of them and are endeavoring to obtain the others, and will send them as soon as possible."

On February 2, 1912, an order of the superior court was made on the application of the administrator, presented by the partnership, permitting the administrator to obtain a correct certificate from the Title Insurance & Trust Company showing a correct description of the real property belonging to the estate of decedent, with plats, etc. On February 5, 1912, the defendant, by written order, instructed the Title Insurance & Trust Company to make "foreclosure search for mortgages as below, in your usual form to property in Los Angeles county, Cal." Then follows book and page of records of 12 mortgages, including all those for which foreclosure fees are claimed by the plaintiff. The certificates of each mortgage search were separate, and shortly after each was delivered a foreclosure was begun to foreclose the mortgage covered by the certificate, and the cost of the certificate was claimed and recovered with interest in the foreclosure.

As the fees allowed in the foreclosure cases were found by the trial court to belong to the partnership, we may note at this point that defendant claims that the fees in three of these cases were made unusually large by stipulation to cover work done for the defendants therein, and for a corporation organized by the heirs to purchase the property at foreclosure sale and that the proportion thereof resulting from such other work does not belong to the partnership, even if the foreclosure fee was a partnership asset. It is sufficient in that regard to say that the fact that such fees were allowed to and paid by the administrator as a fee for such foreclosure is sufficient to sustain the finding of the trial court, if it did not compel its conclusion. It will be necessary to more fully state the additional evidence concerning the foreclosure cases, as the facts vary somewhat in each case.

On May 28, 1912, the administrator mailed the defendant the notes and mortgage of D. W. Lawrence, with interest computed to May 28, 1912, amounting to $148,406.27, in accordance with its practice when foreclosures were contemplated. The search of the records was completed April 30, 1912, and the expense thereof was claimed and recovered in the foreclosure. The complaint was filed September 18, 1912, and numbered 94486. The fee allowed, $8,000. In case No. 94487, filed the same day, the mortgage of Lawrence was delivered to the defendant May 13, 1912. Interest was figured to that date. Total amount of principal and interest was $124,712.84. Certificate of search was completed April 25, 1912. Attorney fee recovered, $4,833. In the foreclosure against Carey the fee recovered was $500. Suit was filed November 16, 1913. The certificate of search for which the cost was recovered was one covered by the general order of February 5, 1912. In the suit against Rankin (foreclosure No. 97715) the complaint was filed January 11, 1913. The original order of search included this mortgage, but the certificate upon which the foreclosure was based was covered by a subsequent order.

While these complaints were all filed along after the death of McNutt, the relationship of the parties, the delivery of the mortgages, the computation of interest, and the order of a foreclosure search as early as February, 1912, all point to the conclusion adopted by the trial court and sufficiently sustain its finding that such business was partnership business, as was the three foreclosures begun before his death, all indicating the general plan of closing up the business of the estate by such foreclosures. There are other facts and circumstances which tend to support the conclusion of the trial court, but in view of our conclusion it is unnecessary to set them forth.

The appellant attacks a finding that a fee of $1,750, allowed in the settlement of the final account of the administrator for the settlement of the executors' final accounts, was a partnership asset. The statement of the defendant, on which the fees were paid, that this work "extended over practically the whole time, from the resignation of the former executors until the settlement of their accounts, and took most of my time," is alone sufficient to sustain the finding that it was partnership business.

[2] The partnership also acted as attorneys for the estate of Phillip Glassell, one of the heirs of Andrew Glassell. The defendant claims that there is no evidence of any employment to complete the administration, and therefore that the fee for such work does not belong to the partnership. This estate had been in probate from April 22, 1907. The partnership had acted as attorneys for the executors, and after the substitution of the

Southern Trust Company in both estates acted for such administrator. After the death of McNutt a decree of partial distribution was procured, the final account was settled, and final distribution had. These proceedings were necessarily contemplated at the time of the employment of the partnership, and the relationship of the parties was such as to justify the conclusion of the trial court that this was partnership business. To uphold the contention of the defendant would be to override the almost universal custom relating to such employment, a custom by which probate courts have for years fixed the fees of the attorneys for executors, and which is now recognized by the statute, which fixes the attorney fees to be allowed to executors and administrators.

[3] The appellant claims that the finding in favor of the plaintiff that a $600 fee received in the case of Provident Gold Mining Co. v. Haines was partnership property is not supported by the evidence. The partnership was employed at an agreed fee of $1,000. Appellant conducted an appeal after the death of his partner, and, having collected $600, claims the right to apply $400 only to the partnership fee, and the balance to his service on appeal. Waiving the question as to whether such appeal was partnership business, the defendant was bound to apply the payment of $600, made without designation, to the partnership fee then due and owing. Appellant claims that the trial court made no finding with reference to a claim that the decedent had received medical services valued at $572 from a client, who owed the partnership a fee exceeding that amount, and had thus, in effect, collected that part of the fee. The client filed a claim against the estate of the decedent, which had not been disposed of. The client could not properly set off this individual debt against the partnership claim, and if there was any error it was in a failure in the accounting to dispose of the fee due the partnership, but this is not assigned by appellant as an error.

Appellant complains that the court only allowed him two-thirds of the fees earned by the partnership and by him in his capacity as surviving partner. Assuming, for the purposes of the decision, that he was entitled to more than one-half of such fees (see Little v. Caldwell, 101 Cal. 553, 36 Pac. 107, 40 Am. St. Rep. 89), we think the record is such that the conclusion of the trial court in the matter of apportionment of fees is sufficiently supported by evidence.

As to the points made concerning the admissibility of evidence, the foregoing sufficiently shows its pertinence.

Judgment affirmed.

We concur: LENNON, J.; SLOANE, J.

183 Cal. 519

COHEN et al. v. CITY OF ALAMEDA et al.
(S. F. 8340.)

(Supreme Court of California. Aug. 12, 1920, Rehearing Denied Sept. 10, 1920.)

1. Municipal corporations ⟸453(2)—Appointing city officers to assess benefits for opening street held not to invalidate assessments.

The appointment of three city officers as commissioners to assess damages and benefits for a street opening, who were to be paid, under St. 1889, pp. 71, 72, §§ 6, 8, from the assessments levied by them, does not invalidate the assessments.

2. Municipal corporations ⟸474—Failure to assess lot within district does not make assessment void.

In the assessment of benefits and damages for the opening of a street, the mere failure to assess a lot of land within the assessment district does not make the assessment void; the remedy being by appeal to the city council, under St. 1889, p. 73, § 14.

3. Municipal corporations ⟸474—Exclusion from improvement district of public property does not invalidate assessment.

Under St. 1889, p. 72, § 9, as amended by St. 1909, p. 1034, § 1, which authorized the commissioners to assess benefits for public improvements against public lands the exclusion by the city council from an improvement district for the opening of streets of all public lands within the exterior boundaries of the district was a mere exercise of their power to determine the extent of the district and the liability of public property to assessment, and did not invalidate the assessment.

4. Municipal corporations ⟸434(2)—Decision of council as to extent of assessment district conclusive except on appeal.

The decision of the city council, determining the extent of the district benefited by an improvement, is conclusive except on appeal to that body; the commission having no power to assess benefits on public lands excluded by the council from the district.

5. Eminent domain ⟸169—General exception of public ways from land to be taken does not invalidate description in resolution and notice.

The resolution and notice for a public work sufficiently described the property to be taken where, after describing in detail the strip of land which was to constitute the street, it excepted therefrom all lands held by the city or the people as open ways.

In Bank.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Emilie G. Cohen and others against the City of Alameda and another, to enjoin the sale of real property for assessments for street work. Judgment for defendants, and plaintiffs appeal. Affirmed.

R. M. F. Soto, of San Francisco, for appellants.

Wm. J. Locke, of San Francisco, for respondents.

WILBUR, J. This action was brought to enjoin the sale of the plaintiffs' respective pieces of property for the nonpayment of assessments for the widening and extension of Encinal avenue in Alameda. The application for an injunction pendente lite having been denied, the plaintiffs paid the assessments under protest, and thereupon filed a supplemental complaint for the recovery of the amounts paid. Judgment was rendered for the defendants on demurrer, and plaintiffs appeal. The assessments were made by authority of the street opening act of March 6, 1889, as amended in 1909 and 1913. St. 1889, p. 70; St. 1909, p. 1034; St. 1913, p. 376.

[1] Appellants claim that the proceedings are void for the reason that three city officers appointed by the city council as commissioners for the assessment of the damages and benefits, to wit, the city clerk, the city auditor, and the city attorney, were disqualified because they were to be paid, as provided by the statute (St. 1889, pp. 71, 72, §§ 6, 8), from the assessments levied by them. There is no merit in this contention. If appellants' position is sound it would invalidate every assessment for the purpose of state and county taxes, and render impossible the performance of such services except by volunteer officers. It is contended that this disqualification also results from the vesting in these commissioners of an uncontrolled discretion, if the law be so construed, to exclude or include public property in the assessment of benefits. But there was no public land within the assessment district, as will be shown in the discussion of the next point.

[2, 3] Appellants claim that the assessment is void for the reason that 14 pieces of property, belonging to the city of Alameda, within the exterior boundaries of the assessment district, were not assessed for benefits. There are two answers to this proposition: First. In a district assessment the mere failure to assess a lot of land within the assessment district does not make the assessment void. The remedy for such an erroneous assessment is by objection to the city council. St. 1889, p. 73, § 14; Larsen v. City and County of San Francisco, 186 Pac. 757. Second. The city council expressly excluded such lands from the district to be assessed by the following proviso in said description:

"Saving, excepting and excluding from said district all public streets, avenues, roads, places and parks, and any and all public property within the exterior boundaries of said district of lands hereinbefore specified and described."

Previous to the enactment of section 9 of the statute, which authorized the commissioners to assess benefits against public lands, the liability of such lands for assessments for benefits accruing thereto by reason of local improvements depended upon the nature and character of the public ownership and the use to which it was applied. Witter v. Mission School District, 121 Cal. 350, 53 Pac. 905, 66 Am. St. Rep. 33; City Street Imp. Co. v. Regents of the University of Cal., 153 Cal. 776, 96 Pac. 801, 18 L. R. A. (N. S.) 451; Tulare Irrigation Dist. v. Collins, 154 Cal. 440, 443, 97 Pac. 1124; 28 Cyc. 1117, 1118. The effect of the statute was to authorize the local authorities to assess public property where, in their judgment, such property would be benefited by the improvement. If, however, in the judgment of the city authorities such property was not benefited, they might so determine and thus exclude such property from assessment. This, is, in effect, what was done by the city council.

The statute provides that before ordering the opening or extension of any street the city council shall pass a resolution of intention to do so describing the opening or extension to be made and the land to be taken, "and specifying the exterior boundaries of the district of lands to be affected or benefited by said work or improvement, and to be assessed to pay the damages, cost, and expenses thereof." Stats. 1889, p. 70, § 2. It also provides for notice and a hearing at which any person interested may object to the extent of "the district of lands to be affected or benefited." Sections 3, 4, and 5. If the objections are sustained, the proceeding terminates. If they are overruled, it goes forward. While the statute requires only the "exterior boundaries" of the district to be specified, it is reasonable to hold that if the council finds that any convenient delimitation of such boundaries would include parcels of land that in its opinion would not be benefited or affected by the proposed opening or extension, it could properly qualify the description by excepting such parcels, so that they would not form a part of the district. The council is empowered to determine the extent of the district benefited. It should be permitted to describe it accurately by making a proper exception of the land that may be within the fixed outer boundaries, but which are not benefited, in order that the resolution may not be inaccurate or misleading. Such a description would not make the proceeding void. The exception herein shown is obviously nothing more than a part of the description of the district, and if the council was of the opinion above referred to, the exception was necessary to make the description accurate. It must be presumed that it so decided and framed the description accordingly.

[4] The decision of the city council, determining the extent of the district benefited by the improvement, is conclusive except on appeal to that body. United Real Estate & Trust Co. v. Barnes, 159 Cal. 242, 113 Pac. 167. The commission had no power to assess any portion of the benefits upon the public lands thus included within the assessment district.

[5] It is contended that the city council never acquired jurisdiction because of the insufficient description in the resolution and notice of public work of the land to be taken. This contention is based upon the fact that after describing in great detail a strip of land 80 feet wide which was to constitute the street as widened and opened, the following exception is stated in the resolution and notice:

"Excepting therefrom all lands now held by said city or the people of said state as open ways."

Proceedings instituted under the same statute here involved were under consideration in Cohen v. City of Alameda, 124 Cal. 504, 57 Pac. 377. The description of the land taken in that case was modified by the following words:

"Excepting therefrom all land now held by said city or the people of said state as open ways."

It was held that the sufficiency of the description was not impaired by the exception. It was there said:

"If, as a matter of fact, a portion of the land within these boundaries has already been appropriated to public use, or is held by the city or state 'as open ways,' the land deemed necessary to be taken is sufficiently described by designating in the resolution the outer lines of the proposed improvement, without any mention of such open ways, or by excepting the same, without describing the exceptions. In either case the parties to be affected by the proposed improvement are fully notified of every fact necessary for the protection of their interests."

Although the language of the exception here involved is somewhat different, the principle is the same, and upon the authority of Cohen v. City of Alameda, supra, it must be held that the description of the land to be taken, contained in the resolution and notice, is sufficient. The same reasoning would apply with equal force to the sufficiency of the description of the district to be assessed, with its exceptions. These exceptions are equally definite.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LAWLOR, J.; LENNON, J.

OLNEY, J. (concurring). I concur in the decision and in opinion of Justice WILBUR, except as to the conclusion that the public lands within the exterior limits of the assessment district were not a part of the district. The assessment district was described by its exterior boundaries followed by an exception reading, "excluding * * * any and all public property within the exterior boundaries of the district." It is plain that the fact that lands are public lands, a park for example, does not affect the matter of their being benefited by the contemplated improvement. The improvement may well benefit the land, although it is public. The statute requires that all lands which will be benefited shall be included within the district, and it necessarily follows, in my judgment, that the city council cannot exclude from the assessment district all lands of a certain character such as lands owned by the public, when such lands are within the exterior limits of the district benefited, and the character or attribute because of which they are attempted to be excluded is one which does not affect the matter of their being benefited or not.

It does not follow, however, that the attempt to exclude such lands from the assessment district invalidates the assessment. The plaintiff was in no wise prejudiced thereby. Under section 9 of the act, it was discretionary with the city council to assess, or not to assess, public lands within the district. The attempt of the city council to exclude the lands from the district is but an attempt to exercise this discretion at the wrong point in the proceedings. The result, however, is the same as if it had been exercised when it should have been, at the time of making the assessment.

48 Cal. App. 354

VIGNAUT v. SUPERIOR COURT OF SACRAMENTO COUNTY et al. (Civ. 2204.)

(District Court of Appeal, Third District, California. June 29, 1920.)

Certiorari ⊂=60—Where orders had been vacated, writ will be dismissed.

Where the certificate of the clerk of the inferior court showed that the orders sought to be reviewed had been vacated, and petitioner consented, the proceeding for writ of review will be dismissed.

Application by August Vignaut for writ of review to be directed to the Superior Court of Sacramento County and Charles O. Busick, Judge thereof, to review certain orders. Petition dismissed.

R. Platnauer, of Sacramento, for petitioner.

H. N. Mitchell, of Sacramento, for respondents.

PREWETT, Presiding Judge pro tem. The petitioner applies for a writ of review to

review the action of above-named respondents in making certain orders in the civil action in said superior court pending wherein one Mary W. Vignaut is plaintiff and the petitioner herein is defendant.

It appears from the certificate of the clerk of said superior court on file herein that the orders complained of have been vacated, and, in consequence, the petitioner consents that this proceeding be dismissed.

The proceeding is accordingly dismissed.

We concur: HART, J.; BURNETT, J.

48 Cal. App. 398

PEOPLE v. MALONE. (Cr. 529.)

(District Court of Appeal, Third District, California. July 1, 1920.)

1. Criminal law ⟸1144(13)—In absence of evidence, appellate court must assume it supported verdict.

Where the appellate court is not furnished with a copy of the testimony on appeal from a conviction of robbery, it must assume that the evidence was sufficient to justify the verdict.

2. Criminal law ⟸916, 1144(18)—New trial not granted because substituted attorney not prepared, where no continuance asked; it being presumed defendant's rights were protected.

It was not error to deny a motion for a new trial, after conviction for robbery, on the ground that defendant's attorney was substituted for another, who was taken ill on the day of the trial, and was unprepared to conduct the defense, where no application was made for a continuance of the trial, and the record does not contain the proceedings, as it must be presumed defendant's rights were protected.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Sam Malone was convicted of robbery, and he appeals from the judgment of conviction and order denying motion for new trial. Affirmed.

T. M. Anaya, of Modesto, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. Defendant was convicted of robbery in the superior court of the county of Stanislaus in having taken by means of force and violence from the person of one L. R. Williams certain personal property. The appeal is from the judgment and order denying defendant's motion for a new trial. The appeal has apparently been abandoned, as no appearance has been made for appellant in this court.

[1] We have not been furnished with a copy of the testimony in the case, and we must therefore assume that the evidence was amply sufficient to justify the verdict. The clerk's transcript, which we have examined, discloses no error. The information is sufficient, the instructions were fair and fully covered the law of the case, and there is apparently no error in the ruling of the court in denying the motion for a new trial.

[2] That motion was based upon the fact that the attorney who was employed by the defendant was taken suddenly ill, and another attorney was substituted by the court on the day of the trial. The latter filed an affidavit on the motion for a new trial, in which he stated that he was unfamiliar with the facts in the case at the time he was appointed by the court, and was utterly unprepared to make a proper defense. It is sufficient to say, however, that no application was made for a continuance of the trial, and, in the absence of the record, we must assume that all of the rights of the defendant were safeguarded; that he was efficiently represented; that he had a fair and impartial trial; and that the verdict is just and legal.

The judgment and order are affirmed.

48 Cal. App. 305

BRIDGFORD v. McADOO, Director General of Railroads. (Civ. 3281.)

(District Court of Appeal, First District, Division 2, California. June 24, 1920.)

1. Trusts ⟸104—Facts held to show an involuntary trustee.

One who had a contract with the United States assigned to plaintiff all checks that might be issued under the contract. Thereafter the Director General of Railroads, with notice of the assignment, issued a check to the contractor, and then received it back from him for application on some other claim. *Held* that, under Civ. Code, § 2223, the Director General was an involuntary trustee for plaintiff, irrespective of proof of the contractor's unwillingness to repay plaintiff the advances to secure which the assignment was made.

2. Assignments ⟸101—Director General of Railroads cannot satisfy prior claim for freight from proceeds of subsequent shipment assigned for advances.

One who had a contract with the United States assigned to plaintiff all checks that might be issued under the contract. Thereafter the Director General of Railroads, with notice of the assignment, issued a check to the contractor, and then received it back from him to satisfy a claim against the contractor for freight charges in connection with other matters. *Held* that the Director General could not so withhold the amount due from the assignee.

3. Costs ⟸260(6½)—Penalty for frivolous appeal not imposed against Director General of Railroads, who was not responsible therefor.

Though an appeal from a judgment against the Director General was palpably frivolous,

a penalty will not be imposed against him, where it was apparent he was not responsible for the delay.

Appeal from Superior Court, Alameda County; Stanley A. Smith, Judge.

Action by E. A. Bridgford against William G. McAdoo, Director General of Railroads. Judgment for plaintiff, and defendant appeals. Affirmed.

Stanley Moore, of San Francisco, for appellant.

E. A. Bridgford and Herrington & Clausen, all of San Francisco, for respondent.

NOURSE, J. Defendant, as Director General of Railroads, appeals from a judgment rendered against him and in favor of plaintiff for $1,078.32, the proceeds of a check belonging to plaintiff and issued by the paymaster of the Quartermaster's Department of the War Department. The facts of the case found to be true by the trial court are: On September 18, 1917, one Lawrence entered into a contract with the United States, acting through its War Department, for the delivery of 2,500 cords of wood to the department at Camp Fremont, in San Mateo county. On January 16, 1918, Lawrence entered into a contract with respondent whereby respondent agreed to advance money to Lawrence from time to time to assist him in the performance of his contract with the government, and Lawrence assigned to respondent all moneys, vouchers, and checks issued under said contract, and authorized respondent to collect and receive the same. Subsequent to said assignment Lawrence delivered at Camp Fremont wood of the agreed price of more than $2,200, and fully prepaid all freight thereon with moneys advanced to him by respondent for that purpose, and there is still due and owing to respondent from Lawrence on account of said advances a sum in excess of $2,200. On the 2d day of August, 1918, an officer of the Northwestern Pacific Railroad Company (then operating under the appellant as Director General of Railroads), with full knowledge of respondent's right and claim to the money due under said contract, accompanied Lawrence to the office of the paymaster of the War Department, and, over the protests of respondent, aided Lawrence in procuring from the paymaster a check for $1,078.32, a portion of the amount due under said contract, and at the same time received the check from Lawrence, which was then delivered to appellant, who ever since has retained the check or its proceeds in his said capacity as Director General of Railroads.

[1] The only point raised by appellant is that it does not appear but that Lawrence was at all times willing to repay respondent all the money advanced to him, and that it does not appear that respondent ever made demand therefor upon Lawrence. Neither fact is essential to recovery in this action. The check and its proceeds were the property of respondent by reason of the assignment. The appellant and his agents, with full knowledge of the title and claim of respondent, having wrongfully secured the check, wrongfully detained possession thereof. The appellant thereby became an involuntary trustee under section 2223, Civil Code, which provides:

"One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner."

Respondent was entitled to recover his own property from the trustee who thus wrongfully held it for his benefit, irrespective of the willingness of Lawrence to recompense him for the loss, and without demand upon Lawrence for that purpose.

[2] It cannot be ascertained from the record what, if any, claim appellant had against Lawrence. None is set up in the pleadings, the answer consisting entirely of denials of the allegations of the complaint. From the briefs it would appear that the claim is for freight charges of some nature. But as the trial court found that all freight on wood delivered by Lawrence to Camp Fremont pursuant to the contract and subsequent to the assignment was fully paid by moneys advanced for that purpose by respondent, and that the same had not been repaid to respondent, it is apparent that if appellant had any claim against Lawrence for freight charges it must have accrued prior to the assignment. Such being the case, Lawrence could not satisfy this indebtedness out of moneys which he had previously assigned to respondent.

[3] Furthermore, the answer filed by defendant consists solely of denials of the allegations of the complaint, including a denial of the delivery of the check to appellant as above outlined, and a denial that the check or its proceeds were ever received by appellant or his officers or agents or retained by them. The evidence offered at the trial, including the admissions of an agent of appellant who was a witness in his behalf, amply supports the conclusion of the trial court that these allegations of the answer were not true. From the record it is apparent that the check and its proceeds are the property of respondent, and that appellant is wrongfully withholding the same without any claim or title.

The appeal from the judgment is frivolous, and was palpably taken either to delay or harass the respondent, but no penalty is imposed, because it is apparent that the appellant is not the party responsible for the delay.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

48 Cal. App. 494

PEOPLE v. PRINCE. (Cr. 514.)

(District Court of Appeal, Third District, California. July 13, 1920.)

Criminal law ⊜1130(4)—Conviction affirmed, in absence of brief, no error appearing on face of record.

On appeal from conviction of receiving stolen goods and denial of new trial, defendant filing no brief and not being represented by counsel, record examined for error, none found, and consequent affirmance.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Cuban Prince was convicted of receiving stolen goods, denied a new trial, and appeals. Affirmed.

Richard P. Talbot, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was convicted by a jury in the superior court of the county of Sacramento under an information charging him with the crime of buying and receiving for his own gain certain stolen property, knowing the same to have been stolen. He appeals from the judgment of conviction and the order denying his motion for a new trial.

The appeal was placed on the calendar of the late (June, 1920) term of this court, and the attorney appearing of record for the defendant regularly and duly notified of the day on which the cause would be called for hearing and argument. No brief was filed in support of the appeal on behalf of the defendant within the time required by the rules of this court, or at all, and none has, since the cause was called for hearing, been filed herein. Nor was the defendant represented by counsel before this court when the case was called, and consequently no oral argument was presented in support of the appeal. There was therefore left to the Attorney General no other alternative but to submit the case upon the record, which, on the motion of that officer, was ordered done.

We have, nevertheless, examined the evidence and the rulings of the court upon objections made to certain questions put to certain witnesses, and, without entering into a detailed or even general statement of the facts, which, under the circumstances, is not required, or referring specifically to the exceptions to the rulings referred to, we state our conclusion to be that the verdict rests upon evidence sufficiently substantial to sustain it, and that none of the rulings upon the evidence to which objections were interposed by the accused is justly subject to the criticism implied from the said objections. We have also carefully examined the court's charge to the jury, and so have been fully convinced that thus the court correctly enlightened the jury upon the principles and rules of law pertinent to the charge and the facts as developed by the evidence.

The judgment and the order are accordingly affirmed.

48 Cal. App. 600

PACIFIC FINANCE & INVESTMENT CO. v. PIERCE et al. (Civ. 3429.)

(District Court of Appeal, First District, Division 1, California. July 21, 1920.)

1. Sales ⊜477(6)—Acceptance of past-due installments not waiver of time as essence.

Where an agent of an automobile company sells under an installment contract a car owned by him to a purchaser, who in fact has purchased for another, whom he is merely financing, and the contract makes time of the essence, and expressly provides that acceptance by the owner of any payment after the same is due shall not constitute a waiver of such provision, the automobile company, which has taken over the contract from its agent by assignment, does not by accepting past-due installments, waive its right to retake the car upon further default.

2. Sales ⊜481—Failure to find as to rights of third person held immaterial.

Where purchaser of automobile in fact purchased for a third person, whom he was merely financing, and default was made in the payment of installments, in claim and delivery by the purchaser against the former owner of the automobile, who had retaken it, it was not necessary to find the amount owing to the purchaser by the third person.

3. Sales ⊜481—Failure to find as to rights under assignment held immaterial in claim and delivery.

Where an owner of an automobile sold it under an installment contract, and thereafter assigned the contract to a company, which after retaking the car on default of payments sold it to another, in an action of claim and delivery by the first purchaser against the assignee, it was not necessary to find as to the rights existing between such assignee and its later vendee.

4. Sales ⊜481 — Evidence held to sustain finding that purchaser made agreement with third person without consent of seller's assignee.

A finding in such action that the ostensible purchaser and such third party entered into an agreement for the protection of the former, without the knowledge or consent of the seller's assignee, *held* supported by evidence.

5. Sales ⊜481 — Award of interest during wrongful detention held erroneous.

In claim and delivery by purchaser for an automobile, it was error, in awarding the pos-

session of the car to defendant, to allow a certain sum as interest on the money invested in the automobile during the time plaintiff was wrongfully in possession thereof, where such award was not supported by allegations, finding, or conclusion of law.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Claim and delivery by the Pacific Finance & Investment Company, a corporation, against Harley Pierce and others. There was a judgment for defendants, confirming the right of possession in defendant Greer-Robbins Company, and plaintiff appeals. Modified and affirmed.

J. De La Motte, of San Diego, for appellant.

R. Lee Bagby, of San Diego, for respondent.

Albert J. Lee, of San Diego, for defendants.

WASTE, P. J. The plaintiff, claiming the right to do so, under the provisions of a contract of purchase and sale, took possession of a certain automobile, and brought this action against the defendants, seeking to be subrogated to the right of the defendant Pierce to perform a contract, entered into between the Greer-Robbins Company and Pierce, to purchase the car. Judgment was for the defendants, and confirmed the right of possession of the automobile to the Greer-Robbins Company. Plaintiff appealed.

The plaintiff is a corporation engaged in the business of financing contracts for automobiles and other commodities sold on the installment plan. The defendant Greer-Robbins Company, engaged in the business of selling automobiles, had sold the automobile in question to Frank H. Wells, one of its salesmen. Wells, as owner, then entered into a contract with the plaintiff, under the terms of which he sold the car to it upon the installment plan for the sum of $1,100. As a matter of fact, the real purchaser from Wells was the defendant Harley Pierce, the plaintiff merely financing the purchase for him. Wells then assigned the contract to the defendant Greer-Robbins Company. Defendant Pierce, in order to secure the plaintiff, entered into a side agreement with it, in which he agreed to buy the automobile from it, on installments, and specified terms. Payments, as per the Wells contract not being made, the Greer-Robbins Company took forcible possession of the car, and declared the contract cancelled. Plaintiff thereupon offered to pay the amount past due on the contract and the entire balance due on the car. The Greer-Robbins Company refused the offer, and sold the car to the defendant National Motors Company, under an installment contract for the amount due it as assignee of the Wells contract. The plaintiff took the possession of the car from the National Motors Company. That concern had in the meantime defaulted in its payments, and the Greer-Robbins Company had instituted an action to cancel all its rights under its contract.

The plaintiff in its amended complaint alleged the whole transaction to have been conceived and carried out for the purpose of cheating and defrauding it out of the money paid by it upon its contract with Wells, and other sums expended for the benefit of Pierce under its contract with him. It offered to pay into court the balance due the Greer-Robbins Company, and sought to be subrogated to the right of Pierce, and to be allowed to redeem and perform the contract for the purchase of the car. The trial court found there was no fraud in the premises. It confirmed in every particular the rights of the defendant Greer-Robbins Company in the transaction, and held that it was entitled to the possession of the automobile.

[1] Much of the appellant's argument upon this appeal is disposed of by the findings of the lower court. By its terms time is the essence of the Wells contract, and it is expressly covenanted that acceptance by the owner of any payment after the same is due shall not constitute a waiver of that provision. Pierce was in default, and plaintiff was in no better position than was Pierce when the Greer-Robbins Company took possession of the car and canceled the contract for its purchase. That company looked to plaintiff for the installments under the contract. The record indicates that it, in turn, relied upon Pierce, and he upon it. Plaintiff knew and warned Pierce of the danger he and it were in from "standing off" the payments, all, or the most of which, were made after they became due, and after notification and demand by the Greer-Robbins Company. By accepting the installments when they were past due that company did not, as contended for by the appellant, waive its right to retake the automobile upon further default. Benedict v. Greer-Robbins Co., 26 Cal. App. 468, 470, 147 Pac. 486. The condition of the contract was the payment of the purchase price in installments at given times. The failure to make them entitled the vendor by the express terms of the agreement, at its option, without previous demand or notice, to retake possession of the car. Hegler v. Eddy, 53 Cal. 597, 598. The appellant and Pierce were one in the transaction, and the Greer-Robbins Company was not estopped to assert the contract against the claim and offer of appellant, no fraud or oppression being proved or found. Van Allen v. Francis, 123 Cal. 474, 481, 56 Pac. 339. The trial court correctly concluded and held that the acceptance of the payments after they became due did not constitute a waiver of the strict performance of the clause in the agreement making time of the essence of the contract and providing for retaking possession of the car on default in the payments. The cases relied upon by appellant to support its contention expressly lay down the rule that they

are not applicable when, as here, time is expressly made the essence of the contract. Liver v. Mills, 155 Cal. 459, 462, 101 Pac. 299, citing Miller v. Steen, 30 Cal. 407, 89 Am. Dec. 124.

[2, 3] The appellant contends that the court omitted to find on material issues. The side agreement entered into by the appellant and Pierce, for the purpose of protecting appellant in its advances for Pierce's benefit, was collateral to the transaction involved here, and immaterial to the real issues of the case. It was unnecessary for the lower court to find the amount, if any, owed to appellant by Pierce under its terms. It does appear from the findings, however, that but two payments were made by the appellant on the contract, and an additional amount of one hundred and sixty-three dollars for advances. Whatever may have been the amount due to Greer-Robbins Company from Pierce, or the National Motors Company, under the contract, was also immaterial. Appellant's contention that there is no finding upon the issue as to the forfeiture of its rights under the Wells contract is not supported by the record. The court expressly found that such a forfeiture was declared, and the finding is supported by the testimony and the written notice of cancellation, dated June 2, 1917. We are unable to see how the appellant is materially injured by the failure to expressly find that the contract between the Greer-Robbins Company and the National Motors Company was canceled or forfeited. The evidence is to the effect that the payments were not made under its provisions. No rights of the appellant rest upon the existence or nonexistence of that contract. It was in default under its own contract before that transaction arose. For the same reason it matters little to appellant who comprised the copartnership National Motors Company, although the finding that Fairbairn and Davis were the partners appears sufficiently supported by the evidence.

[4] The lower court found that after the contract between Wells and plaintiff was made, the plaintiff, without the consent, knowledge, or acquiescence of Greer-Robbins Company, entered into the side agreement with Pierce. While there is evidence tending to show that this finding does not entirely accord with the facts, it finds support in the testimony of the secretary of the Greer-Robbins Company to the effect that, while it was well understood that the plaintiff was financing Pierce in the deal, the company had no knowledge of their real relations, or that there was any contract or agreement between them. Finding 6, relative to the transaction between the Greer-Robbins Company and the National Motors Company, and the interest of Pierce in that concern, after the rights of plaintiff in the Wells contract had been forfeited, finds ample support in all its essential details in testimony, the truth or falsity of which, and the weight to be given it, were matters for the determination of the trial court.

[5] When the appellant commenced this action it had the automobile in its possession. The respondent Greer-Robbins Company, by way of a cross-complaint, on the facts already stated, sought its return and at some stage of the proceedings got possession, which it had at the time of the trial. The finding of the court was that none of the other parties had any interest in the automobile, and that the Greer-Robbins Company was the rightful owner. In addition to awarding the possession of the car, the court included in the judgment "the sum of $17.50 as interest upon the money invested in said automobile during the time plaintiff was wrongfully in possession thereof." Respondent did not suggest, or pray for, damages of that character. We are at a loss to appreciate upon what theory the item was included in the judgment. There is neither allegation, finding nor conclusion of law, to which it responds. We have been unable to bring the amount into agreement with any of the figures of the various contracts, or unpaid balances, entering into the transaction. The findings are not models of legal sufficiency, but on the whole record fairly support a proper judgment, except as just noted. The judgment should be affirmed, except as to the item of interest included therein.

The cause is remanded to the lower court, with instructions to modify the judgment by striking out therefrom "the sum of $17.50 as interest upon the money invested in said automobile during the time plaintiff was wrongfully in possession thereof." When so modified, the judgment shall stand affirmed, the respondent to recover the costs of appeal.

We concur: RICHARDS, J.; WELCH, Judge pro tem.

MEMORANDUM DECISIONS

48 Cal. App. 399

PEOPLE v. MOSLEY. (Cr. 505.) (District Court of Appeal, Third District, California. July 1, 1920.) Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge. Frank Mosley was convicted of grand larceny, and he appeals. Affirmed. Wm. P. Toscano, of San Francisco, and Frank E. Murphy, of Stockton, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. Defendant was convicted in the superior court of the county of San Joaquin of the crime of grand larceny in having stolen two head of cattle, the property of one Chris Wencelburger. No appearance has been made for appellant in this court, and our attention has not been called to any reason why the judgment should be reversed. We have, however, examined the record, and find abundant evidence of the guilt of defendant, and are satisfied that no prejudicial error was committed, and that defendant had a fair and impartial trial. The judgment is therefore affirmed.

CALIFORNIA REPORTER

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183 Cal. 512

In re THORN'S ESTATE. (S. F. 9187.)

(Supreme Court of California. Aug. 12, 1920. Rehearing Denied Sept. 10, 1920.)

1. Wills ⊂=132—Olograph will must be "entirely written."

A will in which words constituting a part of the instrument are inserted with a rubber stamp is not "entirely written" by the hand of the testator, within the mandatory requirements of Civ. Code, § 1277, defining an olographic will.

2. Wills ⊂=132—Document having words inserted by stamp held not an "olograph will."

A document wholly in testator's handwriting, except the name of a park inserted with a rubber stamp as a part of the description of the land devised, *held* not valid as an "olograph will," defined by Civ. Code, § 1277, as one "entirely written," dated, and signed by testator himself, though the land could be identified without the stamped words and though the insertions were made subsequent to signing.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Holographic Will.]

3. Wills ⊂=107—Insertion of words with rubber stamp not "interlineation," "alteration," or "addition."

The insertion of words of description with rubber stamp in spaces left by testator in writing a document intended as an olographic will, defined by Civ. Code, § 1277, *held* not an interlineation, alteration, or addition, within the meaning that all interlineations, alterations, or additions on the face of the will are presumed to have been made after its execution.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Addition; Alteration; First Series, Interlineation.]

In Bank.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

In the matter of the estate of S. F. Thorn, deceased. From an order admitting to probate a certain document as the olographic will of deceased, and denying the application of the Mercantile Trust Company, the nominee of Emma S. Thorn, widow of deceased, for letters of administration, the Mercantile Trust Company and Emma S. Thorn appeal. Orders reversed.

Morrison, Dunne & Brobeck, of San Francisco, for appellants.

Goodfellow, Eells, Moore & Orrick, of San Francisco, for respondent.

ANGELLOTTI, C. J. We have here appeals from orders admitting to probate a certain document as the olographic will of deceased and denying the application of the Mercantile Trust Company, the nominee of the surviving wife, for letters of administration. The claim of appellants is that the document is not a valid olographic will, for the reason that it is not "entirely written, dated, and signed by the hand of the testator himself," as required by section 1277, Civil Code. It was so dated and signed, and was otherwise in the handwriting of the deceased, with the exception of certain words in the following paragraph of the document:

"To this society [California Academy of Sci- *Cragthorn Park*
ences] I leave my country place *Cragthorn* consisting of 241 64/100 acres located about 1¼ mile below Glenwood and about 9¼ miles from the City of Santa Cruz in Santa Cruz County, State of California in Sec. 6 Town. 10 S. Range 1 West. I paid $3300.00/100 for it in 1883, title U. S. Patent Recorded and I attach a memo. herewith advising the Academy as to what they may do with it. * * * Balance of my estate and personal property I leave to Academy of Science toward a fund to improve or care for Cragthorn Park."

In this portion of the document the word "Cragthorn" was in two places inserted with a rubber stamp, instead of being written by the deceased, being the places where we have italicized the word, and the word "Park" immediately following one of these words was in the handwriting of the decedent. A memorandum attached to the document, admitted to probate as a part thereof read:

"To the Academy; Gentlemen: Don't sell Cragthorn Park at a cheap price as it is susceptible of several propositions and values. * * * Cragthorn has water higher up for the Res or Club House."

Evidence adduced on the hearing showed that decedent owned property in Santa Cruz

county known as Cragthorn Park. The trial court admitted the document to probate as the last will of decedent, with the exception of the stamped words "Cragthorn," and the written word "Park" following one of the stamped words "Cragthorn."

[1] Of course, the intent of the deceased is obvious. He was endeavoring to make a valid olographic will, and the manner in which he desired his property to go is clearly specified. Nor can there be a suspicion as to the genuineness of the document. But all this is beside the question. We are confronted here with the question whether in this document there has been that substantial compliance with the mandatory requirements of our statutes relative to the execution of wills that is absolutely essential to the existence of a valid will. See Estate of Carpenter, 172 Cal. 268, 269, 156 Pac. 464, L. R. A. 1916E, 498. There being no witnesses to the execution of the document here involved it can be sustained only on the theory that it is an olographic will. By section 1277, Civil Code, an olographic will is defined as follows:

"An olographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this state, and need not be witnessed."

This court has uniformly held that compliance with the requirements of this section is essential to the validity of a document as an olographic will, viz. that it be entirely written, dated, and signed by the hand of the testator himself. In holding that a date was essential the court said in Estate of Martin, 58 Cal. 530, 533:

"We are not at liberty to hold that the Legislature intended any one of these requirements to be of greater or less importance than the others. If we may omit one, why not either of the others?"

In Estate of Billings, 64 Cal. 427, 1 Pac. 701, where the date was only partially in the handwriting of the deceased, who had used a letter head with the year designated in printing, the court said:

"It must be entirely written, it must be entirely dated, and it must be entirely signed by him. If it be partly written by him, and partly written by another, or printed; if it be partly dated or signed by him, and partly by another—it is not a compliance with the statute."

In Estate of Rand, 61 Cal. 468, 44 Am. Rep. 555, the deceased had used a stationer's blank, with the result that the paper was partly printed and partly in the handwriting of the deceased. The court said:

"The paper before us was not entirely written by the hand of the deceased. Portions of it were printed. The Legislature has seen fit to prescribe forms requisite to an olographic will, and these forms are made necessary to be observed. It was strenuously urged before us that the portions of the paper which were written by the deceased should be admitted to probate, omitting the printed portions. We are not at liberty to so hold. We should, thereby, in effect, change the statute, and make it read that such portions of an instrument as are in the handwriting of the deceased constitute an olographic will. The instrument, in its entirety, is before us. It was not entirely written by the hand of the deceased."

The views expressed in the decisions cited have never been departed from. See Estate of Plumal, 151 Cal. 77, 90 Pac. 192, 121 Am. St. Rep. 100; Estate of Vance, 174 Cal. 122, 162 Pac. 103, L. R. A. 1917C, 479. Estate of Soher, 78 Cal. 477, 21 Pac. 8, is not at all opposed to these views. There an attestation clause in another's handwriting was properly held not to be a part of the will.

In view of the decision in Estate of Dreyfus, 175 Cal. 417, 165 Pac. 941, L. R. A. 1917F, 391, where it was held that a will made wholly by the deceased by means of a typewriter was not a valid olographic will it is clear that words stamped with a rubber stamp cannot be held to be "written * * * by the hand of the testator himself." If the words "Cragthorn," stamped with a rubber stamp upon this document, or either of them, constitute a part of the attempted will it seems obvious that the will is not "entirely written by the hand of the testator himself," and therefore does not measure up to a mandatory requirement of the statute.

[2] Two contentions are made by learned counsel for respondent in reply to appellant's position in this behalf. One of these claims is that, assuming these words to constitute a part of the will, they are wholly surplusage, the property referred to thereby being sufficiently identified without them, with the result that they do not in any way add to, alter, contradict, or cloud the meaning or the intent of the deceased, and were not necessary to complete the document as an olographic will. It may be conceded that the property is sufficiently identified without the inclusion of these stamped words and that the meaning of the attempted will is the same without them as with them. But, in view of the question before us, this consideration appears to be altogether immaterial. We are called upon to decide simply whether the purported olographic will has been executed in accord with the mandatory requirements of the law, and if not so executed we must hold it invalid. One of those requirements is that it must have been "entirely written" by the hand of the testator, which necessarily means that every word must be so written, for unless every word is so written the will is not "entirely" written by the hand of the testator.

We know of no rational theory upon which it can be held that words deemed by the testator himself essential to a description of the

property devised, and inserted by him or under his direction as a part of such description in the dispositive clause of the will devising the property, do not constitute part and parcel of the will itself, notwithstanding that evidence might show the property to be sufficiently identified without the presence of such words. We have been referred to but one decision which is contrary to the view we have expressed, viz. the case of McMichael's Heirs v. Bankston, 24 La. Ann. 451, where the will was entirely written, dated and signed by the testator with the exception of the word "to" and the word "acres" in the dispositive part of the will, and it was held that the validity of the will was not impaired by the fact that these words were in another's handwriting, inasmuch as the meaning of the will was the same without them as with them. The Louisiana case was approvingly cited in Baker v. Brown, 83 Miss. 793, 36 South. 539, 1 Ann. Cas. 371, where the words "my will" at the top of the writing, the only words not in the handwriting of the deceased were very properly held to constitute a mere caption, and not to constitute any part of the will proper; the will following below these words and being in all respects in accord with the requirements of the law. The learned court, however, also based its decision on McMichael's Heirs v. Bankston, expressly approving the doctrine thereof.

We are satisfied that these decisions cannot be followed here, in view of the mandatory requirements of our statute and the decisions relative thereto, to which we have already referred. The statements in 30 Am. & Eng. Ency. Law, p. 552 and Page on Wills, § 230, relied on by respondent, are based solely on the decision in McMichael's Heirs v. Bankston, supra, to which they refer. Where the matter not in the handwriting of the deceased may fairly be concluded not to constitute part of the date or the will itself, undoubtedly it may be held not to invalidate the will; but it cannot fairly be said, however liberal the construction in which we indulge, that a portion of a dispositive clause of the will may be disregarded upon the plea that it is not a part of the will.

The remaining claim of respondent is based upon the contention that the impressions with the rubber stamp were made subsequent to the execution of the will, and for that reason constitute no part thereof, and may be disregarded. The trial court substantially found, it is said, that the document, without these stamped words and the written word "Park" following one of them constitutes the will of deceased, and it is urged that in certain alleged presumptions and inferences from the document itself is to be found sufficient support for this finding, which, it is contended, includes the conclusion that the rubber stamp impressions were made after the execution of the will and were consequently not a part thereof. The only direct evidence touching on this matter was that furnished by the document itself, and stipulations of the parties that the document was found in the safe deposit box of the deceased in the safe deposit vaults of the Crocker National Bank of San Francisco, and that if a certain witness was called he would testify that this box was opened in his presence shortly after the death of deceased and this document found therein, and that the manager of the vaults, if called, would testify that—

"As appears from his records, no one other than S. F. Thorn ever had the right of access to said box, and so far as he knows from his records no one other than S. F. Thorn ever visited said box or removed any contents therefrom during the lifetime of S. F. Thorn."

It is established by this evidence that the document was produced from the custody of the deceased in the condition in which it was filed for probate. That the insertion of the word "Cragthorn" by a rubber stamp in the two places was made by the deceased is made clear by the fact that the word "Park," following the "Cragthorn" placed above the line, is in his handwriting, which also indicates that the impressions were made after the writing of the word "consisting." The space left between the word "place" and the word "consisting," in which the word "Cragthorn" was stamped, was obviously designedly left by the testator for the insertion of a word or words which he deemed essential to his will, and intended to insert as a part of the will. The second impression above, followed by the written word "Park," was probably made, as is suggested by respondent because it was discovered that the space was insufficient in length for the two words, "Cragthorn Park." Whether the stamping was actually done before the writing was completed and the signature appended it is impossible to know; but it is plain, from the leaving of the space and the subsequent insertion of the stamped words, that the deceased at all times intended the stamped words to be a part of his will, and regarded the will as incomplete until such words were inserted and that such insertion was made by him as a part of the making of the will. If this was the situation, and we think no other inference may reasonably be drawn from the showing made by the document itself, it would be immaterial just when in the course of the making of the will the deceased filled in the space left to be filled by a designation of the name of the country place devised to respondent. Whenever filled in, whether before or after signature, the act was a part of the actual making of the will as designed by the deceased, and not an alteration in or attempted addition to a completed will already executed. In this view

of the case, the statement near the close of the document, "This is my handwriting (an olographic will)," relied on by respondent as justifying an inference that the stamped words were not inserted prior to signature, is of no importance; but in no event do we think they would warrant any inference as to whether the stamped words were inserted prior to the signature.

[3] An exhaustive argument is made by learned counsel for respondent in support of the proposition that there is a presumption of law that all interlineations, alterations, or additions appearing on the face of a will were made after execution. This proposition is earnestly combated by counsel for appellants, and the authorities appear to be in conflict on the proposition. We deem it unnecessary to decide this question here, for the reason that the insertion of the stamped words and the written word "Park" was not an interlineation, alteration, or addition within the meaning of the rule as declared by the authorities relied on by respondent. It was simply the filling in of a space apparently left to be filled as a part of the original making of the will. This was certainly true of the word "Cragthorn," stamped on the line in the space. We cannot see that any of the authorities cited sustains the claim of respondent that, in view of the showing made by this document, there is a presumption that the rubber stamp impressions were made subsequent to its execution as a completed will. For the reasons we have stated, we are forced to the conclusion that any finding of the trial court to the effect that the rubber stamp impressions were not a part of the will is without sufficient support in the evidence.

In view of what we have said, we are satisfied that it must be held that the alleged will was not executed in accord with the mandatory requirements of our statute, and is for that reason invalid.

The orders appealed from are reversed.

We concur: SHAW, J.; LAWLOR, J.; OLNEY, J.

183 Cal. 488

SECURITY COMMERCIAL & SAVINGS BANK OF EL CENTRO et al. v. IMPERIAL WATER CO. NO. 1 et al. (L. A. 5665.)

(Supreme Court of California. Aug. 6, 1920.)

1. Corporations ⊂⊃149—Purchaser of stock at execution has right superior to transfer not shown on books.

A purchaser at execution sale of corporate stock standing on the books in the name of the judgment debtor without notice that the outstanding certificate had been assigned or pledged to another is entitled to the stock as against the assignee or transferee, and can have a new certificate issued to him.

2. Waters and water courses ⊂⊃234—Recording deeds to land and appurtenant water right not notice of transfer of corporate stock.

Where there was no proof that the water company whose stock was purchased at execution sale was organized to supply water, within Civ. Code, § 324, or that its shares represent water rights appurtenant to lands, the record of a deed conveying the lands and the capital stock appurtenant thereto is not constructive notice of transfer of the stock.

3. Waters and water courses ⊂⊃253—Purchaser of stock of water company without land acquires no title.

Where a corporation is organized to supply water to the lands of its stockholders described in the stock certificate, and a certified copy of its by-laws has been recorded, as required by Civ. Code, § 324, as amended by St. 1895, p. 118, a purchaser of the stock without the land obtains no title to the stock, and no right to receive the water which it represents.

4. Corporations ⊂⊃149—Transfer of corporate stock subject to attachment sale before transfer entered on books.

Though the transferee of corporate stock, who fails to obtain an entry of his transfer on the books of the corporation, holds title paramount to an attachment lien, a bona fide purchaser at the attachment or execution sale prior to the transfer on the books of the corporation acquires title good against the transferee.

In Bank.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by the Security Commercial & Savings Bank of El Centro and others against the Imperial Water Company No. 1 and others. Judgment for plaintiffs, and defendants appeal. Reversed and remanded.

Conkling & Brown, of El Centro, for appellants.

Dan V. Noland, of Los Angeles, and Ross & Whitelaw, of El Centro, for respondents.

SHAW, J. A rehearing from the District Court of Appeal was ordered in this cause for the purpose of correcting the form of the judgment of reversal so as to eliminate the direction to enter judgment in favor of the defendants Harris and Ferris. With the exception of the judgment we adopt the opinion of the District Court of Appeal as the opinion of this court, with the additions hereinafter stated. That opinion is as follows:

"The appeal here is on the judgment roll alone. The facts were stipulated, and as so agreed to were by the court found to be true. So far as material here, the facts stipulated and found by the court to be true are as follows:

" 'It is stipulated that on the 24th day of September, 1912, and thereafter until a transfer, as

shown by the admitted facts herein, Harry Vanden Heuvel was the owner of 67 shares of the capital stock of Imperial Water Company No. 1, the same being represented by certificate No. 5667, and that at the same time he was also the owner of tracts 123 and 126 in township 15 south, range 13 east S. B. M., and that the said certificate of stock had written thereon the statement that it was located upon the said tracts of land.

" 'That on the 24th day of September, 1912, the said Harry Vanden Heuvel made, executed, and delivered to S. E. Baker his note and mortgage, wherein and whereby he mortgaged to the said S. E. Baker the said tracts of land, and both of them, and that his said mortgage further described, as a part of the property attempted to be mortgaged thereby, certain shares of stock, the same being described in said mortgage as, "together with 62 shares of the capital stock of Imperial Water Company No. 1, located upon and appurtenant to said tracts."

" 'That thereafter, to wit, on the 30th day of November, 1912, and until the assignment of his rights to the substituted plaintiff herein [Baker], has held the said stock certificate No. 5667 in his possession as collateral security, and in connection with the said mortgage, and that the substituted plaintiff now holds the certificate of stock in his possession.

" 'That on the 29th day of June, 1914, said Harry Vanden Heuvel, for a valuable consideration, sold and conveyed all of his right, title, and interest in and to said tract 123 to E. M. Vanden Heuvel, and that his deed of conveyance also described as property conveyed thereunder certain property described as "together with all improvements and water stock appurtenant to and now located thereon."

" 'That on the 29th day of June, 1914, the said Harry Vanden Heuvel, for a valuable consideration, sold and conveyed to June Vanden Heuvel all his right, title and interest in and to tract 126 in said township, and that the deed of conveyance described as being conveyed therewith the capital stock of Imperial Water Company No. 1 appurtenant thereto and located thereon.

" 'That the said deeds were duly recorded on the 29th day of June, 1914.

" 'That the said E. M. Vanden Heuvel and June Vanden Heuvel and the substituted plaintiff are still the owners of the legal title to said tracts 123 and 126, and they are also the owners of said certificate of stock, unless the ownership of said stock has passed to the defendants by virtue of the facts herein admitted and proven.

" 'That prior to the 30th day of April, 1915, one F. B. Ferris commenced an action against the said Harry Vanden Heuvel in the justice court of El Centro township, for the recovery of $105 and costs of suit; that summons was duly issued, and thereafter such proceedings were had that a writ of attachment was regularly issued out of said justice's court, directed to the sheriff, or any constable of said county, requiring him to attach sufficient property of the said Harry Vanden Heuvel to secure the claim of F. B. Ferris; that under and by virtue of said writ of attachment, C. C. Toney, constable of said township, served the said writ upon Imperial Water Company No. 1 by delivering to the said Imperial Water Company No. 1 a copy of the said writ, together with the notice that the aforesaid stock and all stock standing on the books of said company in the name of Harry Vanden Heuvel was attached by virtue of the said writ of attachment.

" 'That thereafter such proceedings were had in such cause in the said justice court, and prior to the 20th day of May, 1915, judgment was duly entered in said justice court in said cause in favor of F. B. Ferris and against Harry Vanden Heuvel for the sum of $113.

" 'That thereafter writ of execution against the property of said Harry Vanden Heuvel was placed in the hands of J. J. Robertson, constable of said Imperial Township, for service.

" 'That thereafter the said constable levied upon the said 60 shares of stock in Imperial Water Company No. 1 under said writ.

" 'That at the time of the levy of the said writ as aforesaid, and at the time of the sale thereunder, as hereinbefore set out, the said certificate No. 5667 stood of record on the books of said corporation, Imperial Water Company No. 1, in the name of said Harry Vanden Heuvel.

" 'That it appeared from the books of the said company that the said Harry Vanden Heuvel was the owner of 60 shares of the stock represented by the said certificate, 7 shares out of said certificate having been theretofore sold by the said company for nonpayment of assessments.

" 'That thereafter, on the 27th day of May, 1916, after the notice required by law, the said constable, acting under the purported authority of the said writ, made the purported sale of the said 60 shares of the capital stock of the said Imperial Water Company No. 1 so represented by the said certificate No. 5667, and so appearing to be owned by the said Harry Vanden Heuvel on the books of said company; it being admitted that the said sale was regular only to the extent that the facts herein admitted or proven, show otherwise.

" 'That neither of the plaintiffs in this action, nor the substituted plaintiff, nor the said Harry Vanden Heuvel, ever knew until long after the said sale that any such sale had been made, or that any attachment had been levied upon the said stock.

" 'That at the said sale F. T. Harris became the purchaser of the 60 shares of stock aforesaid, and at said sale he was the highest and best bidder for said stock, and said constable sold the said stock to the said Harris for the sum of $113, and thereupon issued and delivered to said Harris his constable's certificate of sale, setting out the sale of the shares of stock to said defendant Harris, as aforesaid.

" 'That thereupon the said defendant Harris presented the said constable's certificate of sale to Imperial Water Company No. 1, and demanded the transfer of the said 60 shares of stock to the said defendant, and that certificates therefor be issued to the said defendant Harris; thereupon, said Imperial Water Company No. 1 accepted the said constable's certificate of sale as evidence of the transfer of said shares of stock theretofore represented by stock certificate No. 5667, and canceled the said certificate of stock No. 5667 upon their books, so far as was in their legal power to do so, and issued in lieu thereof to the said defendant F. T. Harris certificates for 60 shares

of the capital stock of Imperial Water Company No. 1, to wit, one certificate No. 7950 for 32 shares, and one certificate No. 7951 for 28 shares, and the said two certificates under the seal of said corporation were delivered to said F. T. Harris, on the notation made upon the books of said corporation by its secretary to the effect that the certificate No. 5667 had been canceled by the reissue of the said certificates No. 7950 and No. 7951.

" 'It is stipulated that M. W. Conkling, acted for F. T. Harris in purchasing said stock, and paid the cash to the constable at said sale for F. T. Harris, and that he did not know, nor did he or they, or either of them, make any inquiry to ascertain at the time, or at any time, before the actual delivery of the certificates of stock to Harris, that either the substituted plaintiff, or any of the plaintiffs, had already claimed any interest in the stock, or had any pledge thereof, and that he had no knowledge concerning the ownership of said stock except what appeared upon the books of the said corporation.

" 'That said M. W. Conkling was also acting as attorney for the plaintiff, F. B. Ferris, in the action in the justice's court, out of which the execution was issued, under which the attempted sale was made.

" 'And thereupon evidence was introduced as to the other issues not covered by the said stipulation, and from such evidence the court finds: That at the said constable's sale mentioned in the said stipulation the said F. T. Harris purchased the said stock in good faith and without any notice or knowledge of the rights or claims of the plaintiffs, or any of them, and without any notice or knowledge of the fact that the said certificate of stock had been transferred, or any thereof, had been transferred to June Vanden Heuvel or E. M. Vanden Heuvel, other than such notice as was imparted by the recording of the deeds to June Vanden Heuvel and E. M. Vanden Heuvel as mentioned in said stipulation, and without any notice or knowledge that the said stock, or any thereof, had been pledged to the plaintiff S. E. Baker, and that he paid the said constable therefor the sum of $113; and that the reasonable market value of the stock at the time was $600. That after the issue of said Imperial Water Company No. 1 of this certificate No. 7950 and certificate No. 7951, as stipulated herein, the said F. T. Harris, for a valuable consideration, indorsed, transferred and sold the said certificate No. 7951 for 28 shares to F. B. Ferris. That at the time the said F. B. Ferris purchased the said certificate from the said F. T. Harris he, the said F. B. Ferris, had notice and knowledge of the fact that prior to the said constable's sale and prior to the levy upon the said stock as stated in the said stipulation the said Harry Vanden Heuvel had sold and transferred his original certificate of stock No. 5667, mentioned in the foregoing stipulation, and that he was not at that time the owner thereof.'

"On these findings the court entered judgment as follows: 'It is ordered, adjudged and decreed that said plaintiffs E. M. Vanden Heuvel and June Vanden Heuvel have and recover judgment against said defendant as follows: (1) That certificates Nos. 7950 and 7951, issued by Imperial Water Company No. 1, be delivered to said company for cancellation, and that said company be, and they are hereby, required to cancel said certificates and reissue to said plaintiffs E. M. Vanden Heuvel and June Vanden Heuvel a new certificate for 60 shares of the capital stock of Imperial Water Company No. 1 in the name of the Security Commercial & Savings Bank as pledgee for the said E. M. Vanden Heuvel and June Vanden Heuvel.'

[1] "Appellants contend that upon the facts found the judgment should have been for the defendants Harris and Ferris; and with this contention, we think, the authorities are in full accord. One who purchases at execution sale shares of stock of a corporation, standing on the books of the corporation in the name of the judgment debtor, is entitled to have the certificate of such shares reissued to him as such purchaser, if at the time of the purchase he acts in good faith and without notice that the outstanding certificate has been assigned or pledged to some person other than the judgment debtor. In order that an assignee or pledgee of a certificate may protect his rights, as against a purchaser at execution sale, he must cause a reissue to him of a certificate, or he must serve notice on the corporation that he holds the certificate as such assignee or pledgee. West Coast, etc., Co. v. Wulff, 133 Cal. 315, 65 Pac. 622, 85 Am. St. Rep. 171; Naglee v. Pacific Wharf Co., 20 Cal. 530; Farmers', etc., Bank v. Wilson, 58 Cal. 600; Spreckels v. Nevada Bank, 113 Cal. 272, 45 Pac. 329, 33 L. R. A. 459, 54 Am. St. Rep. 348; Hall v. Cayot, 141 Cal. 13, 74 Pac. 299; National Bank v. Western Pac. Ry. Co., 157 Cal. 573, 108 Pac. 676, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391; American Trust, etc., Co. v. Union Security Co. (App.) 184 Pac. 508; Bleakley v. Candler, 169 N. C. 16, 84 S. E. 1039, Ann. Cas. 1917A, 425; Stowe v. Harvey, 241 U. S. 199, 36 Sup. Ct. 541, 66 L. Ed. 953. See, also, notes to Mapleton Bank v. Standrod, 67 L. R. A. 656, and Everitt v. F. & M. Bank, 20 L. R. A. (N. S.) 996. It having been stipulated, and the court having found as a fact that 'F. T. Harris purchased the said stock in good faith and without any notice or knowledge of the rights or claims of the plaintiffs, or any of them, and without any knowledge of the fact that the said certificate of stock had been transferred,' etc., there can be no escape, we think, under our law and the authorities in this state, from the conclusion we have reached.

[2] "Neither the findings nor the stipulation upon which the findings are based contain any direct statement that the shares represent any water right or rights appurtenant to the tracts 123 and 126. Nor do the findings show that Imperial Water Company No. 1 is a corporation organized for and engaged in the business of selling, distributing, supplying, or delivering water for irrigation purposes or for domestic use, within the meaning of section 324 of the Civil Code. For these reasons it cannot successfully be claimed that the deeds from Harry Vanden Heuvel to E. M. Vanden Heuvel and June Vanden Heuvel transferred water rights that are simply evidenced by the stock certificates. For the same reason it cannot be claimed that the recordation of the deeds gave notice to subsequent purchasers of the stock that all the rights and interests represented

by the stock had been transferred to the grantees named in the deeds. In short, for the reasons stated, the stock cannot be treated otherwise than as stock issued by any ordinary commercial corporation.

"For the foregoing reasons we think it was error, prejudicial to the rights of appellants, to enter the judgment appealed from, as it is clear from the record here that, as a matter of law, these appellants were entitled to have judgment entered in their favor."

[3] For the information of the lower court and the parties on questions that may arise upon a new trial, we think it necessary to add some further observations. The findings of the court, including the stipulation between the parties as to the facts, indicate the probability that Imperial Water Company No. 1 had provided in its by-laws that the water it was distributing should only be "sold, distributed, supplied, or delivered to owners of its capital stock, and that such stock shall be appurtenant to" the lands described in the certificate issued therefor, and that a certified copy of such by-laws had been recorded in the office of the county recorder in the county where the lands are now, or were then, situated, as provided in section 324 of the Civil Code as amended in 1895 (Stats. 1895, p. 118). If these be the facts, then under that section, the shares of stock can be transferred only with the lands, and can pass as an appurtenance thereto, and not otherwise. The result would be that a purchaser of the stock, without the land, would obtain by such purchase no title to the stock and no right to receive the water which the stock represents. Possibly the same results would follow from the by-laws and certificates, even if the copy of by-laws was not recorded. Riverside Land Co. v. Jarvis, 174 Cal. 328, 163 Pac. 54; Estate of Thomas, 147 Cal. 243, 81 Pac. 539; Thayer v. California D. Co., 164 Cal. 136, 128 Pac. 21. But as to this we express no opinion. Under these circumstances, we think the proper course to pursue is to reverse the judgment without directions to enter judgment for defendants so that the complaint may be amended, if necessary, to show the true character of said stock and the existing facts regarding the by-laws of the corporation as above indicated.

[4] It may be further noted that counsel for the plaintiffs appear to have misunderstood the opinion of this court in National Bank of the Pacific v. Western Pacific, etc., Co., 157 Cal. 573, 108 Pac. 676, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391. Briefs recently filed in this court indicate that other attorneys also misunderstood it. That case was dealing only with the lien of an attachment levied upon the stock, and with the rights of the parties in the stock prior to any sale thereof under the attachment. It holds that the assignee of corporate stock who fails to obtain a transfer of his assignment on the books of the corporation holds title paramount to the lien of an attachment subsequently levied thereon in an action against his assignor. But it does not hold, and it is not the law, that such assignee holds title paramount to one who, in good faith, without notice, purchases the stock on an attachment or execution sale, prior to the transfer of the assignment on the books of the company. Such purchaser, if he buys without notice of an unregistered transfer to another, takes title superior to that of such transferee, provided he pays value for the stock.

The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; LAWLOR, J.; LENNON, J.

183 Cal. 526

CITY OF PASADENA v. RAILROAD COMMISSION OF CALIFORNIA.
(L. A. 6325.)

(Supreme Court of California. Aug. 12, 1920. Rehearing Denied Sept. 10, 1920.)

1. Electricity ⟸11—City operating electric light plant is not a "private corporation," subject to railroad commission.

Under Const. art. 12, § 23, defining public utilities which are subject to regulation by the Railroad Commission as private corporations engaged in certain enterprises, including electric light plants, the term "private corporation" does not include municipal corporations, so that a city engaged in operating an electric light plant to supply its inhabitants is not subject to regulation by commission.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Private Corporation.]

2. Municipal corporations ⟸1—Engaging in business does not affect character of corporation.

Though a city, while engaged in the business of furnishing electric power and light to its inhabitants, is liable for acts of its agents for which it is not liable while performing purely governmental functions, it does not, while engaging in such business, lose its character as a municipal, instead of a private, corporation.

3. Electricity ⟸11—Construction of Constitution, as excluding municipal corporations from regulation, confirmed by other provisions.

The construction of Const. art. 12, § 23, as not subjecting municipal corporations to regulation by the Railroad Commission, is confirmed by other provisions of the same section, protecting control of municipalities over utilities, and by the address to the voters, summarizing the purpose of the section and also by subsequent amendments, taking from municipalities

the regulation of utilities, and authorizing cities to furnish electric light and power outside their boundaries.

4. **Constitutional law ⟸14—Words in Constitution should be given common, not technical, meaning.**

The words of a Constitution, which owes its authority to ratification by the people, should be given their general meaning, unless it appears that they were used in a legal or technical sense.

5. **Public service commissions ⟸6—Constitution does not authorize Legislature to confer on Railroad Commission powers not germane to purpose.**

Const. art. 12, § 22, authorizing the Legislature to confer additional powers of the same kind or different from those conferred on the Railroad Commission, does not authorize the Legislature to confer upon the commission powers not germane to the purpose for which it was created.

6. **Electricity ⟸11—Statute authorizing control of electric companies does not authorize control of city light plant.**

Public Utilities Act, § 2, subd. (r), conferring on the Railroad Commission power to regulate every electric corporation, does not empower the commission to regulate a city in the operation of an electric light plant for its inhabitants and those of the surrounding territory.

In Bank.

Application for certiorari by the City of Pasadena against the Railroad Commission of the State of California to review an order requiring petitioner, a municipal corporation, to file schedule of rates for electric service. Order annulled.

James H. Howard, City Atty., of Los Angeles, for applicant.

Hugh Gordon, of Los Angeles (Douglas Brookman, of San Francisco, of counsel), for Railroad Commission.

Gibson, Dunn & Crutcher, of Los Angeles, for respondent and Pacific Light & Power Co.

SHAW, J. The charter of the city of Pasadena, adopted in 1901, gives it power to construct and operate electric works and supply electricity to its inhabitants for light and heat. The city constructed electric works, and prior to 1909 began to supply its inhabitants with electricity. In 1909 it extended its wires into the adjoining city of South Pasadena, and ever since that time it has been supplying electricity to the inhabitants of the latter city for similar purposes. On August 30, 1919, on the complaint of the Pacific Light & Power Company, which was also engaged in supplying electricity to the inhabitants of South Pasadena, the Railroad Commission, in pursuance of section 14 and other provisions of the Public Utilities Act (Stats. 1915, p. 122), made an order requiring the city of Pasadena "to file with the railroad commission a complete schedule of all its rates, charges, rules and regulations for the service of electric energy to consumers within the limits of South Pasadena." The object of the present proceeding in this court is to review and annul said order on the ground that it is in excess of the jurisdiction of the commission.

[1] The theory of the plaintiff is that the Public Utilities Act, under which the Railroad Commission made the order, has no application to any public service carried on by a municipal corporation under the authority of the Constitution and laws of the state. We are of the opinion that this proposition must be sustained. The authority of the Legislature to make laws conferring powers upon the Railroad Commission is derived from sections 22 and 23 of article 12 of the Constitution. The defendant relies mainly on the two opening sentences of section 23, which are as follows:

"Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling any commercial railroad, interurban railroad, street railroad, canal, pipe line, plant, or equipment, or any part of such railroad, canal, pipe line, plant, or equipment, within this state, for the transportation or conveyance of passengers, or express matter, or freight of any kind, including crude oil, or for the transmission of telephone or telegraph messages, or for the production, generation, transmission, delivery or furnishing of heat, light, water or power or for the furnishing of * * * wharfage facilities, either directly or indirectly, to or for the public, and every common carrier, is hereby declared to be a public utility subject to such control and regulation by the Railroad Commission as may be provided by the Legislature, and every class of private corporations, individuals, or associations of individuals hereafter declared by the Legislature to be public utilities shall likewise be subject to such control and regulation. The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the state of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

It will be observed that the first sentence of this clause declares that every "private corporation" which owns and operates a plant "for the production, generation, transmission, delivery or furnishing of heat, light, water or power," is a public utility. The subsequent sentence declaring the right of the Legislature to confer powers upon the Railroad Commission to be plenary is limited to the conferring of powers "respecting

public utilities." This, of course, means public utilities as defined in the first sentence. That sentence, by its terms, applies exclusively to private corporations and natural persons or associations of persons. It does not include a municipal corporation in the definition.

[2] The argument on behalf of the defendant is that a municipal corporation, when carrying on a public service, such as furnishing water, light, heat, or power to its inhabitants is not acting in its governmental capacity as sovereign, but is acting in a proprietary capacity, and that for some purposes with respect to such action it is subject to the same rules as private persons. For example, it is liable in damages for injuries caused by negligence of its servants in the operation of such public service, whereas it is not so liable for negligence of its servants, such as policemen, who are carrying out its governmental powers. This proposition is well established. Davoust v. Alameda, 149 Cal. 70, 84 Pac. 760, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847; South Pasadena v. Pasadena L. & W. Co., 152 Cal. 595, 93 Pac. 490; Chafor v. Long Beach, 174 Cal. 487, 163 Pac. 670, L. R. A. 1917E, 685, Ann. Cas. 1918D, 106. Upon these premises it is said that a city acts in a dual capacity—that it is a public corporation with respect to its strictly governmental powers, and a private corporation with respect to its public service functions; that for this reason the phrase "private corporation" in section 23 must be held to include municipalities whenever the so-called proprietary powers of the municipality are concerned; and that therefore the Legislature may confer powers upon the Railroad Commission to regulate the rates of municipalities for carrying on such public service.

It is not true that a city is a private corporation when carrying on a municipally owned public utility. No decision so holds. All the decisions on the subject recognize the fact that a city does not change its character by engaging in such enterprises. The entire course of reasoning in the opinions is founded on the postulate that such city retains its character as a municipal corporation, and the burden of the arguments consists of efforts to find reasons for holding it liable to the same extent as a private corporation engaged in the same service, notwithstanding the fact that the city carries on the business as a municipal corporation. They all assume that such city is as much a municipal corporation with respect to such business functions as it is with regard to the exercise of its purely governmental powers. The distinction does not go to its character as a corporation, but to its liabilities in exercising one class of its powers, as compared to its liabilities in the exercise of its functions as a local governmental agency.

[3] The phrase "private corporation" in section 23 should therefore be given its natural and ordinary meaning, and consequently this section does not include municipal corporations among the public utilities it deals with. That this must have been the intent of the framers of the section, and of the voters who adopted it, is shown by other provisions of the section and by the address in its favor sent to each voter with the sample ballot and copy of the proposed amendment just prior to the election. The section carefully provides that, nowithstanding the powers thereby given to the Railroad Commission "respecting public utilities," the powers of control over "any public utility" that were vested in any municipal corporation should not be affected by the section, unless the voters of such municipality, at an election held for that purpose, should decide to relinquish such powers. This, of course, refers to "public utilities" as defined in the opening clause of the section. The proviso would not engender the suspicion that the municipal corporation itself was included in the "public utilities" to which it refers, nor lead any one to suppose that the voters were to be invited to surrender to the Commission the control and management of any municipally owned water systems, lighting plants or street car lines. It does strongly imply that it refers solely to the powers of such cities to regulate the operations of privately owned systems of that kind. The address to the voters, after stating that the term "public utilities" was so defined by the section as to embrace every conceivable kind of public service, summarized its effect on that subject as follows:

"Briefly, the amendment proposes to extend the jurisdiction of the railroad commission to every kind of public service excepting that furnished by municipally owned plants"

—and pointed out that the provision reserving to cities the powers over public utilities theretofore vested in them was inserted in the section because of the feeling that the voters of such cities might feel reluctant to submit to the revocation of such powers and the transfer thereof to the Railroad Commission without their consent. By this address the voters were clearly informed that municipal corporations were not included in the definition of public utilities in the opening clause of the section. To hold that under all these circumstances the voters nevertheless were aware of the refined distinction between the governmental powers and proprietary powers of cities and towns and understood that municipal corporations, so far as they exercise proprietary functions, were to be included in the definition of public utilities and in the term "private corporations," seems to be the height of absurdity.

While many lawyers may understand the distinction, it is certainly true that the ordinary citizen has no conception thereof.

It is true that section 23 was amended in 1914, so as to provide that the rate regulating power of municipal corporations over "public utilities" should no longer be retained by them. But the definition of the term "public utilities" remained unchanged, and the amendment made rather emphasizes the proposition that municipal corporations performing such public service were not supposed to be embraced in the definition.

Furthermore, at the election of 1911 the people also adopted an amended section 19 of article 11, which provides that "any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat," and the like, and might also furnish such service to inhabitants outside its boundaries. They were empowered to do these things as municipal corporations, not as private corporations, thus showing that they were not, while so doing, to be classed as private corporations.

[4] The conclusion we have reached is in accordance with the well-established rules for the construction of the language of a Constitution. The Constitution, "unlike the acts of our Legislature, owes its whole force and authority to its ratification by the people; and they judged of it by the meaning apparent on its face according to the general use of the words employed where they do not appear to have been used in a legal or technical sense." Miller v. Dunn, 72 Cal. 465, 14 Pac. 27, 28, 1 Am. St. Rep. 67. Where word has a popular and also a technical meaning, "the courts will accord to it its popular meaning, unless the very nature of the subject indicates or the context suggests that it is employed in its technical sense." Weill v. Kenfield, 54 Cal. 113.

[5] The defendant also claims that the right of the Legislature to confer such powers upon the Railroad Commission is given by a passage in the amended section 22 of article 12, an amendment also adopted in 1911. This section creates the Railroad Commission, and contains provisions for the appointment of its members and for its organization, and confers upon it certain powers with regard to common carriers of freight and passengers, and thereupon it provides that—

"No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Railroad Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Railroad Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution."

If the provision of section 22 that "the authority of the Legislature to confer upon the Railroad Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred" upon the commission by the Constitution, should be thenceforth "plenary and unlimited by any provision of this Constitution," is to be taken literally, its possible results would be so startling that it cannot be conceived that any citizen could ever be induced knowingly to vote for such a measure. If so construed, the Legislature would thereby be empowered to confer upon the Railroad Commission all the powers of government, executive, judicial, and even the legislative power itself. Of course, no such effect can be allowed to this broad declaration. It must be construed in connection with the general subject of the section, with the other sections which precede it relating to the same general subject, and with the place in which it occurs in the Constitution. It is a part of article 12, the whole of which is devoted to the subject of private corporations, as distinguished from public corporations; the latter being the particular subject of article 11. The powers referred to are therefore to be understood to mean powers relating to private corporations, except where the words indicate a different intent. Section 22 was in article 12 as originally adopted. It was the concluding section of a series beginning with section 17, all of which related to common carriers and the public control and regulation thereof. While amendments of sections 20 and 21 were also adopted in 1911, they were not changed, so as to relate to any other subject. Section 22, before the amendment of 1911, also created a Railroad Commission, and granted to it certain powers over common carriers in language in many respects similar to the amendment.

Considering all these circumstances, the only reasonable conclusion is that the authority intended to be given to the Legislature by this section to confer powers upon the Railroad Commission must be limited to the subject of powers over common carriers and transportation and the control and regulation thereof by the commission, and such other things as may be necessary or convenient for the proper and effectual exercise of such powers of regulation and control. The subject of similar powers over all other classes of public utilities carried on by private corporations or persons is covered by the provisions of section 23, as we have seen. The provisions of section 22 should not be extended beyond the matters included in the context and the subject-matter of the article in which it occurs, and hence it cannot be construed to give the Legislature authority to confer upon the commission power to regulate the rates of service charged by municipal corporations

operating municipally owned public utilities.

This is in harmony with the interpretation heretofore given to this provision of the section. In Pacific, etc., Co. v. Eshleman, 166 Cal. at page 691, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822, the court speaking through Justice Sloss, said concerning these clauses of sections 22 and 23:

"To the extent, then, that the Legislature has acted in conferring powers (*germane to the subject of the regulation and control of public utilities*) upon the Railroad Commission, it necessarily follows that the validity of such grant of powers is not to be questioned by reason of any other provision of the state Constitution." (Italics ours.)

And again on page 702 of 166 Cal. on page 1143 of 137 Pac. (50 L. R. A. [N. S.] 652, Ann. Cas. 1915C, 822), on the same subject, the learned justice, by way of conclusion, said:

"This statement is, however, to be taken subject to the qualification that the powers conferred by the Legislature on the Railroad Commission must be such as are cognate and germane to the purposes for which the Railroad Commission was created; i. e., the regulation and control of public utilities."

And in the same case Justice Henshaw said in summing up:

"The legality of such powers as the Legislature has or may thus confer upon the commission, if cognate and germane to the subject of public utilities, may not be questioned under the state Constitution" 166 Cal. at page 689, 137 Pac. at page 1138 (50 L. R. A. [N. S.] 652, Ann. Cas. 1915C, 822).

The court here, as the context of the opinions plainly shows, uses the phrase "public utilities" with the meaning given to it by the definition thereof in section 23, and as referring solely to public service carried on by private corporations or natural persons.

The defendant contends that the decision in South Pasadena v. Pasadena L. & W. Co., 152 Cal. 579, 93 Pac. 490, is contrary to these conclusions. In that case the defendant, a private corporation, owned a water system supplying water to a defined territory, situated partly in Pasadena and partly in South Pasadena; they being adjoining cities. Pasadena was about to acquire the system from the company as a part of its municipal water system. The suit was brought to enjoin the company from making the transfer. In the course of the opinion it is declared that, after Pasadena acquired the water system, it would be obliged to continue the public service in South Pasadena, as before, and that South Pasadena, under section 19, article 11, and section 1, article 14, of the Constitution, as it then stood, would thereafter, as before, have the right to fix the rates to be charged for the water served within that city. The main reason given was that, since the Constitution then gave to each city power to fix rates for water supplied within its limits for public use, the power of South Pasadena was paramount with respect to the rates for water supplied therein. The case was decided in 1908, prior to the adoption of the constitutional amendments we are now considering. Section 19, article 11, then gave powers to cities to regulate the rates for public service of water or light within its limits by "any individual or any company duly incorporated for that purpose." Section 1, article 14, provided that rates for the use of water supplied in any city by "any person, company, or corporation * * * in this state" should be fixed annually by such city. The word "private" was not appended as a limitation of the meaning of the words "company" and "corporation," in these sections, as it is now in section 23 of article 12; and as there was no other body then authorized to fix such rates, the words "company" and "corporation" were obviously as applicable to rates for water supplied by a municipal corporation to the inhabitants of an adjoining city as to rates for water so supplied by any other corporation, and this the court there assumed without stating it. The decision can have no bearing upon the meaning of the words "private corporation" in the part of section 23 of article 12 defining "public utility," adopted in 1911.

In may be that, by reason of the recent amendment of section 19, article 11, in the few cases where one city operates a municipal plant for a public service which extends into another city, there may be some doubt which one of the two cities shall have the right to fix the rates for such outside service. The terms of the amendment are not clear on the question. With that subject we are not here concerned. It is clear, as we have shown, that the city furnishing the outside public service is not a "public utility" within the meaning of that term, as defined in section 23, article 12, and hence that the Railroad Commission has no power to fix its rates for such service.

[6] It is also suggested that the Public Utilities Act confers upon the commission power to regulate the rates of every "electrical corporation," a term which it defines as including "every corporation or person * * * owning, controlling, operating or managing any electric plant for compensation within the state" (Stats. 1915, p. 115, § 2, subd. [r]), and that this definition is broad enough to include municipal corporations. The language of the subdivision and also that of the other subdivisions of the section indicate that the legislative purpose extended to the regulation of commercial corporations only, and that municipal corporations were not within its purview. If municipal corporations are to be included, the result would be that the Railroad Commission would have power to regulate and control the rates and the service of every

water plant, gas plant, electrical plant, and street car system owned or operated by any municipality in the state. We cannot believe that the very general language used should be so broadly interpreted, in the absence of any specific mention of municipal corporations, even if it were conceded that the Legislature under the general grant of legislative power (article 4, § 1) might transfer such powers from the municipalities to the commission.

We find no tenable ground upon which to base the conclusion that the rates charged by a municipality for its service in carrying on any public utility, either within its own limits or in outside territory, are under the control of the Railroad Commission.

The order is annulled.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

183 Cal. 568

In re HAWKINS.

MERRITT v. HAWKINS.

(S. F. 9029.)

(Supreme Court of California. Aug. 17, 1920.)

1. Guardian and ward ⊂⊃13(3) — Allegations held to raise issues as to competency of father contesting appointment.

In a proceeding for the appointment of a guardian for a minor opposed by the minor's father, allegations in the answer that contestant was the father of the minor, and in all respects capable, ready, able, and willing to properly provide for and care for such minor, being deemed denied, were sufficient to raise an issue as to whether contestant was capable, ready, able, and willing to assume the duties of guardianship, including the issues of abandonment and incompetency.

2. Guardian and ward ⊂⊃13(4)—Evidence held to show that father was unfit to act as guardian of child.

In a proceeding for the appointment of a guardian of a minor opposed by the minor's father, evidence *held* to sustain a finding that the father was unfit and incompetent to discharge the duties of guardianship.

3. Guardian and ward ⊂⊃10, 13(8)—Primary consideration in appointment is best interest of child.

In guardianship proceedings relating to minors, the primary consideration for the guidance of the court is the best interest of the child with respect to its temporal and its mental and moral welfare, and the conclusion reached by the court will not be set aside on appeal, unless it was reached as the result of an abuse of discretion in view of Civ. Code, § 246.

4. Guardian and ward ⊂⊃13(4) — Evidence held to sustain finding that father had abandoned child.

In a proceeding for the appointment of a guardian for a minor contested by the father, evidence *held* to sustain a finding that the father had abandoned the child and its mother.

5. Guardian and ward ⊂⊃8 — Residence of abandoned minor child held within county of petitioner's domicile.

Where a minor child has been abandoned by its father, and its custody is assumed by a grandfather, the residence of the child for the purposes of the appointment of a guardian *held* to be within the county of the grandfather's residence within Code Civ. Proc. § 1747, and Civ. Code, § 246.

Department 1.

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

Petition by John T. Merritt for letters of guardianship of the person of Helen Anthony Hawkins, a minor, opposed by George W. Hawkins. From an order appointing petitioner guardian and from a decree that letters of guardianship be issued to him, contestant appeals. Decree and order affirmed.

Pillsbury, Madison & Sutro and C. C. Sullivan, of San Francisco, for appellant.

Samuel Rosenheim, of San Francisco, for respondent.

LAWLOR, J. Petition by John T. Merritt for letters of guardianship of the person of Helen Anthony Hawkins, a minor. The petition was granted. George W. Hawkins, the father of the minor, contested the petition, and has taken two appeals—one from the order appointing petitioner guardian, and the other from the decree that letters of guardianship issue to him. The record of the appeals is presented under the alternative method.

Helen Anthony Hawkins is the only child of appellant and Ethel A. Hawkins, the deceased daughter of respondent. The minor was born in 1913. Her father and mother were married in 1905, and for at least one year prior to March 22, 1917, were living in Arizona. On the last-mentioned date Mrs. Hawkins obtained a final decree of divorce from appellant, the validity of which is not questioned. By this decree the custody of the little girl was awarded to the mother, with whom the child lived until October 14, 1918, when the former died. Within a few days thereafter petitioner caused the minor to be brought to his home in Petaluma, Sonoma county, and on October 24 he filed this petition in the superior court for that county, setting forth that the minor was a resident therein. On October 22 appellant sued out a writ of habeas corpus, seeking the custody of the child. Both proceedings were heard

together, and the writ was discharged. In the matter of the guardianship the court found inter alia that appellant had "knowingly and willfully abandoned" the minor, that appellant was "not a fit or proper or competent person" to have her care or custody, and that respondent was fit and competent to be appointed guardian. Accordingly, the court ordered on December 31 that respondent be appointed guardian, and on January 13, 1919, that letters of guardianship issue.

[1] 1. We shall first consider appellant's claim that "the pleadings are insufficient to raise the issue of abandonment or incompetency." In making this contention appellant has apparently ignored the allegations of his answer that he "is the father of the above-named minor * * * and is in all respects capable, ready, and willing * * * and under the laws of the state of California entitled to obtain the care, custody, and control of said minor, and that he is capable, ready, able, and willing to properly provide and care for said minor." These allegations were deemed denied, and it thus became an issue whether appellant was "capable, ready, able, and willing" to assume the duties of guardianship. The pleadings were therefore sufficient to raise the issues of appellant's abandonment and incompetency.

[2] 2. Appellant's second contention is that there was "no showing that the father was unfit or incompetent to discharge the duties of guardianship." We think the evidence was amply sufficient. Mrs. Theodore Kohn testified that she had been acquainted with appellant and his deceased wife; that on one occasion the witness and her husband had visited the wife at her home in Arizona prior to the divorce; that on this occasion, in appellant's absence, the wife had told the witness that appellant neglected the child; that the witness had seen appellant kick and otherwise abuse his wife; and that the witness saw a letter written by appellant to the mother, in which he made no mention of the child.

The evidence was uncontroverted that, prior to the divorce, appellant mistreated his wife, and habitually neglected the child, and that for a considerable time he occupied questionable relations with an unmarried woman whom he has since married, and who is his present wife, residing with him in the state of New York.

Regarding appellant's life in Arizona, J. H. Knost testified that, according to his knowledge, appellant occasionally associated with lewd and depraved women at Globe, Ariz.; that he indulged in the excessive use of intoxicating liquors; that subsequent to the beginning of his relationship with his present wife he would leave home, giving no information as to his whereabouts, and failing to communicate with the mother or child; that he gave the latter practically no attention, except in the way of sending her money in accordance with the decree of divorce; and that after the divorce, he never visited or wrote to the child; that the divorce was granted because of the illicit relations between appellant and his present wife; that the reputation of the latter was such that the witness did not consider her capable of properly raising or instructing the child; that her reputation was that of an immoral woman; that he had seen telegrams signed by her and addressed to appellant, denoting improper relations between them before the divorce; that appellant had told him of visits he had made to her prior to the divorce; and that it was commonly understood among his associates that she was a woman of questionable character.

John M. Wyatt stated in his deposition that he had known appellant since 1904; that for the past few years appellant had been drinking to excess; that he was decidedly unkind to the mother of the child; that on or about October 10, 1916, the witness had seen him kick her out of bed, and at other times slap her face and kick her; that appellant paid "very little attention" to the minor; that "at times in the house he didn't care to have her around him at all"; that appellant had paid no attention to the child since the divorce; and that his present wife "had the reputation of leading a very fast life in many different ways, as to drinking and being intimate with men."

James E. Nelson, who was assistant city attorney of Phœnix, Ariz., during 1916, testified that prior to the divorce the present Mrs. Hawkins and another woman were arrested by the police on a charge of conducting a disorderly house, and that the former was a disturbing element in Phœnix, "causing the police a great deal of trouble by reason of numerous drunken parties which she and her friend attended."

L. T. Sutherland, captain of police at Phœnix, testified that she had registered at the Ford Hotel in Phœnix in a room adjoining that of appellant before the divorce, and that her reputation with the police department of Phœnix was that of an ordinary prostitute.

George Brisbois, chief of police of Phœnix; Miss Harriet J. Oliver, chief clerk in the office of the secretary of state of Arizona; Alpheus Harding, a business man of Tucson, Ariz.; Kirke T. Moore, county attorney of Pima county, Ariz.; and Alice W. Birdsall, an attorney of Phœnix—testified that appellant had frequently associated with his present wife before his divorce; that her reputation was that of a common prostitute, and that he neglected the mother and child.

The appellant produced a score of depositions. Some of his witnesses testified to the

good reputation of his present wife and himself in New York, and that she was fond of children; but none of them had been acquainted either with her or appellant in Arizona. William Mueller testified that her reputation at her home in Hillside, Ariz., was good, but admitted that he could not testify as to her reputation for chastity, virtue, and morality in Phœnix, where she resided during the years 1916 and 1917. Mrs. F. E. Marum, assistant postmaster at Hillside, testified that appellant and his present wife had stopped at the hotel at which the witness lived, but her mother stated that she did not know that her daughter had gone to the hotel. Her father was asked where his daughter lived in Phœnix, and he answered, "I could not say." Appellant testified in his own behalf, but only as to his willingness to take care of the child, and the present Mrs. Hawkins did not testify at all.

Section 246 of the Civil Code provides:

"In awarding the custody of a minor, or in appointing a general guardian, the court or officer is to be guided by the following considerations: 1. By what appears to be for the best interests of the child in respect to its temporal and its mental and moral welfare; * * * 3. Of two persons equally entitled to the custody in other respects, preference is to be given as follows: (1) To a parent; (2) to one who was indicated by the wishes of a deceased parent; * * * 4. Any parent who knowingly and willfully abandons * * * his minor child under the age of fourteen years, forfeits the guardianship of such child. * * *"

See, also, Guardianship of Danneker, 67 Cal. 643, 8 Pac. 514; Guardianship of Vance, 92 Cal. 195, 198, 28 Pac. 229; Guardianship of Imperatrice, 188 Pac. 48.

[3] And the rule is well settled that "the primary consideration for the guidance of the court is 'the best interest of the child with respect to its temporal and its mental and moral welfare,' * * * and the conclusion reached [by the court] will not be set aside on appeal unless it was reached as the result of an abuse of discretion." Matter of Allen, 162 Cal. 625, 124 Pac. 237. See, also, Guardianship of Vance, supra; Guardianship of Danneker, supra; Guardianship of Lewis, 137 Cal. 682, 70 Pac. 926; Lawrence v. Thomas, 84 Iowa, 362, 51 N. W. 11.

In the instant case the evidence bearing upon appellant's fitness and competency to perform the duties of guardianship was involved throughout in conflict. Appellant's witnesses, while testifying to the good reputation he and his present wife enjoyed in New York, and which, according to their testimony, she had enjoyed in Arizona, did not state what his reputation was in the latter state. Respondent's witnesses testified, as we have seen that the reputation of both her and appellant in Arizona was unsavory, and that he had neglected and abandoned his former wife and child. Appellant claims "that the trial court totally disregarded the fact that the testimony * * * in no way, directly or indirectly, questioned the present reputation or character of George W. Hawkins or Mrs. Hawkins, his present wife." The trial court, however, was entitled to consider all the evidence in determining whether appellant was fit and competent to be appointed guardian. The testimony of his witnesses at most merely raised a conflict in the evidence on this question. It was said in Guardianship of Imperatrice, supra:

"When resolving the question of the guardianship of children, the court is controlled by what appears to be for their best interest. * * * This rule requires no citation of authority."

Assuming for the purposes of this discussion that a father's right to the custody of his child revives upon the death of the mother, who had been awarded the custody under a decree of divorce, yet it must be shown that the minor's interest will be conserved by recognizing the father's right. Estate of White, 1 Coffey's Probate Decisions Ann. 128. In our opinion the evidence is amply sufficient to support the finding that appellant is "not a fit or competent person to have the custody of the child."

3. We shall now consider appellant's claim "that there was no evidence that the minor was deserted or abandoned by its father." Estate of White, supra, lays down the rule that—

"Where a husband deserts his wife, who is left to care and provide for their infant child, this will be considered as an abandonment of the child, upon the father's application for guardianship after the mother's death."

[4] It appears that prior to his divorce appellant frequently left his wife and child for extended periods, without indicating where he could be found; that he habitually neglected and ignored the child; and that since the divorce he has done nothing for the child, except to make the payments for its support in accordance with the decree of divorce. We think this evidence was clearly sufficient to sustain the finding of abandonment. The fact that he complied with the decree is not sufficient to overcome the finding that he abandoned the child.

On the point of abandonment appellant cites Guardianship of Snowball, 156 Cal. 240, 104 Pac. 444. In that case, however, it appears that the mother, seeking the guardianship as against the children's aunt, had not been divorced from their deceased father. The court said:

"At most there was only an offer to prove temporary absences, accompanied by statements

which do not in any way evidence an intent to surrender parental rights."

The case is plainly distinguishable from the one at bar on the facts.

[5] 4. We now turn to a discussion of appellant's contention that—

"In the absence of evidence showing that the minor was a resident or inhabitant of the county of Sonoma, * * * the court was without jurisdiction to hear and determine the petition."

Section 1747 of the Code of Civil Procedure, under which this proceeding was instituted, provides:

"The superior court of each county * * * may appoint guardians for the persons * * * of minors * * * who are inhabitants or residents of the county."

Guardianship of Vance, supra, is authority for the general rule that—

" 'The residence of the father during his life * * * is the residence of the unmarried minor child.' Pol. Code, sec. 52, subd. 4. But this rule does not apply when the child is under the age of 14 years and has been abandoned by the father. In such case he forfeits the guardianship of the child, and can no longer claim its custody."

And in 19 Corpus Juris, at page 412:

"Abandonment by the father prevents the domicile of the child from following that of the father."

See, also, People v. Dewey, 23 Misc. Rep. 267, 50 N. Y. Supp. 1013. We quote from Cannon's Estate, 15 Pa. Co. Ct. R. 312:

"Residence is a matter of intention, and a minor * * * cannot form such intention for himself." His residence, "if the parents be dead," is where he "is removed by those who intend to give" him "a permanent home elsewhere."

Although in the instant case only one of the parents is dead, yet, since the surviving parent has, by abandonment, forfeited his right to the care and custody of the child, the rule last quoted will apply. It appears that respondent and his wife have brought the minor into their home in Sonoma county with the intention of educating and caring for her as their own child. It is clear that the residence of the minor was in Sonoma county within the meaning of the jurisdictional requirement of section 246 of the Civil Code and section 1747 of the Code of Civil Procedure.

Decree and order affirmed.

We concur: SHAW, J.; OLNEY, J.

183 Cal. 602

Petition of WOLFF. (Cr. 2330.)

(Supreme Court of California. Aug. 26, 1920.)

1. Habeas corpus ⟸27—Will not lie after conviction except for want of jurisdiction.

Habeas corpus does not lie after judgment of conviction of a crime for any cause except want of jurisdiction in the court which rendered the judgment.

2. Infants ⟸16—Special findings not necessary in juvenile court proceedings.

Special findings in proceedings before the juvenile court are not necessary.

3. Habeas corpus ⟸3—After conviction irregularities and jurisdiction cannot be raised where not objected to below.

Where one charged with murder was taken before the superior court sitting as a juvenile court, which declined jurisdiction, whereupon he was convicted in the superior court, objections to irregularities or to the jurisdiction of the superior court after filing of information could only be raised by presenting them to the superior court, and they cannot be raised by proceeding in habeas corpus after conviction.

In Bank.

Application by Roy Wolff for a writ of habeas corpus to be directed to James A. Johnstone, Warden of San Quentin Penitentiary. Writ denied.

Jackson Mahon and W. W. Laidley, of Bakersfield, C. F. Tramutolo, of San Francisco, and Iverson L. Harris, of San Diego, for petitioner.

PER CURIAM. [1] Habeas corpus does not lie after judgment of conviction of a crime for any cause except want of jurisdiction in the court which rendered the judgment.

The claim of petitioner is that there was a want of jurisdiction in the superior court of Kern county to render the judgment of conviction, because, after the justice of the peace had found the defendant to be under 18 years of age and had certified the case to the superior court for proceedings in its capacity as juvenile court, and in pursuance of said court's directions a complaint had been filed by the probation officer against the defendant, the said superior court, in its capacity as juvenile court, proceeded to determine that the defendant was "not a fit subject for further consideration under the terms of the juvenile court law," without making any findings of fact on that subject, or taking any evidence on the hearing tending to show said fact so determined, and without making any order setting the case down for a hearing for that purpose.

[2] The record shows that the proceedings in the juvenile court were in all respects regular, and that evidence was taken showing the defendant's character and the nature of

his crime; that this was done in his presence; and that he was represented by able counsel. There is no ground for the claim that the proceedings were irregular or that there was anything unfair therein to the defendant. A very brief statement of the facts would suffice to show that it was not a fit case for the juvenile court. Special findings in such a proceeding were not necessary, nor was the court required to set some other day for the hearing.

It should be added that the objections above mentioned can have no possible bearing on the merits of the charge of murder of which the defendant was found guilty. It was not the purpose of the juvenile court law to lay the foundation for additional technical objections to be resorted to after conviction in an effort to free the defendant by means of a writ of habeas corpus.

[3] We add further that, even if there were irregularities or defects in the proceedings under the juvenile court law, the defendant, if he wished to take advantage thereof, or to object to the jurisdiction of the superior court after the information against him is filed, could do so only by presenting his objections in the superior court, and he cannot raise the objections by a proceeding in habeas corpus after conviction.

The application for the writ is denied.

SHAW, OLNEY, LAWLOR, LENNON, and WILBUR, JJ., concur.

183 Cal. 600

WALLING v. WILLIAMS. (L. A. 6078.)

(Supreme Court of California. Aug. 24, 1920.)

1. Venue ⊂⊃66—Affidavit of merits on motion for change of venue held insufficient to show that advice was that of attorney.

An affidavit of merits on a motion for change of venue, stating that affiant had submitted the facts to her attorney, and that "after such statement of facts she was advised that she had a good and substantial and meritorious defense to said action on its merits, and so verily believes," *held* insufficient, as failing to specifically aver that the advice she received was from her attorney.

2. Evidence ⊂⊃43(1)—Judicial notice not taken that damages claimed are excessive, etc.

On motion for change of venue, judicial notice will not be taken of the fact that the amount of damages claimed is greater than is likely to be allowed by a jury, or that defendant will put in issue the amount of the damages claimed, so as to justify an affidavit of merits.

In Bank.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Elisa S. Walling against Mary L. Williams. From an order denying a motion for change of venue, defendant appeals. Affirmed.

A. J. Hughes, of Los Angeles, and Wm. Evans, of San Francisco (Ernest Pagnuelo, of San Francisco, of counsel), for appellant.

H. A. Massey, of Los Angeles (Albert H. Elliott, of San Francisco, of counsel), for respondent.

WILBUR, J. This is an appeal from an order denying defendant's application for a change of venue to the county of her residence, in a suit to recover $20,000 damages for the abduction of plaintiff's former husband from her. The motion was denied because of the insufficiency of the defendant's affidavit of merits for the reason that it failed to show the defendant was advised by her attorney that she had a good defense.

[1] After stating that she submitted the facts of the case to her attorney, it is averred by the affiant that—

"After such statement of facts she was advised that she had a good and substantial and meritorious defense to said action upon its merits, and so verily believes."

The affidavit failed to specifically aver that the advice she received was from her attorney. It may have been given by some one else. Hence the affidavit failed in an essential particular as an affidavit of merits. Jensen v. Dorr, 9 Cal. App. 19, 98 Pac. 45. However, in view of the nature of this case, and the fact that the amount of damages claimed is plaintiff's arbitrary estimate thereof, and that a defendant, even though guilty of the wrong complained of, never fails to put in issue the amount of damages, and usually succeeds upon the trial in very substantially reducing the amount claimed, we very reluctantly reach the conclusion that the affidavit was insufficient. If the defendant intended to put in issue the amount of damages, she was justified in making an affidavit of merits.

"An affidavit for such purpose is sufficient. if it states he has a good defense to the action on the merits as he is advised by his counsel, without specifying the nature or extent of the defense. A defendant may safely swear when sued for one hundred dollars, he being indebted only $50, or any sum less than the amount claimed, that he has a good defense to such an action on the merits." Hurd v. Burr et al., 22 Ill. 29.

[2] We cannot take judicial notice of the fact that the amount of damages claimed is greater than is likely to be allowed by a jury, or that the defendant will put in issue the amount of damages claimed. In view of the extremely technical character of the objection to the affidavit, we have no doubt that the trial court, if application had been made

therefor, would have permitted an amendment of the affidavit, as it was authorized to do. Palmer & Rey Co. v. Barclay, 92 Cal. 199, 28 Pac. 226. But the defendant chose to stand on the affidavit presented, and in the absence of any application to the trial court for leave to amend, that court was not called upon to exercise its discretion in favor of the defendant.

Order affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; SHAW, J.; LAWLOR, J.; OLNEY, J.

183 Cal. 589

In re HESS' ESTATE.

HESS v. YOUNG.

(S. F. 9230.)

(Supreme Court of California. Aug. 23, 1920. Rehearing Denied Sept. 20, 1920.)

1. Trial ⟸194(5)—Trial judge cannot charge jury as to value of expert testimony.

An instruction on testamentary capacity that expert testimony was unsatisfactory and unreliable, with reasons therefor, and that experts' opinions were often opposed to each other, was improper, being in violation of Const. art. 6, § 19, prohibiting judges charging juries as to matters of fact.

2. Trial ⟸296(8)—Instruction on weight of expert testimony not cured by instructions to weigh it.

An instruction in a will contest that the expert testimony on testamentary capacity was unsatisfactory, entitled to less weight than facts, and calculated to impress the jury that the court regarded it as of little weight, was not cured by instructions making it clear that the jury was to weigh such testimony.

3. Wills ⟸55(1)—Evidence held not to show testamentary incapacity.

Evidence as to decedent's lifelong dislike of her sister, the contestant, and of decedent's nervous trouble after an attack of la grippe, and of hallucinations, seeing black objects, and consulting fortune tellers for real or fancied ailments, being subject to insomnia, taking sleeping powders, etc., *held* not to show want of testamentary capacity.

4. Evidence ⟸317(3) — Physician's opinion held incompetent as hearsay.

Witness' testimony as to the opinion of a physician concerning the effect of a lump at the base of testatrix's brain was hearsay and incompetent.

5. Wills ⟸384—Instructions on expert testimony held harmless.

On the contest of a will for want of testamentary capacity, where the evidence is such that a verdict for the contestant appealing from the probate would not have been supported, no prejudice resulted from proponent's erroneous instruction as to expert testimony.

6. Appeal and error ⟸1058(2)—Rejection of evidence subsequently admitted not prejudicial.

Appellant was not prejudiced by the sustaining of an objection to a question which was subsequently answered by the witness and such answer not stricken.

7. Appeal and error ⟸237(2)—Appellant cannot complain of testimony, where no motion to strike was made.

Where a witness was asked for an opinion and answered, and opposing counsel objected, and the court said, "Yes, that is for the jury to determine," appellant cannot complain of such ruling, where no motion was made to strike the answer.

8. Wills ⟸384—Exclusion of testimony as to testamentary capacity held not prejudicial.

In a will contest for want of testamentary capacity, the exclusion of a physician's statements as to whether there were any grounds for testatrix's fear of contestant was not prejudicial, where the witness had already testified that he told testatrix there were no grounds for her fears.

9. Wills ⟸53(1)—Evidence of source of property disposed of inadmissible on issue of testamentary capacity.

In a contest of a will for want of testamentary capacity, it was not error to exclude the will of the father of contestant, the half-sister of testatrix, to show the source of testatrix's property, as establishing equities between the sisters.

Department 1.

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

George C. Young produced the will of Sophie Hess, also known as Sophie Wright, for probate, and Gertrude Hess Voyer contested the will, and from an order admitting it to probate and appointing the proponent as executor, contestant appeals. Affirmed.

E. J. Doyle, of Petaluma, and R. L. Thompson, of Santa Rosa, for appellant.

F. A. Meyer, of Petaluma, and T. J. Geary, of Santa Rosa, for respondent.

LAWLOR, J. This is an appeal by the contestant, Gertrude Hess Voyer, from an order admitting to probate the will of Sophie Hess, otherwise known as Sophie Wright, deceased, and appointing as executor the proponent of the will, George C. Young.

Appellant is the half-sister of the decedent, being the issue of the mother's second marriage. The decedent was a spinster, 52 years of age at the time of her death on May 25, 1918. She left surviving her no issue, parents, brothers, or sisters, other than appellant. Appellant contests the will on two grounds: (1) That the decedent "was not of sound mind and memory, and, by reason of protracted sickness and imbecility of mind and want of understanding, was mental-

ly incapacited from making a will"; and (2) that the will was not properly executed. The case was tried by a jury, and the verdict was that the decedent was of sound mind on June 19, 1917, the date of the execution of the will. By stipulation at the trial, "the issues as to the execution of the will" were withdrawn from the jury and submitted to the court for determination.

It appears that decedent and appellant grew up together in the same household with their mother and the father of appellant. The latter testified that from their early infancy decedent manifested an intense dislike toward her; that when the decedent was about 25 or 26 years old she had an attack of la grippe, and from that time until her death from cancer became increasingly "nervous and peculiar"; that toward the end of her life decedent was addicted to the use of sleeping powders and became very superstitious; and that her dislike for appellant was without any foundation whatever. The witness admitted, however, that she had been jealous because of the mother's love for the decedent. She further testified that the mother was capable of managing the household until 1905, when she suffered a stroke of paralysis; that the family consisted of herself, decedent, their mother and the father of appellant, "After his death it consisted of my mother, my sister, and myself"; that a Dr. Serene, who attended the decedent in infancy, had expressed the opinion that she had an "enlargement" at the base of her brain, and that unless it was removed it would cause decedent "to lose her mind and die"; that after the mother's stroke of paralysis in 1905 decedent took care of her, and would not allow appellant any opportunity to speak with the mother; that decedent had struck the witness on many occasions; that decedent and the mother had frequently complained to her "that the people I kept company with were not good enough for me"; that decedent had told her "she hated me so much she could hardly look at me"; that she (the witness) and decedent had differed as to the settlement of her mother's estate and the disposition of her property; and that after decedent moved to San Francisco in 1917 the witness made an attempt to become reconciled with her.

Appellant called a number of witnesses in support of the contest. Dr. Kurt Urban testified that he had attended appellant in childhood; that appellant was then "rather nervous, depressed mentally, and subject to insomnia"; that he had expressed the opinion to decedent that appellant should be operated upon; that decedent replied that, "on account of Gertrude's peculiar mental condition, she was in fear of Gertrude's doing some bodily harm to her or their mother"; and that he had told decedent her fears were groundless. Mrs. Emma Harris McMullin testified that on one occasion, when she visited decedent in San Francisco, "her eyes had a vacant stare, and I was a little afraid of her." Mrs. Ivy Osborne testified that she had been employed as a night nurse for the mother in 1905; that decedent was "of a nervous temperament; in some ways she was peculiar"; but that she had not noticed any "vacant stare."

Mrs. Ella Mego testified that "Sophie and her mother agreed that they would cut Gertrude off with a dollar if she dared to have any company with any young man." Mrs. Ella Cameron declared that she had first known the decedent in 1893; that "there was quite a lump at the base of her brain"; and that Dr. Serene had said if this lump were not removed she would "lose her mind and die." Mrs. Louise Huegle testified that she thought decedent had taken sleeping powders, and Mrs. Lena Kalish stated that decedent had told her she could not sleep without taking them. Miss Sarah Frances Cassiday testified that as a young girl the decedent "was rather peculiar, both in dress and manner."

Mrs. Catherine Jane Emerson stated that after decedent's attack of la grippe she "became more nervous, * * * was rather irritable, and complained she could not sleep. * * * I don't think she ever quit taking sleeping powders. * * * Sophie saw black objects and heard rappings about the house. She had signs for everything. * * * She believed in fortune telling, and consulted them for her ailments. * * * A spider came down from the ceiling on his web and hung between us, and * * * Sophie said, 'I am so glad because that lady didn't take the house, for see the spider.' * * * I would say she was irrational because I don't see how anybody could dislike a sister as much as she disliked Gertrude." Mrs. Lodia M. Dole testified to decedent's nervousness and sleeplessness after her attack of la grippe and her antipathy toward appellant, and corroborated Mrs. Emerson's testimony. Carl Schuler declared that "the reputation about the neighborhood was that Sophie was very mean to Gertrude," and that on one occasion appellant had come to his house bearing evidences of a blow which she asserted had been struck by the decedent.

Each of these witnesses testified that decedent had always entertained a violent dislike for appellant. Miss Agnes Morrison, who was the nurse attending decedent during her last illness, testified that, while decedent had told her she and appellant were "not on friendly terms," the witness had never administered to her any sleeping powders, and that in her opinion decedent's mind was sound. Appellant's counsel put to Dr. Butler, medical superintendent of the California Home for Feeble-Minded Pa-

tients, who was not personally acquainted with the decedent, an elaborate hypothetical question, based upon the "peculiarities" which previous witnesses had testified the decedent manifested, and his answer was, "I should say she was irrational, * * * of unsound mind."

On the other hand, numerous witnesses for respondent, one of whom, Dr. David Domb, was the physician who attended decedent in her last illness, testified that, while decedent was of a nervous temperament and had stated on many occasions that she thought appellant was "after her money," appellant had cordially reciprocated any "attitude of dislike" which the decedent had maintained toward her; and that decedent had uniformly conducted her affairs with a high degree of business acumen. Dr. Domb testified that in his opinion decedent was of sound mind.

[1] Appellant assigns numerous errors in the giving of instructions as ground for reversal. The first of these assignments is that "instruction 23, requested by proponent, on the weight and value of expert evidence, was erroneous." That instruction reads:

"Medical witnesses have been examined in this contest, and, so far as their testimony is dependent upon hypothetical questions, the court instructs you that: The testimony of experts is frequently unsatisfactory and many times unreliable. It is unsatisfactory because it cannot convey to our minds the precise reasons why the conclusions are reached; and it is unreliable because it is frequently based upon speculations instead of facts. Experts in the exact sciences and in mechanics, who base their opinions upon the laws of nature of the exact sciences, and their own experience with those laws, have tangible facts before them; but where the opinions are based upon speculation, where the subject of the inquiry, namely, the operation and condition of the human mind, is beyond the possibility of human knowledge, we should receive those opinions as at least uncertain. So, when we see a person perform such and such an act, we can form an opinion whether the act is rational or irrational, whether it is consistent with the standard or average human intelligence and reasonableness, but when we advance to speculation upon what would or would not follow upon some supposed existence of mental conditions, we go beyond the scope of knowledge and tread upon the realms of imagination or conjecture. You are instructed, therefore, that, while we receive and you will take into consideration the opinions of experts, such opinions are not entitled to as much weight as facts, especially where there is a conflict between an opinion and a fact. When a fact is established, it is a fact and cannot be overcome, while an opinion is but an opinion, and it may be true and it may be untrue. Opinions of different experts are often diametrically opposed to each other, even when based upon the same supposed conditions."

This instruction is in the identical language of one held to be prejudicially erroneous in Estate of Blake, 136 Cal. 306, 68 Pac. 827 (89 Am. St. Rep. 135), and on account of which the judgment admitting the will to probate was reversed. The court said:

"The testimony of the experts was competent, and went to the very gist of the claim made by contestants. By the instruction the court so discredited it as to practically destroy it. The jury could not but see that the judge had a very poor opinion of testimony of this character. The jury were told that it was unsatisfactory, and the reason why it was so. They were further told that it was unreliable, and the reason why it was so. Not only this, but, to make assurance doubly sure, they were told that opinions of experts are not entitled to as much weight as facts, and that such opinions, based upon the same supposed conditions, are often diametrically opposed to each other. While the opinion of the judge may have reasons to support it, it was not proper for him to give his opinion to the jury. Neither was it proper for him to give the jury, in the instruction, an argument as to the reasons why such evidence in his opinion was unreliable and unsatisfactory. The judge may have been of the opinion that the common-law rule, by which the parties in interest were not competent witnesses, is the better rule. Suppose such to have been his opinion, and he had told the jury that the parties had testified, and then told them further that the testimony of parties is unreliable and unsatisfactory because experience has proven that in many cases parties will not tell the truth against their interests. Would any one doubt that such an instruction would be error? The judge, if allowed to express his opinion as to one class of evidence, would be allowed to do so as to others, and we would have some evidence discredited in every case, depending upon the particular views and prejudices of the judge presiding. * * * The judge, under our system, is not allowed to charge juries as to the facts, but may state the testimony and declare the law. There is no law which declares that the testimony of experts is unsatisfactory and unreliable."

See, also, Quint v. Dimond, 147 Cal. 707, 714, 82 Pac. 310; People v. Wilkins, 158 Cal. 530, 111 Pac. 612; People v. Hadley, 175 Cal. 119, 123, 165 Pac. 442. It is not to be questioned that such an instruction involves a violation of section 19, article 6, of the Constitution, that judges shall not charge juries as to matters of fact.

[2] Respondent's first contention is that—

"This instruction, taken apart and separate from the remainder, * * * might be subject to criticism, but, even if it was conceded that this instruction was not a perfect statement of the law, * * * yet it is submitted that, considering the failure of contestant to establish her case, error * * * would not, under the circumstances of this case, justify a reversal."

In this connection we shall first consider respondent's claim that, in the light of other instructions, there was no error. The other instructions referred to are numbers 29, 40, and 41, given at the request of appellant. It is claimed that "they gave the jury a fair

statement of the law applicable to expert testimony." But they do not cover the point involved. No. 29 is to the effect that the opinions of experts, though proper to be considered "and entitled to have at your hands all the weight which reasonably and justly belongs to them, are nevertheless not binding on you against your judgment." No. 40, after dealing with the qualifications of experts, continues that in arriving at a conclusion the jurors "may take into consideration their testimony, and award to it such value as in your judgment it deserves." No. 41 correctly defines a hypothetical question, and charges that—

"The opinion of the witness must therefore be brought to the test of the facts in order that you may judge what weight the opinion is entitled to."

It is not contended that these instructions do not correctly state the law touching expert testimony as far as they assume to deal with it. But, while the instructions make it clear that the jury is to weigh such testimony, in no manner did they tend to cure the vice in the one complained of.

[3] We shall next consider respondent's contention that—

"The testimony on the part of contestant * * * did not show * * * mental incapacity on the part of the testatrix at the time of the execution of the will. * * * For this reason if any error had been committed by the court in its instructions, * * * it would be harmless and unprejudicial error, on which a judgment cannot be reversed."

It was said in Estate of Carpenter, 94 Cal. 406, 419, 29 Pac. 1101, 1105:

"People may hate their relatives for bad reasons, and yet not be deprived of testamentary power."

And in Estate of Spencer, 96 Cal. 448, 31 Pac. 453, the court declared:

"The likes and dislikes of human beings—their confidences and mistrusts—are often capricious and arbitrary; but they are not evidences of insanity because they cannot be logically defended to the satisfaction of those who think them wrong. * * * 'The right of a testator to dispose of his estate depends neither on the justice of his prejudices nor the soundness of his reasoning. He may do what he will with his own; and if there be no defect of testamentary capacity, and no undue influence or fraud, the law gives effect to his will, though its provisions are unreasonable and unjust.' Jackson v. Jackson, 39 N. Y. 157."

See, also, Estate of Kendrick, 130 Cal. 360, 62 Pac. 605; Estate of Riordan, 13 Cal. App. 313, 109 Pac. 629; Estate of Kaufman, 117 Cal. 288, 295, 49 Pac. 192, 59 Am. St. Rep. 179. We quote from Estate of Redfield, 116 Cal. 637, 652, 48 Pac. 794, 798:

"Before a will can be rejected on that account [that the testator was subject to insane delusions] it must appear that 'its dispository provisions were or might have been caused or affected by the delusion' (Amer., etc., Soc. v. Hopper, 33 N. Y. 624); delusions which are not operative in the testamentary act * * * are not permitted to invalidate it."

And the court held in Estate of Chevallier, 159 Cal. 161, 168, 113 Pac. 130, 133, that insanity which will invalidate a will "must be an insanity of one of two forms, either insanity of such broad character as to establish mental incompetency generally, or some specific and narrower form of insanity, under which the testator is the victim of some hallucination or delusion. And, even in the latter class of cases, it would not be sufficient merely to establish that a testator was the victim of some hallucination or delusion to avoid the will. The evidence must go further, and establish that the will itself was the creature or product of such hallucination or delusion, or, in other words, that the hallucination or delusion bore directly upon and influenced the creation and terms of the testamentary instrument." See, also, Estate of Kendrick, supra; Estate of Guilbert, 188 Pac. 807; Maynard v. Tyler, 168 Mass. 107, 46 N. E. 413.

[4] Viewing the evidence in the light most favorable to appellant, it appears that decedent entertained a lifelong dislike for her; that after decedent's attack of la grippe she grew more nervous and irritable; that she was subject to hallucinations, such as seeing "black objects," and consulted fortune tellers for her real or fancied ailments; and that she was subject to insomnia and took sleeping powders. In view of the foregoing authorities we cannot agree with appellant that the evidence shows a want of testamentary capacity on the part of decedent. Decedent's dislike for appellant would not constitute unsoundness of mind. It may have been caused by the jealousy which appellant admitted she harbored toward decedent because the mother, as she thought, favored her, or have had its origin in the belief that, as the mother complained, appellant's associates were unsuitable for her. It appears from Dr. Urban's testimony that, to some extent at least, decedent's fears of appellant were based upon the latter's depressed mental condition. And decedent's dislike for appellant may have been heightened by the difference between them over their mother's estate. Mrs. McMullin's testimony that she had noticed a "vacant stare" in decedent's eyes is not indicative of any delusion, or, if it is, that such delusion constituted unsoundness of mind which influenced the making of the will. This must also be said of the testimony of Mrs. Kalish and Mrs. Huegle. Mrs. Cameron's testimony as to Dr. Serene's opinion of the effect of the "lump" at the base of decedent's brain does not show a lack of testamentary capacity at

the time of the making of the will, for it does not appear that decedent suffered from this trouble in her later years. Moreover, it was hearsay and incompetent.

Mrs. Mego's testimony only tends to confirm the existence of decedent's profound antipathy toward appellant. The peculiar notions of dress and the mannerisms referred to by Miss Cassiday at most amounted to idiosyncrasies which would not constitute delusions. The hallucinations and superstitions to which Mrs. Emerson and Mrs. Dole testified are not uncommonly entertained by people whose soundness of mind is not questioned, and certainly there was not a shred of evidence to show that any of these peculiarities, hallucinations, or beliefs affected the provisions of the will. Moreover it is not questioned that decedent conducted her affairs with intelligence and shrewdness. Indeed, no claim is made that there was not sufficient evidence before the jury to warrant the finding of testamentary capacity.

We quote from Estate of Collins, 174 Cal. 663, 164 Pac. 1110, as to the hypothetical testimony of Dr. Butler:

"At best, the testimony of expert witnesses to insanity, based on hypothetical questions skillfully framed to call for an answer favorable to the party in whose behalf it is asked, 'is evidence the weakest and most unsatisfactory.' Estate of Dolbeer, 149 Cal. 227, 243."

See, also, Estate of Flint, 179 Cal. 552, 177 Pac. 451. Dr. Butler stated in support of his opinion:

"The facts * * * which I consider essential to justify my conclusions are those delusions. By delusions I mean the delusions there of this figure, for instance, of the other delusions, seeing spiders, also the idea of her sister going to kill herself and her mother. Persecutions. By delusions I mean something that is not natural; have an opinion about something that is not real; saying or thinking something that is not real."

But it was for the jury to decide whether it had been established by appellant's witnesses that decedent was subject to any delusions. Moreover, the hypothetical question put to Dr. Butler did not fix any particular time when it was claimed decedent had delusions.

[5] From this analysis of the evidence received it is plain that if a verdict had been rendered in favor of appellant it could not have been supported. If this be true, then no prejudice resulted from the giving of the erroneous instruction.

[6] But appellant contends that certain rulings on evidence "were of such a character as to seriously prejudice the presentation of contestant's case." Mrs. Lena Krone, who had known both decedent and appellant "as a little girl," was asked by counsel for appellant, "From your observation and knowledge of Sophie and Gertrude Hess, did you consider that Sophie's hatred of her sister was rational or irrational?" Counsel for respondent interposed the objection that the question was "immaterial, irrelevant, and incompetent," and the objection was sustained. It appears, however, that the witness was later asked the same question, no objection was made, and the question was answered. This answer was not stricken out. It cannot be said that appellant was prejudiced by the ruling.

[7] Appellant also assigns error to the ruling which appears in the following excerpt from the testimony of Mrs. Dole:

"Q. Basing your judgment on what you have told us and all that you know in regard to Sophie, would you say that her mind, particularly with regard to her sister Gertrude, was rational or irrational? A. She was absolutely irrational.

"Mr. Geary (counsel for respondent): To that question we object as immaterial, irrelevant, and incompetent. * * *

"The Court: Yes, that is for the jury to determine."

Appellant cannot complain of any error in this ruling, because the question was answered, and no motion was made to strike out the answer.

[8] It is further contended by appellant that the court erred in sustaining respondent's objection to a question which was put to Dr. Urban after he had testified that decedent expressed to him a fear that appellant would do her "some bodily harm":

"Now, was there any danger that Gertrude would do anything in the nature that Sophie feared? Did you see any ground for that fear?"

This witness had already testified that he told decedent there were no grounds for her fear. Assuming that the inquiry was proper, upon the entire record we do not perceive how the ruling could have been prejudicial.

[9] Appellant's next assignment of error is to the ruling of the court in excluding a copy of the will of appellant's father, Frederick Hess. Her contention is that this was admissible as tending to show "the source of the property" disposed of by the will herein, "as establishing the equities between the sisters." In other words, appellant's position is that, inasmuch as Frederick Hess was not the father of decedent, his will, by which it is claimed "he treated the two girls alike," gave appellant a claim "on her sister's bounty." With this we do not agree. Any possible effect of this evidence was so nebulous that it could have no bearing on the issues. Estate of Ruffino, 116 Cal. 304, 48 Pac. 127, cited by appellant on this point, was a case where it was held that, "upon the question of undue influence," evidence was admissible of the source from which the decedent acquired the property disposed of

in the will. In this case the question is one of testamentary capacity.

Even if all the rejected evidence had been admitted, there would still be a failure by appellant to show that decedent was mentally unsound at the date of the execution of the will. In this view it will not be necessary to consider appellant's assignments of error in the giving of various other instructions or respondent's contention that Estate of Blake, having been decided prior to the adoption of section 4½, article 6, of the Constitution, is not authority for the reversal of the judgment herein because of the giving of instruction 23.

The judgment is affirmed.

We concur: SHAW, J.; OLNEY, J.

183 Cal. 434

MORDECAI et al. v. BOARD OF SUP'RS OF MADERA COUNTY et al.

(Sac. 3032.)

(Supreme Court of California. Aug. 3, 1920.)

1. Statutes ⟸73(2)—Irrigation Act invalid as violating provisions as to uniformity.

The Irrigation Act of 1919 which supplanted Act June 4, 1915 (St. 1915, p. 1173), as amended by St. 1917, p. 1068, and like it provides that nothing in the act shall affect or apply to any irrigation district, etc., situated wholly or in part within any county which has adopted a charter pursuant to Const. art. 11, § 7½, prior to June 4, 1915, is invalid, being in violation of article 1, § 11, declaring that all general laws shall have uniform operation, for the act is general, and the exception could apply to only two counties which had adopted a charter prior to the act of 1915, this being so in view of the fact that the constitutional provision must be construed with article 1, § 21, prohibiting the grant of special privileges.

2. Statutes ⟸71—Irrigation laws are subject to provision requiring uniformity.

Const. art. 11, § 13, declaring that the Legislature shall have power to provide for the supervision, regulation, and conduct in such manner as it may determine, of irrigation reclamation districts, does not authorize, the Legislature in enacting irrigation laws to violate article 1, § 11, requiring general laws to have a uniform operation, and so Irrigation Act of 1919, which violates that section, cannot, on that ground, be upheld.

3. Statutes ⟸64(1)—Where separable invalid portions will not defeat the whole act.

That an act does not operate uniformly in some respect does not necessarily render it entirely void, and if those provisions are reasonably separable from the balance of the act, and the purpose of the Legislature will be subserved even with them gone, the balance will stand.

4. Statutes ⟸64(2)—Exemption of Irrigation Act from counties which had adopted charter renders entire act invalid.

Irrigation Act of 1919, providing that it shall not apply to irrigation projects in counties which have adopted a charter pursuant to Const. art. 11, § 7½, etc., is invalid as a whole because the provision which destroyed uniformity of operation could not be separated from the remainder of the act.

In Bank.

Application by George W. Mordecai and others for a writ of review to annul the order of Board of Supervisors of the County of Madera and others, forming an irrigation district. Writ denied.

Harris & Hayhurst, of Fresno, and Haven, Athearn, Hall & Chandler, of San Francisco (Edward F. Treadwell, of San Francisco, of counsel), for petitioners.

Stanley Murray, of Madera, and A. L. Cowell, of Stockton, for respondents.

Edson Abel, of Taft, amicus curiæ, for Kern Co. Farm Bureau.

James H. Farraher, for certain protestants.

OLNEY, J. This is a petition for a writ of review annulling an order of the respondent board of supervisors of Madera county. The petitioners are owners of land in that county, and it seems that on October 31, 1919, they filed with the state irrigation board, the administrative board created by the so-called California Irrigation District Act of 1919 (St. 1919, p. 671), an application for the formation of an irrigation district under that act. Subsequent to the filing of this application, and while it was pending, the owners of other lands in Madera county presented to the board of supervisors of the county a petition for the formation of an irrigation district under the so-called Wright-Bridgeford Act (St. 1897, p. 254), an act which has been in force for years, and under which, and under the Wright Act (St. 1887, p. 29) which preceded it, most, if not all, of the irrigation districts of this state have heretofore been organized. The district whose formation was so sought included the lands of the petitioners here, and they appeared before the board of supervisors and represented that the state irrigation board had previously acquired jurisdiction of the matter of organizing a district, including their lands, and that the proceedings before that board were still pending, and requested that their lands be excluded from the district sought to be organized by the board of supervisors. The supervisors denied this request, and made an order approving the formation of a district, including the petitioners' lands. It is this order which it is sought to have annulled by the present proceeding.

The ground upon which its annulment is sought is that the state irrigation board, having acquired jurisdiction of the lands of the petitioners for the purpose of including them in an irrigation district, the board of supervisors was without jurisdiction of them for the purpose of including them in another district of the same character. The respondents contend by demurrer to the petition: First, that it is not true that the supervisors were without jurisdiction because of the previous application to the state irrigation board; and, second, that in any case the California Irrigation Act, under which the prior application was made, is unconstitutional and void. It is plain that if the second contention is correct there is no need for considering the first. Likewise, while it is contended that the act is unconstitutional in a number of different respects, if it is unconstitutional in one, and that of such character as to vitiate the provisions of the act applicable to the organization of irrigation districts, it is plain there is no need for considering any other respect in which the act may possibly be invalid. There is one respect of this character in which we believe the act is unconstitutional, and our discussion therefore will be limited to it.

The California Irrigation Act was originally passed on June 4, 1915 (Stats. 1915, p. 1173; Deering's Gen. Laws 1915, Act 1732i). It was much amplified by amendment in 1917 (Stats. 1917, p. 1068), and in 1919 was repealed, and a new act, substantially the same as the amended act of 1917, adopted in its place (Stats. 1919, p. 671; Deering's Consol. Supp. for 1917–19, Act 1732m). The prime purpose of the act is apparently to provide adequate machinery for undertaking irrigation works of a magnitude too great to permit of their being undertaken by the ordinary irrigation district. The act of 1915 provided for the formation of so-called water districts, and for the transformation of existing irrigation districts into water districts. The function of the water districts were to be practically those of irrigation districts. The amended act of 1917 and the act of 1919 provide for the formation of irrigation districts as such, and the transformation of districts existing under other laws into districts existing under the act. It also provides for the formation of consolidated districts called conservation districts, made up of irrigation, reclamation, or drainage districts as units. Wide powers are conferred upon the irrigation board and upon the districts within their jurisdiction, looking to the conservation, storage, and drainage of water and to its beneficial use. The purpose and scope of the act, as the foregoing statement shows, are general. Its express terms are likewise general, with one exception. The last section of the act of 1915 (section 17) provided:

"Nothing in this act contained shall affect, or apply to, any irrigation, protection, flood control, conservation, or other improvement district wholly or in part within any county which has adopted a charter pursuant to section seven and one-half of article eleven of the Constitution of California, ratified and approved as provided therein, or within any city and county; and said board shall have no power of jurisdiction within any of said districts or within such counties or city and county."

Section 19 of the amended act of 1917 and of the new act of 1919 read:

"Nothing in this act contained shall affect, or apply to, any irrigation, protection, flood control, conservation, or other improvement district situated wholly or in part within any county which has adopted a charter pursuant to section seven and one-half of article eleven of the constitution of California, ratified and approved as provided therein, prior to June 4, 1915, or within any city and county; and said board shall have no power of jurisdiction within any of said districts or within such counties or city and county."

[1] The contention of the respondents is that the law is general in its nature, and that by reason of the exception so made in its operation it violates the mandatory provision of our state Constitution (section 11 of article 1) that "all laws of a general nature shall have a uniform operation." It cannot be and is not questioned that the act is general in nature. The only question therefore is as to its uniformity of operation.

The meaning and effect of the provision of our Constitution requiring uniformity of operation on the part of general laws have been before our courts on numerous occasions, and the general rule applicable is too plain and too well established to require or to justify a discussion of the authorities. The many times reiterated statement of our decisions is that, while the requirement that a general law must have a uniform application does not mean that it must have a universal operation, and it is valid if it applies alike to all persons or objects within a class—or, what is the same thing, there is excepted from its operation a class—founded upon some "natural intrinsic or constitutional distinction," yet if the statute operates only upon a class, or there is excepted from its operation a class, not founded upon a "natural intrinsic or constitutional distinction," its operation is not uniform, and it is discriminatory legislation of the sort which the Constitution purposed to prohibit and is invalid. See Application of Miller, 162 Cal. 687, 698, 124 Pac. 427, and cases there cited.

Now it is somewhat difficult to see how any such distinction in the applicability of an act of the scope and purpose of that under consideration could rationally be made, as the act of 1915 made, between lands, waters, and districts within counties not having a

charter form of government and those within counties that do, or why, in reason, the state irrigation board should have jurisdiction to function in one class of counties and not in the other. While the Constitution itself provides that counties may adopt charters for their government, and a constitutional distinction is thus made between such counties and others, the distinction is one that apparently has no relation to or bearing upon the applicability of an act of the scope and purpose of the California Irrigation Act and furnishes no reason for making the act applicable in nonchartered counties, but not in chartered counties. Rauer v. Williams, 118 Cal. 401, 50 Pac. 691. It would seem as if it were no more the function of a chartered county than of an unchartered one to provide as a part of the system of county government for the irrigation of private lands within it.

But, however this may be, we think it plain that no valid reason whatever can be assigned for the distinction made by the acts of 1917 and 1919 between counties which had adopted a chartered form of government prior to June 4, 1915, and those which had not. The distinction so made is not merely between chartered and unchartered counties, but between those chartered prior to June 4, 1915, and those that have been chartered since or may be chartered hereafter. There is certainly no such constitutional distinction, and just as certainly there is no such natural or intrinsic distinction. The counties which had adopted charters prior to June 4, 1915, were those of Los Angeles and San Bernardino. The description in the statute of the counties to be excepted from its operation as those chartered prior to June 4, 1915, is in effect but a designation of those two counties, a designation which might just as well have been made by name. The statute then simply sets off these two counties as a special class within whose limits the act does not operate. There can be no natural and intrinsic distinction in such a classification, since very plainly, so far as the objects of this act are concerned, the furtherance of irrigation and the securing of water for that purpose, there is no difference between the two counties excepted and the counties adjoining them, or, for that matter, between the two counties excepted and a great majority at least of the counties of the state.

The matter may be put in another way. It has been frequently and truly said that the purpose of the constitutional mandate was to prevent special privileges or immunities being granted to a class. See Application of Miller, supra. In fact, the provision of the the Constitution for uniformity of operation is closely connected with its further provision (article 1, § 21) expressly prohibiting the granting of special privileges or immunities. Brooks v. Hyde, 37 Cal. 366, 379. Now, if the California Irrigation Act be considered as a privilege, what reason is there why the inhabitants and property owners of Los Angeles and San Bernardino should not enjoy that privilege when those within other counties may do so? On the other hand, if the act be considered a burden, why should those within those two counties be immune from it when the rest of the state is subject to it?

We can see no sufficient answer to these questions or to the objection involved in them that the exception from the applicability of the act of counties chartered prior to June 4, 1915, destroys the uniform operation of the act. The first answer made by the petitioners is that the date on which the distinction turns, June 4, 1915, is the date of the passage of the original act, and that counties adopting charters subsequent to that date are in a different class from those which had then adopted charters, because their charters would be adopted with the act in view. There might perhaps be a distinction along this line—whether it would be a sufficient one is another question—if the counties adopting charters after the passage of the act could by their charters take themselves without the operation of the act. But they cannot. The act is applicable to them whether they wish it or no, whether their charters so provide or not. What difference it makes under these circumstances that a county adopts its charter after the passage of the act we do not see.

A second answer given by the petitioners is that the Legislature, in granting "immunity" from the act to counties which had adopted charters, did so in deference to the right of self-determination and local self-government. But if this be true, why are not counties chartered after the passage of the act given "immunity" from it as well as those chartered before? Certainly one class is as much entitled to the immunity as the other, and the principle of self-government is as important in the one case as in the other.

A third answer given by the petitioners is based upon the fact that when the act of 1919 repealed the previous act it provided (section 20) that all proceedings initiated under the previous act should not be affected by the repeal, but should proceed under the new act, and that any districts previously organized under the old act should continue under the new. It is argued from this that inextricable confusion would have been caused if the date of the passage of the original act had not been inserted. If any districts had been organized under the original act, its repeal in 1919 might well have caused confusion if provision were not made for their continuance under the new act, but how the date of the passage of the original act could affect the matter we do not see. It is true that districts might have been organized in counties which had subsequently adopted

charters, but it was not necessary, in order to preserve such districts and avoid confusion, to except from the operation of the act counties chartered prior to the passage of the original act. The two things have no connection. The exception from the act of counties chartered prior to the passage of the original act, and the preservation in existence of districts organized in counties chartered subsequent to that time, are two distinct things, which have no relation to or bearing upon each other.

[2] A fourth answer by the petitioners is based upon the provisions of section 13 of article 11 of the Constitution "that the Legislature shall have the power to provide for the supervision, regulation, and conduct, in such manner as it may determine, of the affairs of irrigation districts, reclamation districts or drainage districts, organized or existing under any law of this state." It is argued, in effect, that this provision empowers the Legislature to pass what laws it sees fit in regard to irrigation districts, untrammeled by the general requirement that laws of a general nature shall have a uniform operation. We cannot agree with this. There is nothing to indicate that the power granted the Legislature by this provision was not to be exercised by it subject to the general requirements of the Constitution governing the manner in which the power of legislation when conferred or possessed shall be exercised. The Legislature has the power, as conferred by the provision of the Constitution just quoted, to legislate concerning the affairs of irrigation districts, but that power, like the power of the Legislature to legislate on other subjects, must be exercised in the manner in which the Constitution provides that the power of legislation when it exists must be exercised. Before any grant of power to legislate on a particular subject can be held to be free of a general requirement governing all legislation, the intent of the Constitution to that effect must be plain. No such intent appears in the present instance.

[3, 4] The final contention of the petitioners is that, even though the exception of counties which adopted charters prior to June 4, 1915, is invalid, it is separable from the balance of the act, and may be disregarded, and the act allowed to stand without the exception so made. An express exception, such as that under consideration, is always easily separable from the balance of the statute of which it is a part. It of necessity stands by itself as an exception. If the contention of the petitioners were sound in this case, it would also be sound in a considerable number of other cases similarly involving statutes of a general nature, but which make unauthorized exceptions to the uniformity of their operation. The instances of such statutes are by no means few. But we have been cited to no authority which when examined really supports the petitioners' contention.

If it were possible for the courts without usurping the function of the Legislature merely to hold the obnoxious exception invalid and permit the balance of the act to stand unaffected by it, it should, of course, be done, for the rule that the courts should not hold acts of the Legislature unconstitutional unless they are plainly so extends to their striking down only such portions of a statute as the constitutional mandates or limitations plainly require should be stricken down. But the difficulty in such a case as the present lies in the fact that, accurately speaking, the constitutional objection is not to the exception, in and of itself, which is made to the statute, but is to the general law with the exception in it. The objection is to the lack of uniformity of operation, to a law which, because of an exception which it itself contains, does not operate uniformly.

It is not a case of a defect affecting only a separable provision of the act, which may be stricken out without affecting the balance, but is the case of a defect which affects the whole act to the extent to which it destroys its uniformity of operation. In other words, the situation is simply that the Legislature has not passed a general law which will operate uniformly, as it was required by the Constitution to do. For the courts to eliminate the exception and thus make the statute operate uniformly would be to hold that the Legislature had passed a statute which it had not in fact passed, and would, in effect, be for the courts themselves to legislate. To put it concretely, for the courts to strike out from the California Irrigation Act the exception of the counties of Los Angeles and San Bernardino, for that is what the exception really is, would be for the courts themselves to extend the operation of the act to those counties, although the Legislature has expressly said that they shall not come within its operation.

Upon this point the present case comes directly within the authority of Spraigue v. Thompson, 118 U. S. 90, 6 Sup. Ct. 988, 30 L. Ed. 115. An action had there been brought to collect pilotage fees due under a section of the Georgia Code prescribing such fees except in certain specified instances within which the defendant did not come. The defendant contended that the section was invalid because discriminatory by reason of the exception. It plainly was discriminatory, but the Supreme Court of Georgia, while so holding, held that the exception might be disregarded, so that the act would stand as if the exception were not there, and gave judgment that the defendant was liable for the fees sought to be recovered. This was reversed on writ of error to the Supreme Court of the United States, the court saying upon the

point (118 U. S. 94, 6 Sup. Ct. 989, 30 L. Ed. 115):

"It was held, however, by the Supreme Court of Georgia, in the case now before us, that so much of the section as makes these illegal exceptions may be disregarded, so that the rest of the section as thus read may stand, upon the principle that a separable part of a statute, which is unconstitutional, may be rejected, and the remainder preserved and enforced. But the insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the Legislature of Georgia the statute is made to enact what confessedly the Legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions. We are therefore constrained to hold that the provisions of section 1512 of the Code of Georgia cannot be separated so as to reject the unconstitutional exceptions merely, and that the whole section must be treated as annulled and abrogated by section 4237 of the Revised Statutes."

See, also, Lassen County v. Cone, 72 Cal. 387, 14 Pac. 100; Ex parte Bohen, 115 Cal. 372, 47 Pac. 55, 36 L. R. A. 618; Estate of Mahoney, 133 Cal. 180, 65 Pac. 389, 85 Am. St. Rep. 155; Ex parte Sohncke, 148 Cal. 262, 82 Pac. 956, 2 L. R. A. (N. S.) 813, 113 Am. St. Rep. 236, 7 Ann. Cas. 475; State v. Robinson Co., 84 Wash. 246, 146 Pac. 628.

The language of Estate of Mahoney, just mentioned, is particularly pointed, and, while we are aware that the result reached in that case was overruled in Estate of Johnson, 139 Cal. 532, 73 Pac. 424, 96 Am. St. Rep. 161, it was overruled upon the theory that the want of a legislative enactment covering the excepted class, a want usually inherent in a general law which contains an exception to its operation, did not exist in the particular case because the want was supplied by a superior legislative enactment, the Constitution of the United States, which operated to extend the state statute over the excepted class regardless of the contrary intent of the state Legislature. In other words, the conclusion reached in Estate of Mahoney was overruled in Estate of Johnson, not because of any question as to the correctness of the principle there laid down, but because it was believed that it was not applicable.

The only authorities which are cited by petitioners as laying down a different rule are Hale v. McGettigan, 114 Cal. 112, 45 Pac. 1049, and Application of Mascola, 25 Cal. App. 92, 142 Pac. 903. In the latter of these a statute as to the use of fishing nets applicable by its terms to the sixth game district and to a part of the fifth was attacked as invalid because not operating uniformly throughout the fifth by one who had violated its provisions in the sixth, where it did operate uniformly. The Legislature had the right to make a distinction by game districts, and the court held in effect that the want of uniformity as to the fifth district did not affect the validity of the statute as to the sixth, since as to the latter the defect did not exist, a ruling manifestly correct and not in conflict with the views we have here expressed.

In Hale v. McGettigan, the Legislature had passed a general statute for the organization and government of counties throughout the state. It contained a general section, making the term of office of county officers four years. Tucked away in a subsequent section fixing the compensation of officers of counties of the eighth class was a provision, pretty evidently inserted or left there by inadvertence, which the court construed as a special provision that the term of office of officers of that class of counties should be two years. The court held that this special provision was invalid, but that it did not affect the validity of the balance of the act. The ground on which the decision is placed is that the special provision was wholly analogous to the case of a separate act fixing the term of officers of counties of the eighth class at two years, that such an act would be invalid as special legislation in an instance where that character of legislation is prohibited by section 25 of article 4 of the Constitution, a provision distinct from that concerning the uniformity of operation of general laws and by no means having the same effect, and, that, being invalid as special legislation, it would not affect the uniformity of operation of the general law which it purported to modify.

The rule on which the decision so proceeds, that a separate act, which purports to affect the uniformity of operation of a general law, but is invalid for some reason, such as being special legislation, does not affect the general law or its uniform operation, is not open to question. Whether that rule was properly applicable to the case then before the court where the provision as to a particular class of counties different from the provision as to counties in general was not made by a separate act, but as a part of the general law itself, we need not stop to inquire. The rule is plainly not applicable here. If, for example, the California Irrigation Act by its own terms applied to the whole state without exception, and then by a separate but invalid act certain counties were excepted from its operation, the Irrigation Act would still exist as a legislative enactment applicable by its terms exactly as passed by the Legislature to the excepted counties as well as to the balance of the state, and its uniformity of operation would not be affected. But where the Irrigation Act by its own terms omits, as it does, certain counties from its operation, without justification for the distinction so made, then there is no legislative enactment as to those counties, the Legislature has not spoken as to them except to say that the act

shall not apply to them, the courts cannot speak for the Legislature and supply such an enactment, and the statute must fail because of a want of uniformity of operation necessarily inherent in it.

There remains to be said but one thing more. It does not necessarily follow that because an act does not operate uniformly in some respect the whole act is void. It is void primarily, so to speak, only in those provisions as to which a want of uniformity of operation exists, and if those provisions are reasonably separable from the balance of the act, and the purpose of the act and the intention of the Legislature will be subserved even with those provisions gone, the balance of the act will stand. In other words, so far as the effect upon the act as a whole is concerned of the invalidity of certain of its provisions which because of some exception to them do not operate uniformly, the principles applicable are those applicable to any case of a part of an act being found to be unconstitutional. But in the present case there can be no doubt as to the effect upon the proceedings initiated by the petitioners for the formation of an irrigation district under the Irrigation Act. One respect in which the act does not operate uniformly because of the exception contained in it is that of organizing irrigation districts. It follows that in this respect at least the act, being a general law, is invalid, with the result that the proceedings taken under it by the petitioners are void, and constitute no legal objection to the inclusion of their lands in a district organized under proceedings subsequently initiated before the board of supervisors. No ground, therefore, appears for annulling the order of the latter organizing such a district.

Writ denied.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; LENNON, J.; LAWLOR, J.; WILBUR, J.

SHAW, J., deeming himself disqualified, does not participate.

183 Cal. 604

CABRERA v. THANNHAUSER & CO.
(S. F. 8786.)

(Supreme Court of California. Aug. 30, 1920.)

1. Banks and banking ⟸165 — Proceeds of drafts for collection are general not special deposit.

As a general rule, the proceeds of drafts sent to a correspondent for collection become general, not special, deposits, though the correspondent has knowledge of the purpose for which the proceeds were intended to be used.

2. Banks and banking ⟸154(8)—Evidence held not to show intention that proceeds of drafts should be special deposit.

Directions accompanying drafts sent for collection to credit to account as collected at stated intervals, with other evidence, *held* to show an intention that the proceeds of the drafts should be a general deposit notwithstanding statement they were to cover drafts drawn upon the correspondent payable before those sent for collection were due.

3. Appeal and error ⟸616(1)—Translation of letter subsequent to trial not considered in determining admissibility.

The translation of a letter made by the trial court after the trial which differed from the translation of the letter at the trial and which appeared in the transcript, but was not certified by the official reporter or the judge, cannot be considered on appeal, in the absence of a stipulation to that effect, in determining the admissibility of the letter.

4. Evidence ⟸215(3)—Letter by payee of drafts held not admissible as tending to show want of interest in drafts.

Where the drawee had refused acceptance of drafts because the drawer was responsible for another account which was overdrawn and asked the payee of the drafts to use his offices to secure payment of the overdrawn account, a letter by the payee that he could not intervene in that matter as it was foreign to him is not admissible against him in an action on the draft as an admission that he had no further interest in the drafts.

5. Evidence ⟸455—Course of business between drawer and drawee admissible to show meaning of terms used.

The course of business between the drawer and drawee of drafts in suit, including subsequent dealings as well as those prior to and contemporaneous with the draft transaction, is admissible against the payee of the drafts to show the meaning of the terms used in the correspondence regarding the drafts, especially where the letter accompanying the drafts requested that the drawer be protected as usual.

6. Banks and banking ⟸154(7)—Overdraft admissible to show drafts for collection were general deposit.

In an action by the payee against the drawee of foreign bills of exchange, evidence that, at the time the bills together with drafts on other parties sent for collection were transmitted to the drawee, the drawer's account was overdrawn, is admissible to show that the proceeds of the drafts sent for collection were to be credited generally to the drawer's account not a special deposit for the payment of the bills in suit.

7. Banks and banking ⟸154(7)—Subsequent direction to transfer accounts admissible to show intent that proceeds of drafts were general deposit.

In an action by the payee of drafts against the drawee where plaintiff claimed that the proceeds of other drafts sent by the drawer to the drawee for collection were a special deposit for payment of the drafts in suit, a letter by

the drawer subsequent to the transaction, directing the account to which the proceeds of the drafts for collection had been credited to be credited to his general account, is admissible to show that such proceeds were intended to be a general, not a special, deposit.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Manuel Estrada Cabrera against Thannhauser & Co. Judgment for plaintiff, and defendant appeals. Reversed.

Chickering & Gregory, of San Franscisco, for appellant.

Lent & Humphrey, of San Francisco, for respondent.

LAWLOR, J. This is an appeal from a judgment in favor of the plaintiff, Manuel Estrada Cabrera, and against the defendant, Thannhauser & Co., a corporation, in an action brought upon three foreign bills of exchange. The defendant appeals.

In the year 1906, and for some time prior thereto, appellant was conducting in San Francisco the business of a commission merchant, importer and exporter. During the same period, in the Republic of Guatemala, Triebel & Co. had been conducting a similar business. These two firms were correspondents; appellant purchased and sold merchandise and accepted and paid drafts for Triebel & Co. in San Francisco, and Triebel & Co. performed similar functions for appellant in Guatemala. On the 5th day of September, 1906, Triebel & Co. advised appellant that they had drawn six drafts on appellant in favor of the respondent, who was then president of the Republic of Guatemala, five drafts for $5,000 each, and ine for $3,587, a total of $28,587. By the same letter Triebel & Co. remitted to appellant thirteen drafts on two business concerns in Hamburg, Germany (these last-mentioned drafts are hereinafter referred to as the Hamburg drafts), aggregating $29,012.94. That letter was in the German language and was translated as follows:

"Following up our letter of to-day, we still inform you that we were obliged to pay the government's coffee on the 31st ultimo and consequently drew the following amounts upon you: [Listing the six drafts in favor of respondent] begging you to protect these drafts as usual upon presentation. For the reimbursement of above-mentioned amounts, please find inclosed the following remittances [listing the 13 Hamburg drafts] which please credit. As the President will probably retain the drafts for some time yet, we beg you, as we told you formerly already, to negotiate every week Mk. 10000 of above-mentioned drafts, in order that we can make some more profit on the interests."

In answer to the foregoing, appellant wrote to Triebel & Co. on September 28:

"We wrote you under date of the 21st instant and acknowledged receipt of your favor of the 5th of equal month, contents of which have been duly noted. We have charged to your Coffee Duty account: [Listing respondent's 6 drafts] and beg you to send us a signature of the Licentiate [Attorney] Manuel Estrada Cabrera, without which we cannot pay. * * * From the other Mk. 110,000 remitted to us, we shall, according to your desire, dispose of Mk. 10,000 every week."

On October 30 Triebel & Co. sent to appellant "an old document" bearing respondent's signature.

Commencing on September 22 appellant did dispose of about 10,000 marks per week of the Hamburg drafts. The proceeds thereof were deposited by appellant in its general account in a San Francisco bank, and Triebel & Co.'s Coffee Duty account was credited in the same amounts. Upon each of these occasions Triebel & Co. were notified of the credit to their account, and they replied, stating that appellant's Coffee Duty account had been correspondingly debited. On December 31 appellant sent to Triebel & Co. a statement of the Coffee Duty account for the six months just closing. This statement showed that the proceeds of the Hamburg drafts had been credited as already stated. It also showed numerous other drafts drawn in the regular course of business by Triebel & Co. against the same account, which had been debited therein. A small commission was also shown as having been charged to Triebel & Co. for services rendered by appellant in indorsing long term paper, and in allowing Triebel & Co. to use appellant's credit. This charge included the indorsement by appellant of the Hamburg drafts. No account was kept in the books of appellant in favor of respondent. The drafts drawn in favor of respondent were in the ordinary form. They were payable at three days' sight, and gave the direction—"and charge same to our account with advice." Three of the drafts were severally presented to appellant in 1906 and 1907 and were accepted and paid. The three remaining drafts, totalling $15,000, respondent indorsed "for collection" to G. Oetiker & Co., a firm in Guatemala. These drafts were not presented until on or about January 30, 1915. At that time Triebel & Co. had overdrawn their account with, and were indebted to, appellant. Appellant refused either to accept or to pay the drafts, they were duly protested for nonacceptance and nonpayment, and on November 17, 1916, respondent instituted this action to recover the total amount of the paper. The case was tried before a jury, which rendered a verdict in favor of the plaintiff for $15,000, with legal interest thereon from January 30, 1915. Judgment was accordingly entered for $18,374.56. The record of this appeal is presented in typewriting.

[1] 1. The principal question, as indicated by the pleadings, is whether the transaction by which appellant received the Hamburg drafts created, as to the proceeds of those

drafts, the relationship of debted and creditor between appellant and Triebel & Co. or between appellant and the respondent. McBride v. American Lighting Co., 60 Tex. Civ. App. 226, 127 S. W. 229, was a case where certain funds had been deposited in Bank A. at Boston to be transmitted to Bank B. in Dallas, Tex., there to be placed to the credit of C. Bank B. knew that the funds were to be devoted to the payment of various claims for construction work which C. was having done. Plaintiff B. held C.'s check on Bank B., given to him in payment for construction work, but before he presented the check Bank B. suspended payment. D. asserted that "said fund was a specific fund for payment of construction claims." The court said:

"When money or its equivalent is deposited in a bank without any special agreement, the law implies that it is to be mingled with the other funds of the bank, the relation of debtor and creditor is created between the bank and the depositor, and the deposit is general. In such a transaction the bank becomes the owner of the fund. When, on the other hand, money or its equivalent is so deposited with an accompanying agreement that the identical thing deposited shall be returned, or that the same shall be paid out for a specific purpose, the relation thus created is not that of debtor and creditor. Such a transaction is a special deposit, and the bank is liable only as bailee. In such a case the fund is a trust fund, the bank acquires no title thereto, and is a mere trustee for the safe-keeping, return, or disbursement of the fund, according to the special contract by which the deposit is made. 1 Morse on Banks and Banking, §§ 183, 188; 5 Cyc. 513–515; Anderson v. Bank, 112 Cal. 598, 44 Pac. 1063, 32 L. R. A. 479, 53 Am. St. Rep. 228; Peak v. Ellicott, 30 Kan. 156, 1 Pac. 499, 46 Am. Rep. 90; Association v. Jacobs, 141 Ill. 261, 31 N. E. 414, 16 L. R. A. 516, 33 Am. St. Rep. 302; Bank v. Weiss, 67 Tex. 331, 3 S. W. 299; Bank v. Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85."

See, also, City of Miami v. Shutts, 59 Fla. 462, 51 South. 929; Woodhouse v. Crandall, 197 Ill. 104, 64 N. E. 292, 58 L. R. A. 385; Butcher v. Butler, 134 Mo. App. 61, 114 S. W. 564; Citizens' State Bank v. Worden, 95 Neb. 53, 144 N. W. 1064; Michie on Banks and Banking, vol. 2, p. 1339.

The rule as to the implication arising upon the creation of a deposit is thus expressed in Tiffany on Banks and Banking, at page 20:

"Where * * * money is deposited for the purpose of paying the indebtedness of a third person, if no contrary instructions are given, it is customary to mingle the money with the funds of the bank, and upon principle it seems that the bank is to be regarded as the debtor of the depositor. In this view neither the depositor nor the beneficiary under the agreement is entitled to any preference over other creditors if the bank fails to apply the funds according to the agreement."

See, also, People v. California Safe Deposit & Trust Co., 23 Cal. App. 199, 137 Pac. 1111, 1115; Plumas County Bank v. Rideout etc., 165 Cal. 126, 138, 131 Pac. 360, 47 L. R. A. (N. S.) 552; Newmark Grain Co. v. Merchants' National Bank, 166 Cal. 203, 135 Pac. 958; Bank of Republic v. Millard, 10 Wall. 153, 155, 19 L. Ed. 897; Burton v. U. S., 196 U. S. 283, 25 Sup. Ct. 243, 49 L. Ed. 482; Minnesota Mutual Life Insurance Co. v. Tagus National Bank, 34 N. D. 566, 158 N. W. 1063, L. R. A. 1917A, 519; Hendrix v. State (Ala. App.) 82 South. 564; 1 Morse on Banks and Banking (5th Ed.) § 210; 7 C. J. 681, note 4.

In Schofield Manufacturing Co. v. Cochran, 119 Ga. 901, 47 S. E. 208, A. had pledged a quantity of yarn with B. as security for a loan. C., desiring to purchase the yarn, deposited the purchase price in the bank, of which the defendant later became the receiver, to the account of B., and the yarn was released. It was known to the officers of the bank that the sole purpose of the deposit was to obtain the release of the yarn, but no special instructions were given with regard to the funds deposited. It was held that the deposit was a general one, the court saying:

"The fact that the president of the bank knew that the payment * * * was * * * for the sole purpose of releasing the yarn * * * has no bearing upon the character of the deposit. *The reasons which influenced the plaintiff to make the deposit * * * were, in the absence of special instructions on the subject, of not the slightest concern to the bank, and could not * * * affect the nature of the transaction as a general deposit.*" (Italics ours.)

See, also, Dearborn v. Washington Savings Bank, 13 Wash. 345, 42 Pac. 1107; Myers v. Twelfth Ward Bank, 28 Misc. Rep. 188, 58 N. Y. Supp. 1065.

From the foregoing authorities these conclusions may be drawn: When, in the regular course of business, one person sends to another drafts or bills of exchange for collection or sale and does not specifically direct that the funds realized therefrom are to constitute a special deposit, they become a general deposit. Even if the reason for the remittance be known to the depositary to be the payment of an obligation owed by the depositor to a third person, nevertheless the depositor must, at the time of making the deposit, specify that the funds are to be kept apart from other moneys of the depositary and devoted only to the payment of the depositor's debt.

[2] So much for the implications which the law will draw in the absence of evidence of the express intention of the parties as to the creation of a general or special deposit. This brings us to consider the question whether, according to the evidence admitted in this case, the express intention of the parties was that the proceeds of the sale of the Hamburg drafts should constitute a general or a special

deposit. Certain evidence offered by appellant as tending to show "that there was no * * * specific deposit intended to be created," but "that this was one item in a general run of accounts," was rejected, and these rulings we shall take up under another head. In Ætna National Bank v. Fourth National Bank, 46 N. Y. 82, 7 Am. Rep. 314, A. was the maker of a certain promissory note for $5,000 due April 4. April 2, A. sent to the defendant bank a check in its favor for $4,895, inclosed in a letter containing this request:

"Which the inclosed check please credit our account, and charge us our note of $5,000, *due the 4th instant.*" (Italics ours.)

On April 3, A.'s note for $5,000 *due April 2* was paid by the defendant and the amount thereof charged to A.'s account. Subsequently the plaintiff presented for payment the note described in the letter containing the check, but payment was refused. The plaintiff claimed the right to recover upon the theory that the proceeds of the check constituted a deposit for the specific purpose of paying the note due April 4. The court said, "The direction was to *credit* the account with this sum; and this direction was complied with, and the relation of debtor, and creditor, between the defendant, and the Florence Mills [A.] * * * was the result" (Italics ours), and held for the defendant. In Young v. Bundy (Tex. Civ. App.) 158 S. W. 566, the plaintiff deposited with some private bankers a deed to certain property owned by him, to be turned over to the vendee for said property upon receipt of $200, which he instructed the bank to place to his credit. The bank received the $200, placed it to his credit, and later paid it out upon a forged check. The bank claimed that the $200 constituted a special deposit, as to which they were responsible only to the extent of using reasonable care. The court held that no special deposit was established because the plaintiff's direction to place the money to his credit and the action of the bank in so doing brought into existence the relationship of debtor and creditor. We quote from the opinion:

"Appellee testified it was the agreement that, when the deed was delivered and the money paid for the lots, the bank should deposit the sum in the bank *to his credit.* The undisputed evidence is that, when the cashier's check was received, the bank placed the amount in the bank as a deposit to the credit of appellee, subject to check, in the usual and ordinary course of business." (Italics ours.)

In the case of In re Broad, Ex parte Neck, Court of Appeals, L. R. 13 Q. B. D. 740, A. was a banker in London and B. a merchant in Sweden. On July 13 B. remitted to A. a sight draft on C. for £450, inclosed in a letter containing the following instruction: "Inclosed I beg to remit £450 at sight on Westenholz Brothers, which please encash to my credit." A. replied: "We are in receipt of your favor of the 13th instant handing a cheque for £450, * * * which is noted to the credit of your account." The court said:

"It is suggested that there was a specific appropriation so far as regards this particular transaction, and reliance has been placed on the letter of the 13th of July. * * * But the terms of that letter seem to me to be entirely in accordance with the usual practice. No doubt the general ground or reason why the remittance was made was, that bills drawn by Thomsen [B] on Neck [A] were becoming due. * * * but an authority to 'encash' the remitted bill, and to carry the amount to Thomsen's credit, is contained in this very letter."

In the light of these authorities let us examine the letters that passed between the parties here: First, as to the letter of September 5. The phrase "for the reimbursement of above-mentioned amounts," in our opinion, meant that the proceeds of the sale of the Hamburg drafts were to "reimburse" appellant for any sums it might be called upon to pay out on Triebel & Co.'s account. There are numerous decisions to the effect that similar words do not mean that a remittance is to constitute a fund to be exclusively devoted to the payment of a particular obligation, but are employed merely to indicate to the drawee "his means of reimbursement." Corbett v. Clark, 45 Wis. 403, 30 Am. Rep. 763. See, also, Redman v. Adams, 51 Me. 429; First National Bank v. Lightner, 74 Kan. 736, 88 Pac. 59, 8 L. R. A. (N. S.) 231, 118 Am. St. Rep. 353, 11 Ann. Cas. 596; Macleed v. Snee, 93 Eng. Rep. 833. The most significant language, as showing the intention of Triebel & Co. in respect to the character of the deposit is, "please credit." It would seem clear that if a fund is to be "credited" the result must be the relation, not of trustee and beneficiary, but of debtor and creditor. As we have seen, such was the conclusion of the court in the Ætna National Bank Case, in Young v. Bundy, supra, and in Ex parte Broad, supra. The language of the letter was not, as respondent contends, to "credit to the specific purpose of paying the Cabrera drafts," but only to credit. It will be noted that Triebel & Co. also asked that the Cabrera drafts be protected "as usual upon presentation." Such a request was inconsistent with any intention that said drafts were to be payable out of a particular fund. Moreover, the sale of the Hamburg drafts was directed "in order that *we* can make some more profit on the interests." (Italics ours.) If it had been intended to establish a special deposit the payee of the Cabrera drafts, and not the depositor, would have been entitled to the interest which might accrue on the funds deposited.

No account was ever opened on appellant's books in the name of respondent, but, as the Hamburg drafts were disposed of, appellant notified Triebel & Co. of the fact that said drafts had been sold and Triebel & Co.'s Cof-

fee Duty account credited with the respective amounts received. Triebel & Co. replied that appellant's Coffee Duty account with them had been debited in the same amounts. Had Triebel & Co. intended that the proceeds of the Hamburg drafts were to constitute a deposit for the specific purpose of meeting the drafts in favor of respondent, they would have adopted a different course than the entry of the proceeds in a form whereby appellant was designated as their debtor. Each of the drafts in favor of respondent was at three days' sight, and, according to the letter of September 5, had already been delivered to respondent, who was therefore at liberty to forward them at any time to appellant for acceptance and payment. It is true that Tribel & Co. advised appellant that the respondent "would probably retain the drafts for some time yet," but apparently this was merely a surmise and there is no evidence that there was any agreement that respondent would not present the drafts at once. Three days after acceptance the drafts would become due and payable. If the proceeds of the Hamburg drafts had been intended as a deposit for the specific purpose of meeting respondent's drafts, it would have been necessary, however, for him to have waited until said Hamburg drafts, payable at ninety days' sight, had been accepted and paid in Germany. If the respondent had presented his drafts before such acceptance and payment, appellant would have had no funds other than its general funds out of which to pay them. While appellant was authorized to sell the Hamburg drafts in order to meet respondent's bills as presented, nevertheless, in order to make such disposal, appellant was obliged to indorse them, thus incurring a liability which only terminated when they were paid in Hamburg. In other words, in order to be prepared to meet respondent's bills, payable at three days' sight, appellant had the alternative, to be prepared to make such payment out of its general funds (which would create the relationship of debtor and creditor between Triebel & Co. and appellant), or to sell the Hamburg drafts after indorsing them for payment (which fixed upon appellant a liability contingent upon the nonpayment of the drafts in Germany). Triebel & Co., in the letter of September 5, requested appellant "to protect these drafts *as usual upon presentation.*" (Italics ours.) And the Cabrera drafts themselves, after ordering appellant to pay the respective amounts thereof, contained the direction: "Charge to our account." The above-quoted language shows that the Cabrera drafts were intended by Triebel & Co. to be paid three days after presentation in the regular course of business, and that the amounts paid were to be debited to Triebel & Co.'s account. Thus respondent's position involves the strange contention that the parties intended to create a fund to be exclusively devoted to the payment of the Cabrera drafts, which fund might not come into existence or at least would not be in a form available for the payment of those drafts until after they, in the usual course of business, had been accepted and paid.

The request for a specimen signature of the respondent did not tend to show that appellant had accepted the Hamburg drafts as a trust fund. Whether or not such drafts were to be devoted exclusively to the payment of respondent's bills, appellant was probably desirous of paying such bills to the proper party, and S. T. Leffmann, appellant's secretary, testified that it was the custom of appellant "always to have the signatures of persons whose drafts were drawn on the company." Respondent contends that—

> "The acts of appellant in charging the Coffee Duty account with the Cabrera bills and in rendering the special account of December 31 * * * are conclusive evidence that the agreement * * * was for a special deposit."

It appears, however, that the two sets of drafts were not entered against each other. They were listed in the same account, but that account contained many other items, none of which had any connection with this transaction. The Cabrera drafts were all debited on September 22, while the Hamburg drafts were credited as they were sold, over a period from September 22 to November 19. The account does not purport to show out of what funds payment of respondent's drafts was to be made. Regarding the meaning of the entry of the Cabrera drafts, Leffmann testified:

> "When we get advices of these drafts, it is our custom to charge them right away on the presumption that they would come in in two or three days, even before we got through with our work."

This testimony was not controverted. The entry of the Cabrera drafts meant, therefore, that appellant was, from the time of making the entry, prepared to pay the drafts when presented. They were debited on September 22. On that day, prior to said entry, the account showed a balance against Triebel & Co. of about $900. The only items credited to Triebel & Co. on September 22 were the proceeds of two of the Hamburg drafts, amounting to $3,482.80. As already noted, the total of the Cabrera bills was $28,587. Obviously, payment of respondent's drafts was not to be made from the proceeds of the Hamburg drafts, for when appellant, by its entry of the former, signified that it was prepared to accept and pay them, no such funds were shown by the account. It is plain that the intention of the parties was that respondent's drafts should be payable out of Triebel & Co.'s general account with appellant. In each of the cases cited by respondent in support of its contention that this was a deposit for a specific purpose the intention of the par-

ties was assumed, and hence those authorities can have no application here. In our opinion it is clear from the evidence that the remittance of the Hamburg drafts did not constitute them a deposit to be devoted to the specific purpose of meeting respondent's drafts, and the jury, therefore, was not justified in finding for the plaintiff.

[3, 4] 2. Since the judgment must be reversed it will be proper to discuss other questions raised by appellant. The first of these is, "Whether the trial court erred in its rulings on evidence." Appellant first assigns error in the exclusion of a letter written by respondent to appellant under date of March 13, 1915. In this letter respondent, referring to an adjustment and settlement of the account of B. Millan & Co., regarding which appellant had asked respondent to "use his good offices," stated, "I cannot intervene in this matter as it seems entirely foreign to me." The court on its own motion, "subsequent to the trial," procured an independent translation of this letter from the original Spanish, reading, "That matter appears to me to be entirely foreign with my intervention in the matter of the protested drafts," which translation, although appearing in the bound volume of the transcript before us, is not certified by the official reporter or the judge. We find in the record no stipulation that this translation may, nevertheless, be considered on appeal. Indeed, at the time the first translation was offered in evidence, counsel for respondent stated that no point would be made that the translation presented had not been proved. In view of this state of the record, we are unable to consider the translation made after the trial. Appellant claims that the letter tended to show that respondent "had no longer any rights in the drafts," and, therefore "that prior to the time this action was commenced, respondent had ceased to be the owner and holder of the drafts in suit." The facts surrounding the sending of the letter are: As already shown, respondent had indorsed his drafts to G. Oetiker & Co. "for collection." Subsequently they were presented, but acceptance was refused, and appellant wrote to respondent under date of February 8, 1915, stating that the reason for nonacceptance was that Triebel & Co., the drawers, were responsible for the account of the Millan Company, which was overdrawn, and requesting respondent to "use his good offices" in adjusting and settling the last-mentioned account. We think the evidence was properly excluded. The language of the letter shows that respondent did not consider that the adjustment of the Millan account concerned him in any way, but that he regarded appellant as responsible to him independently of such account.

[5] Appellant also claims that "the court was in error in excluding evidence showing the course of dealings between appellant and Triebel & Co. at and prior to * * * the letter of September 5, 1906." The court, in sustaining respondent's objections to this class of evidence, ruled that—

> "This plaintiff is not concerned with the course of dealings between the defendant and Triebel & Co. with respect to other transactions not involved in this case. * * * To go into the general account and what their course of dealings was in other transactions and other matters is wholly immaterial in my opinion."

The rule involved is thus stated in 22 Corpus Juris, 1183:

> "Previous and contemporaneous transactions may properly be taken into consideration to ascertain the sense in which the parties to a writing used particular terms."

See, also, First National Bank v. Bowers, 141 Cal. 253, 262, 74 Pac. 856; Fee v. McPhee, 31 Cal. App. 295, 316, 160 Pac. 397; Peters Shoe Co. v. Murray, 31 Tex. Civ. App. 259, 71 S. W. 977.

In the letter of September 5 we find the terms "protect * * * as usual upon presentation," and "please credit." Plainly, if the Cabrera drafts were to be protected "as usual," this evidence was admissible to show that these terms did not mean that the drafts were to be paid from a special deposit, but out of appellant's general fund. Moreover, the understanding between Triebel & Co. and appellant is to be determined from a consideration of the entire course of dealings between them, of which the correspondence was only a part. It is also settled that proof of subsequent dealings, tending to show the meaning which the parties placed upon a writing or contract between them, is admissible. Mayberry v. Alhambra, etc., Co., 125 Cal. 444, 446, 54 Pac. 530, 58 Pac. 68; Keith v. Electrical, etc., Co., 136 Cal. 178, 68 Pac. 598; Mitau v. Roddan, 149 Cal. 1, 15, 84 Pac. 145, 6 L. R. A. (N. S.) 275; Woodard v. Glenwood, etc., Co., 171 Cal. 513, 521, 153 Pac. 951.

[6] Appellant next assigns error in the exclusion of "evidence showing the state of Triebel & Co.'s credit with appellant at the time of the writing of the letter of September 5." Appellant asserts that, in another letter written on the same day by Triebel & Co. to appellant—September 5, 1906—Triebel & Co. admitted "the firm was in the debt of appellant to the extent of over $15,000," and therefore, it is claimed, the letter was admissible upon the theory that "a depositor [Triebel & Co.] at a bank, who is about to draw a check [respondent's drafts] in excess of his then existing account, will naturally deposit further funds [the Hamburg drafts]." We think this contention is correct. If the appellant could prove that at the time of the remittance of the Hamburg drafts Triebel & Co. were indebted to appellant, an inference might properly be drawn that the remittance was intended to replenish the general account.

[7] Appellant's fourth assignment of error

in the rulings upon evidence is the refusal to admit a letter dated September 18, 1909, in which Triebel & Co. requested appellant "to book the balance of the Coffee Duty account in the general account." It seems to us that this letter was admissible as tending to show that Triebel & Co. regarded the Coffee Duty account as a general account, and, therefore, as already shown, they acquiesced in appellant's action in crediting to this account the proceeds of the Hamburg drafts.

4. Appellant has assigned error to the refusal of the court to give certain instructions which it proposed, but in view of our statement of the law any error in this connection will be avoided on another trial.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; WILBUR, J.; LENNON, J.

48 Cal. App. 428

PETERSEN v. MORSE, Com'r Public Health and Safety, et al. (Civ. 3486.)

(District Court of Appeal, First District, Division 2, California. July 6, 1920. Rehearing Denied July 26, 1920. Hearing Denied by Supreme Court Sept. 2, 1920.)

1. Mandamus ⊜5—Jurisdiction not ousted by commencement of a proceeding in a court of equal or inferior jurisdiction.

No respondent in a mandamus proceeding can oust the jurisdiction of the court in which it is pending by commencing another proceeding involving the same question in a court of equal or inferior jurisdiction, so where a policeman, removed by the commissioner of public health and safety, began proceedings in the appellate court for writ of mandate to compel reinstatement pursuant to the decision of the civil service board, the commissioner must present whatever defense he has in that action, and cannot, by commencing certiorari proceeding in the superior court to review the decision of the board, oust the appellate court of jurisdiction.

2. Mandamus ⊜77(1)—Title to office cannot be determined in mandamus.

The legal title to office cannot be tried by mandamus, but must be determined in an action of quo warranto.

3. Mandamus ⊜172—Commissioner of safety cannot refuse to reinstate policeman on ground that he was not an officer.

Where the commissioner of public health and safety of the city of Oakland removed a police officer, and the civil service board on appeal pursuant to the Oakland charter reinstated the officer, the commissioner cannot, in mandamus proceedings, justify his refusal to reinstate the officer on the ground that the officer by previously obtaining leave of absence was no longer member of the police force, for the title to an office cannot be tried in mandamus, and the order of removal was an admission of the officer's title.

4. Mandamus ⊜172—Commissioner of safety bound to reinstate police officer whose appeal was sustained by civil service board.

Where the order of the commissioner of public health and safety of the city of Oakland, removing a police officer, was reversed on appeal to the civil service board, the order of the board amounted to a judgment which the commissioner was bound to obey, and he cannot in mandamus proceedings excuse his refusal to obey on the theory that the officer was subject to removal on the other grounds, or had been removed by the city council, for that would be collateral attack on the judgment.

Nourse, J., dissenting.

Application by Walter J. Petersen for writ of mandate to be directed against F. F. Morse, as Commissioner of Public Health and Safety of the City of Oakland, and the City of Oakland, a municipality. Writ granted.

Burton J. Wyman, of Oakland, and Cedric W. Petersen, of Pleasanton, for petitioner.

H. L. Hagan, City Atty., John Jewett Earle, Asst. City Atty., and Peter J. Crosby, all of Oakland, for respondents.

BRITTAIN, J. The proceeding is for mandate. The petitioner alleged that while exercising the functions of captain of inspectors of the bureau of criminal investigation of the police department of the city of Oakland, he was discharged by the written order of the respondent Morse on March 19, 1920. The address and signature being omitted, the order was as follows:

"You are hereby discharged and removed from the position of captain of inspectors of the Oakland Police Department of the City of Oakland, for misconduct, incompetency, failure to perform your duties and under and observe the rules and regulations of the police department and pertaining to your office. This order shall be effective forthwith."

By section 82 of the charter of the city of Oakland it is provided that—

"Any person suspended, fined or discharged * * * may within five days from the making of the order * * * discharging him * * * appeal therefrom to the civil service board, which shall fully hear and determine the matter. The accused shall be entitled to appear personally, and to have counsel and a public hearing. The finding and decision of the board shall be certified to the official from whose order the appeal is taken, and shall forthwith be enforced and followed by him."

Within the time limited the petitioner filed his appeal from the order of discharge, and, the appeal coming regularly on to be heard, a resolution on which the petitioner relies was adopted, reading as follows:

"Resolution No. 4693. The time having arrived for the hearing of the appeal of Walter

J. Petersen, appealing from the order of discharge made by Commissioner of Public Health and Safety F. F. Morse, discharging him from the position of captain of inspectors, police department, the board proceeded with the hearing.

"Attorneys H. L. Hagen and Earl Warren appeared on behalf of F. F. Morse, Commissioner of Public Health and Safety.

"Attorneys B. J. Wyman and C. W. Petersen appeared on behalf of Walter J. Petersen, the appellant.

"The following witnesses were sworn and testified on behalf of the commissioner of public health and safety: F. G. Thompson, W. F. Kyle, J. L. Lynch, V. J. Coley, Alexander Trotter, Jas. T. Drew, B. A. Wallman, and Chas. F. Nightingale.

"No witnesses were sworn and no testimony was offered on behalf of the appellant, and the case was submitted without argument.

"The board, after hearing all the evidence in the matter, finds: That, the evidence submitted on behalf of the commissioner of public health and safety does not substantiate the charges of misconduct, incompetency, or failure to perform the duties and observe the rules and regulations of the police department. Therefore be it resolved that the decision of this board is that the appeal of Walter J. Petersen, appealing from the order of discharge made by Commissioner of Public Health and Safety F. F. Morse, discharging him from the office of captain of inspectors, police department, on March 19, 1920, be and the same is hereby sustained, and that said appellant be forthwith restored to his civil service position of captain of inspectors in the Oakland Police Department, and be it further resolved that, the secretary be, and he is hereby, directed to certify to the commissioner of public health and safety the findings and decision of the board in this matter."

On April 7, 1920, the secretary of the civil service board addressed a communication to the respondent Morse, as commissioner of public health and safety, reading as follows:

"Please be advised that on April 6, 1920, the civil service board sustained the appeal of Walter J. Petersen, appealing from your order of discharge, discharging him from the position of captain of inspectors on March 19, 1920. The action of the board restores said Walter J. Petersen to his civil service position of captain of inspectors in the Oakland Police Department."

The same notice was addressed to J. F. Lynch, chief of police of Oakland, and copies of the resolution and notices were delivered to Morse and Lynch. On the same day the petitioner delivered to respondent Morse as commissioner a writing addressed to him and signed by the petitioner, reading as follows:

"Pursuant to an order dated April 7, 1920, made by the civil service board of this city, restoring me to the position of captain of inspectors in the Oakland Police Department, I respectfully report to you that I have this day reported for duty in compliance with said order."

Thereupon the petitioner reported to the chief of police for duty. Lynch informed the petitioner that the respondent refused to acknowledge or to be governed by the resolution or decision of the civil service board, that he had directed him as the chief of police to ignore the same, and to refuse to acknowledge the petitioner as captain of inspectors, which order of the commissioner was in writing, signed by him and addressed to the chief of police, dated April 7, 1920. It was as follows:

"Captain Walter J. Petersen came to this office this morning and requested me to reinstate him in his former position as captain of inspectors. I informed Captain Petersen that I was giving the matter careful consideration, and would take such action in the premises as I believed to be proper.

"This is to inform you that Captain Drew shall continue in the work as captain of inspectors until further orders from this office. Statements have been made also that Captain Petersen declared that he would take charge of his office without instructions. These orders to you are clear and explicit. As chief of police you will tolerate no interference whatsoever from Captain Petersen or any one else in the execution of orders regularly issued in your department.

"I may further say to you that I cannot return a discharged captain of inspectors to his former position after a dismissal based upon uncontradicted facts until a court decision requires me to take such action.

"Accordingly I have instructed the city attorney to prepare papers and present the entire matter to the superior court for the purpose of obtaining a court judgment in the matter."

Under the same date Lynch, as chief of police, delivered to the petitioner a writing addressed to the petitioner reading as follows:

"In view of the following received this day from Commissioner F. F. Morse, I respectfully request that you refrain from assuming charge in the police department as captain of inspectors: 'This is to inform you that Captain Drew shall continue in the work as captain of inspectors until further orders from this office. Statements have been made also that Captain Petersen declared that he would take charge of his office without instructions. These orders to you are clear and explicit. As chief of police you will tolerate no interference whatsoever from Captain Petersen or any one else in the execution of orders regularly issued in your department.' Therefore, kindly be governed accordingly."

[1] Upon the petition setting forth the foregoing facts this court issued its order, directing the respondents to show cause, if any existed, on May 10, 1920, why the peremptory writ of mandate should not issue to require obedience to the resolution of the civil service board in terms reinstating the petitioner to the office of captain of inspectors. After the issuance and service of the order

of this court the respondent Morse commenced a proceeding in the superior court in Alameda county to review the action of the civil service board in making the order under consideration in this proceeding. In the answer of the respondents filed here the fact of the pendency of the certiorari proceeding in the superior court is relied upon to prevent this court from proceeding to the determination of the present mandamus proceeding. No respondent in a mandamus proceeding may be permitted to oust jurisdiction of the court in which that proceeding is pending by commencing another proceeding involving the same questions in a court of equal or inferior jurisdiction. The respondents, having been ordered to show cause to this court why the order of the civil service board should not be obeyed, had the right, and it was their duty, to present to this court any excuse they may have had for their disregard of the order of the civil service board.

[2, 3] In addition to their reliance upon the pendency of the certiorari proceedings, which cannot be considered as defensive matter, they also relied upon certain contentions based on provisions of the charter of the city of Oakland in regard to leaves of absence which may be granted to civil service employés of the municipality generally and to civil service members of the police department specifically, and alleged that the petitioner, long prior to his formal discharge as captain of inspectors on March 19, 1920, was granted leave of absence in order that he might become the chief of police of the city of Oakland, and that the leave of absence granted him was in violation of the terms of the charter; wherefore, it is argued that the civil service board, on the appeal from the discharge for specific reasons, none of which had anything to do with this contention, was without power to order the petitioner to be reinstated to the position he held at the time of the discharge. In the present proceeding this contention is without force. By the very terms of the discharge the petitioner was occupying the position of captain of inspectors at the time of the discharge. The propriety of that discharge for the reasons stated was the sole question presented under section 82 of the charter for the adjudication of the civil service board. Upon the case thus made the civil service board had the power to make its order requiring the reinstatement of the petitioner to the position from which he had been wrongfully discharged.

Out of an abundance of caution and because of the assertions made on behalf of the respondents that the evidence submitted by Morse on the appeal to the civil service board not only did not sustain its conclusions, but showed a complete lack of the exercise of the discretion vested in the commission by the charter, an order was made by this court under which the record of the evidence submitted to the board by the respondent Morse in support of his discharge was filed in this proceeding. It has been carefully examined, and the conclusions reached by the civil service board have the approval of this court. The evidence adduced was of such a flimsy character as to require no refutation. The civil service board upon the concrete case submitted to it could not properly have reached any determination than that the discharge of the petitioner for the reasons given by Morse was wholly unwarranted.

The respondents refused to obey the order made in the exercise of the power vested in the civil service board under section 82. They seek to justify their disobedience of the lawful order of the board by contending here that the petitioner was not holding the position from which he was wrongfully discharged. On this proceeding they cannot try title to the office of captain of inspectors based on facts which did not enter into consideration of the appeal from the order of discharge. It is a well-settled rule that title to office cannot be tried by mandamus. It may be used for the purpose of putting a claimant in a position to assert his right when without that he could not do so. People v. Olds, 3 Cal. 175, 58 Am. Dec. 398. The proper proceeding to try title to the office is by the legal action of quo warranto. "When the writ is invoked to enforce a specific duty, * * * aid will not be refused merely because occupancy or incumbency or title is incidentally involved. The court will act under such circumstances as does equity, and inquire into and determine rights so far as, but no further than, may be necessary to the granting of the relief sought. * * For it once being established that the respondent is a de facto officer, as the law, for grave reasons of public policy, holds valid the acts of such an officer, the question of legal title which alone is sought to be litigated, will be relegated to another forum." Morton v. Broderick, 118 Cal. 481, 50 Pac. 646. The very wording of the discharge in this case constituted an admission of record that the petitioner was at least a de facto captain of inspectors, and for that reason the question of legal title, which alone is sought to be litigated by the special defense in this proceeding, must be relegated to another forum. The defense based on the claimed illegality of a prior leave of absence, therefore, ought not to be considered on this proceeding.

[4] The respondents further allege that while exercising the functions of chief of police, the petitioner was discharged from that office by an order of the city council. Neither the actions of the petitioner as chief of police, nor of the city council in relation thereto, have any bearing upon the present controversy, which involves only the question

of whether or not the order of the civil service board directing the petitioner to be reinstated to the office of captain of inspectors, from which he was discharged, was such as a matter of law commanded obedience on the part of the respondents. If the petitioner had been discharged because of any action of his, or any action of the city council, or because he was illegally holding the office of captain of inspectors, and he had appealed to the civil service board, that tribunal in the first instance, under the charter, would have been compelled to examine into these matters. If such an appeal had been sustained and the respondents had refused to obey the order of the civil service board upon mandamus, those matters might have been presented as matters of defense, and upon a proper showing would have been considered, but it requires no citation of authority to demonstrate that if those questions alone had been considered by the civil service board on the appeal, the disobedient respondents would have been concluded by the judgment on the appeal, and could not in response to the petition for mandate have argued that the petitioner should have been discharged for the grounds upon which his discharge in this case was based. So in this case the court is concerned only with the respondents' admitted disobedience of the order of the civil service board, and will consider only the matters involved in the adjudication of the civil service board. The evidence introduced on behalf of the respondents on the appeal was insufficient to sustain the discharge. The order was a correct and valid exercise of the power vested in the civil service board to determine finally the particular matter before it. It was in effect a judgment, and nothing is better settled than that a judgment valid on its face is binding on the parties to it until set aside by a direct attack. Its validity cannot be questioned in another proceeding based upon it for matters not submitted to, nor adjudicated by, the tribunal which rendered the judgment. To permit such an attack to be made would be at variance with the whole law in regard to collateral attacks upon judgments. In determining the validity of that order, the court must confine itself to the matters before that tribunal and considered by it. Unless in such a proceeding as this this rule were adopted, the door would be open to interminable contentions in regard to matters which would frequently have more of the character of political than of legal controversies.

On the record here and the showing made on behalf of the respondents, it appears that under the charter on the certification of the findings of the civil service board on the appeal, the law enjoined the duty upon the respondent Morse as commissioner and upon the respondent municipality to restore the petitioner to his status as captain of inspectors at the time of the discharge. If for reasons other than those involved in the discharge and appeal he is illegally holding that office, his title to the office must be determined in some other proceeding.

Let the peremptory writ of mandate issue as prayed.

I concur: LANGDON, P. J.

NOURSE, J. I dissent. Mandate will issue against a public officer "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office." Section 1085, Code Civ. Proc. It is not the duty of a public officer to admit to a subordinate public office one who has no right to occupy such office. Under the terms of the Oakland charter the petitioner, by taking an indefinite leave of absence from his civil service position of captain of inspectors of the police dapartment and by accepting the incompatible position of chief of police, relinquished his civil service standing in the former position. The office of captain of inspectors is governed by the civil service provisions of the charter. It is filled by examination, certification, and promotion. The office of chief of police is noncivil service. That one person cannot occupy both offices goes without question. That petitioner could not occupy one and keep a string on the other is equally clear, because the charter specifically limits the period of leaves of absence from the civil service positions, and defines the purposes for which they may be granted. When petitioner accepted the position of chief of police the office of captain of inspectors became vacant, and should have been filled by the one whose civil service standing entitled him to the appointment. Such person, whoever he may be, still has the legal right to such office. It is alleged in the petition and not controverted, that another now occupies such office, and it is to be presumed that he is the one who is legally entitled to possession.

The situation is not changed by the action of the city officials in recognizing petitioner as captain of inspectors after he returned to that office. Estoppel does not run against the city in a case of this kind. That is to say, none of the city officials could defeat the plain provisions of the charter merely by failing to object to the unlawful occupancy of the office by petitioner or by recognizing him for a time as such.

Such being the case, the special defense interposed by respondents to the effect that petitioner was not entitled to be restored because he had voluntarily relinquished his civil service standing demands a denial of the writ prayed for.

The effect of the majority opinion is that when a petitioner seeks mandate against a public official, assigning certain reasons why he has been denied the right which he claims,

such official may defend only upon such grounds as are laid out for him by the petitioner. With this rule I do not agree.

In this case no duty rests upon respondents to admit petitioner to the office of captain of inspectors unless he is entitled to occupy it. If his title is disputed, and that cannot be tried by mandamus, then he, too, should proceed by quo warranto, as the majority opinion holds must be done by one who questions that title. If the question of title is merely incidental to the relief sought, then it may be tried in this case. Bannerman v. Boyle, 160 Cal. 197, 203, 116 Pac. 732. Petitioner has put his title in issue. Respondents have controverted it. The facts are undisputed, and the law is not questioned.

The petition should be denied.

48 Cal. App. 1

YOUNG et al. v. NEW PEDRARA ONYX CO. et al. (two cases). (Civ. 3011.)

(District Court of Appeal, Second District, Division 2, California. May 29, 1920. Hearing Denied by Supreme Court July 28, 1920.)

1. Corporations ⇐114—Shares may be transferred without assignment or delivery of certificates.

A share of corporate stock, being an incorporeal right incapable of manual delivery, and the certificate being merely evidence of its existence, in absence of any controlling statutory inhibition, the shares, without assignment or delivery of certificate, may be assigned in any manner appropriate to transfer of incorporeal personal property, as by bill of sale, or any sufficient mode for passing title to a chose in action or intangible property.

2. Corporations ⇐114—Statute providing for transfer of stock by delivery of certificates does not prohibit other methods.

Civ. Code, § 324, relating to transfer of corporate stock by delivery of certificates, does not cover the whole subject and stock would be transferable without its provisions under section 1044, so that, where certificates have been issued, a transfer of title good as between the parties may be made in any manner appropriate to assignment of choses in action or intangible personal property.

3. Corporations ⇐114—Stock transferred without transfer of certificates held to pass equitable title subject to pledge.

Where stock was transferred other than by transfer of certificates, if the legal title did not pass, the full equitable title did, subject to a prior pledge of the stock existing at the date of the contract of exchange, if the buyer had actual or constructive notice thereof.

4. Corporations ⇐116—An unconditional offer to exchange stock unequivocally accepted constitutes a contract of exchange.

Where there was an unconditional offer to exchange corporate stock and an immediate and unequivocal acceptance of that offer, the contract was one of exchange, and not a contract to exchange, so that the title passed, the provisions of Civ. Code, § 1806, relating to sales, being applicable to exchanges.

5. Corporations ⇐119—Where neither party required to do anything precedent or concurrent, title to stock passed.

Where a contract exchanging corporate stock did not require either party to do anything precedent or concurrent, on which passing of the property was to depend, the intention was to pass title, even though it would be necessary to cause the transfer to show that it was made subject to a prior pledge.

6. Sales ⇐201(1)—Delivery not essential to passage of title.

As between the parties, delivery is not essential to passage of title.

7. Corporations ⇐119—Contract construed as passing present title to stock.

A written confirmation of a contract exchanging corporate stock, using the terms "hereby exchanges" and also "and agrees to transfer at once," construed as constituting an exchange transferring title.

8. Corporations ⇐116 — Addition of word "trustee" to holder's name does not alone imply that he could not deal with stock as his own.

Where shares of corporate stock stood in the holder's name, the addition thereto of the word "trustee" does not necessarily and alone raise an implication that the holder did not have a full right to deal with the stock as his own.

9. Corporations ⇐119 — Inability to deliver whole amount did not prevent passing of title to stock.

Though a purchaser bargained for 100 shares of stock from one who individually and as trustee controlled but 96 shares, title passed under the contract to the shares controlled.

10. Corporations ⇐123(4)—Transfer of stock on corporation's books not essential.

A transfer on the books of the corporation is not essential to a pledge of corporate stock.

11. Corporations ⇐140—Whether buyer had notice of former pledge of stock purchased held for the jury.

The question whether buyer of corporate stock on exchange had notice of a prior pledge thereof to a bank was one of fact for the trial court to determine from the conflicting evidence.

12. Corporations ⇐149—Buyer of stock with notice takes subject to prior pledge, but without notice he takes seller's title unincumbered.

If a purchaser of corporate stock by exchange had notice of a prior pledge thereof to a bank, then the only title that passed was such as remained in the seller as pledgor, but if buyer had no notice of pledge, or notice of circumstance which would put a prudent person on inquiry, he took whatever title seller had, unincumbered by such pledge.

13. Corporations ⟸117—Resolution to rescind an exchange of stock held not to pass title.

Even if a written notice to a corporation for rescinding an exchange whereby it acquired stock of another corporation had recited the contract actually made, the accepting resolution, providing that "the officers of this corporation be authorized to make, execute and deliver all the necessary documents to carry out the purpose and spirit of this resolution," indicating that something else was to be done, would not repass title where neither actual nor constructive redelivery could be made because the certificates were in the hands of a banking company, claiming the stock as pledgee.

14. Exchange of property ⟸11—Sales ⟸94—Agreement for rescission of executed contract will not alone repass title.

Where a contract of sale or exchange has been fully executed, merely rescinding it by mutual consent of the parties will not alone and ipso facto, in the absence of an intent to effect a restoration of title solely by reason of rescission, restore to either of the parties that which he may have parted with under the fully executed contract.

15. Corporations ⟸117—Intended formalities are necessary to repass title on rescinding executed exchange of stock.

A corporate resolution to rescind an executed exchange of stock, where it appears further formalities were intended to effect the re-exchange of property, cannot ipso facto repass the title.

16. Dismissal and nonsuit ⟸57 — Granting nonsuit as to proper party error.

Where, in an equitable proceeding there is an answer to the complaint, the court may grant plaintiff any relief consistent with the case made by the complaint and embraced by the issues, Code Civ. Proc. § 580, and it is error to grant a nonsuit as to one who is a proper, if not a necessary, party defendant.

17. Corporations ⟸133—Right of owner of stock to resort to equity to compel registration and issue of new certificate.

The true owner of stock may resort to a court of equity to compel the corporation to register its transfer on the books and to issue to him a new certificate, and in such case it is proper to bring before the court, as parties, all persons having any interest in the stock, whether legal or equitable.

18. Corporations ⟸133—Pledgee of corporate stock necessary party in proceeding to compel registration and issue of new certificate.

In a proceeding to set aside a rescinding resolution and to require registry of corporate stock and issue of new certificate, one claiming stock as pledgee is a necessary party to a complete determination of the controversy, and the court should, sua sponte, under Code Civ. Proc. § 389, direct that pledgee be brought in as defendant.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Two actions by J. A. Young and others against the New Pedrara Onyx Company and others. Both judgments were favorable to the defendants, and the plaintiffs appeal. On rehearing. Both judgments reversed.

H. J. Bischoff and Bischoff & Thompson, all of San Diego, for appellants.

Laurence Hammond Smith, Eugene Ferry Smith, and Sam Ferry Smith, all of San Diego, for respondent Smith.

J. C. Hizar and F. W. Stearns, both of San Diego, for respondents Pedrara Onyx Co. and Lea.

FINLAYSON, P. J. Plaintiffs, stockholders of the New Pedrara Mexican Onyx Company (hereafter referred to as the California company), suing on behalf of that corporation, brought this action to set aside a certain resolution adopted by the company's board of directors on June 27, 1911, whereby, so it is claimed, the board rescinded a transfer to the company of certain shares of the capital stock of another corporation, hereafter, for convenience, referred to as the Mexican company. There are two appeals, each upon a separate record. Both appeals are from judgments in the same case.

These two appeals were decided and opinions filed on December 10, 1919. 30 Cal. App. Dec. 828, 829. Thereafter, on petition of appellants, a rehearing was granted in each case. 31 Cal. App. Dec. 141 and 142. The appeal in case No. 3053 is from a judgment of nonsuit entered August 13, 1915, in favor of defendants Smith, Lea, and the Pedrara Onyx Company (hereafter referred to as the Arizona company), and the appeal in case No. 3011 is from a judgment on the merits, entered February 4, 1916. Both appeals will be treated in one opinion.

Our résumé of the principal facts, gleaned in part from the findings and in part from the evidence, will suffice for an understanding of the questions presented. It may be that, as to some of the facts set forth in our statement of the case, there is a conflict in the evidence. Needless to say, nothing that may be said by us should be regarded as a foreclosure of the trial court's exclusive right to decide, according to the evidence governed by the exercise of its own sound judgment, any controverted fact that may be presented on the retrial of any issue that may properly be the subject of a new trial upon the case being remanded.

The material facts of the case are these: Some time prior to July 3, 1906, the New Pedrara Onyx Company (the company herein referred to as the Mexican company) was incorporated under the laws of this state, with a capital stock of $10,000, divided into 100 shares of the par value of $100 each. Immediately upon its organization all of its shares were issued, one share to each of the

company's five directors—one of whom was the defendant L. A. Blochman—and the balance, 95 shares, to "L. A. Blochman, Trustee." All of the 100 shares stood upon the books of the Mexican company in the names of these five persons until June 29, 1911, when they were transferred to the name of Pedrara Onyx Company, the corporation herein referred to as the Arizona company.

Shortly after the organization of the Mexican company, and prior to July 3, 1906, the 100 shares of the Mexican company's capital stock were pledged to the Blochman Banking Company to secure an indebtedness due to it. The bank is not a party to the action. When this pledge was made the certificates evidencing the 100 shares were indorsed and delivered to the bank as pledgee, but the transaction was not noted on the records of the Mexican company in any manner whatever; and, so far as the books of that company show, the five original shareholders continued to be the record owners of the 100 shares until June 29, 1911, until which date 1 share stood on the books of the Mexican company in the name of L. A. Blochman and 95 shares in the name of "L. A. Blochman, Trustee."

The New Pedrara Mexican Onyx Company (the California company) was incorporated shortly prior to July 3, 1906. It was incorporated with a capital stock of $1,000,000, divided into 100,000 shares of the par value of $10 each. Its shares were divided into preferred and common stock—25,000 shares of preferred and 75,000 shares of common stock. Plaintiffs are holders of some of the shares of the capital stock of the California corporation, and, as we have said, they are prosecuting this action in its behalf.

Blochman was elected president of the California company at the first meeting of its board of directors, held July 3, 1906. At this first meeting—the certificates evidencing the 100 shares of the Mexican company still remaining in the hands of the bank as pledgee, but the shares evidenced thereby still being registered on the books of the Mexican company in the names of the five original subscribers—Blochman, so the minutes of the California company show, orally offered to sell and deliver to the California company the entire capital stock of the Mexican company, 100 shares, and receive in exchange therefor the entire capital stock of the California company, 100,000 shares. This offer, so the minutes show, was immediately accepted by the California company's board of directors. Thereupon, after the acceptance of Blochman's offer to exchange the 100 shares of the Mexican company for the 100,000 shares of the California company, Blochman offered to give to the California company the optional right to repurchase all of its 25,000 shares of preferred stock and 23,000 shares of its common stock for the sum of $160,000, payable at any time within two years. This offer was immediately accepted by the California corporation, and thereupon the first vice president and secretary of the California company were authorized and directed to enter into a contract with Blochman in accordance with his offer to give such optional right to repurchase said shares for $160,000.

Four days thereafter, viz. on July 7, 1906, a written instrument, subscribed by Blochman, was delivered by him to the California company. By this instrument, Blochman, in effect, confirmed his previous oral offer to exchange all of the capital stock of the Mexican company for the stock of the California company. This instrument, so far as material, is as follows:

"* * * L. A. Blochman, of San Diego, California, hereby exchanges and agrees to transfer at once one hundred shares of the New Pedrara Onyx Company [the Mexican company] * * * for twenty-five thousand (25,000) shares of the preferred stock and seventy-five thousand (75,000) shares of the common stock of said latter company [the California company], being all of the stock of said company."

Then follows a paragraph in relation to the optional right of the California company to repurchase its shares for $160,000, and a further paragraph whereby Blochman agrees to deliver as many shares of the stock of the California company as that company should sell, provided he be paid $8 on each share sold by the company, less the cost of sale, the same to be credited on the purchase price of $160,000. Immediately thereafter certificates for all the shares of the California company's capital stock were made out in the name of Blochman, but remained in the manual possession of that corporation. As the California company's stock was sold to others at $8 per share, certificates for the shares so sold were issued and delivered to the purchasers, among whom are these plaintiffs. The trial court found that the California company neglected to pay to Blochman the proceeds of the shares so sold by it, but, instead, used the money in the conduct of its business.

The property of the Mexican company consisted almost entirely of certain onyx quarries in Mexico. From the date of the exchange of the California company's shares for those of the Mexican company, the directors and stockholders of the former seem to have treated that company as the owner of the quarries and of all onyx quarried therefrom, although it is alleged in the complaint, and we think the allegation is a correct conclusion from the facts of the case, that—

"Said Mexican company, at all times mentioned in the complaint, was and still is the owner of 5,000 acres of land in Lower California in which are situated the quarries of onyx known as the Pedrara Onyx Quarries."

On June 27, 1911, at a meeting of the board of directors of the California company,

Blochman presented to that company the following written communication:

"New Pedrara Mexican Onyx Company, City —Gentlemen: On July 3d, A. D. 1906, your corporation made an agreement with me wherein and whereby I was to transfer to your corporation all of the capital stock of the New Pedrara Onyx Company [the Mexican company] for the sum of one hundred and sixty thousand ($160,000) dollars, and in order to carry said purchase into effect I was to transfer to your corporation all the stock of the New Pedrara Onyx Company [the Mexican company] in exchange for all the capital stock of your corporation, and I was then to give you an option to purchase all of the stock of your corporation transferred to me for the sum of one hundred and sixty thousand ($160,000) dollars. Your corporation has sold 3,200 shares of preferred stock and 2,564 shares of common stock, but nothing has been paid to me on said option and no consideration has been paid to me for the transfer of the stock of the New Pedrara Onyx Company [the Mexican company]. Your corporation has used from the quarries onyx to the value of more than ninety thousand ($90,000.00) dollars, and have paid nothing to me or the New Pedrara Onyx Company [the Mexican company] therefor. This condition certainly cannot continue much longer. I therefore give you notice that I rescind said contract for the sale of said stock of the New Pedrara Onyx Company [the Mexican company] to your corporation for the said sum of one hundred and sixty thousand ($160,000.00) dollars, and herewith tender you all of the stock of the corporation [the California company] save and excepting such as you yourself have sold out of the same, and demand of you the immediate transfer to me of all the capital stock of the New Pedrara Onyx Company [the Mexican company] and the payment to me of the sum of ninety thousand ($90,000.00) dollars for the onyx used from said quarries; or if you prefer, I will make you this alternative proposition: I will relinquish all claim to the 3,200 shares of preferred stock and the 2,564 shares of common stock sold by you; I will accept stock in part payment of said ninety thousand ($90,000.00) dollars, and will close matter on the following basis: You surrender to me the stock of the New Pedrara Onyx Company [the Mexican company], pay me five thousand ($5,000.00) dollars in cash and issue to me 9,000 shares of capital stock of your corporation [the California company], and I will surrender to you all the remainder of said stock, to wit: 72,436 shares of common stock and 12,300 shares of preferred stock. This last proposition will enable your corporation to continue business in fine shape. I will also surrender to your corporation all claim to all onyx on storage in all other parts of the United States, save and excepting the onyx now in your bonded yard. This onyx is the property of the New Pedrara Onyx Company [the Mexican company] and you must release all claim thereto.

"Trusting that this proposition will meet with your favorable consideration, I am,

"Sincerely yours, L. A. Blochman."

It will be noticed that this communication from Blochman to the California company's board of directors misstated the terms and effect of the contract that had been made on July 3, 1906. That contract, so the court found, was not an agreement by Blochman to transfer or sell to the California company the stock of the Mexican company for $160,000, but was a contract of exchange, whereby Blochman had exchanged the shares of the Mexican company for all the capital stock of the California company, and then gave the California company the optional right to repurchase its own stock for $160,000.

Immediately upon the presentation of Blochman's communication of June 27, 1911, the board of directors of the California company adopted a resolution that purports to rescind the contract which, in Blochman's communication, is assumed to be the contract that he had made with the California company on July 3, 1906. In our future references to this resolution we shall refer to it as the "rescinding resolution of June 27, 1911." In this resolution of rescission, or purported rescission, after certain recitals in the preamble, not necessary to be set forth here, the California company's board of directors resolved:

"That the contract made and entered into on the 3d day of July, A. D. 1906, for the sale by L. A. Blochman to this corporation, and the purchase by this corporation of all the stock of the New Pedrara Onyx Company [the Mexican company] be rescinded, and said stock be redelivered to the said L. A. Blochman; and that, in addition thereto, the said L. A. Blochman be paid the sum of five thousand ($5.000.00) dollars, lawful money of the United States; and that the said L. A. Blochman is to release all claim to the 3,200 shares of preferred stock and 2,564 shares of common stock heretofore issued; and that there be issued to the said L. A. Blochman in payment of the onyx used from the quarries of the New Pedrara Onyx Company [the Mexican company] during the time that said contract has been in existence, 9,000 shares of the preferred stock of this corporation."

This resolution further provided that—

"The officers of this corporation be authorized to make, execute and deliver all the necessary documents of every kind, nature and description to carry out the purpose and spirit of this resolution, and to carry into effect the transfer of the stock of the New Pedrara Onyx Company [the Mexican company], and the onyx belonging to it, to the said L. A. Blochman."

It is alleged in the complaint that the board of directors of the California company was induced to adopt this resolution of rescission by reason of certain false and fraudulent representations alleged to have been made by defendants Blochman, Smith, and Lea, and certain false promises alleged to have been made by them without any intention of performance. As we view the case, the inducements that prompted the board of directors

to adopt the rescinding resolution of June 27, 1911, are not material, because, for reasons stated infra, we think that, fraud or no fraud, the rescinding resolution did not divest the California company of any title that may have been received by it under the contract of exchange made July 3, 1906.

Though the board of directors of the California company, by this resolution of June 27, 1911, resolved that the officers of that corporation be authorized "to make, execute and deliver all the necessary documents of every kind, nature and description to carry out the purposes and spirit of this resolution," no attempt seems to have been made to carry out the resolution by the payment of any money to Blochman, or by the retransfer to him, or to any one for him, of any of the shares of the capital stock of the Mexican company, or by the transfer to him of any property owned or claimed by the California company. In short, the "rescission," assuming for the present that the board's resolution of June 27, 1911, was effective as a rescission of the contract of exchange that had been made on July 3, 1906, was not carried out by any attempt to redeliver or retransfer or reassign the stock that, it is claimed, Blochman, on July 3, 1906, had assigned to the California company in exchange for all the shares of that company's capital stock.

Shortly prior to the adoption by the California company's board of directors of the rescinding resolution of June 27, 1911, the Arizona company was incorporated and organized. And on June 29, 1911, the 100 shares of the capital stock of the Mexican company, for the first time since their issuance to the five original subscribers, were transferred on the books of the Mexican company; the transfer being made on the books of that company to the Arizona company, as the transferee, the certificates, meanwhile remaining in the possession of the Blochman Banking Company, as pledgee.

The trial court found that—

"The said 100 shares of stock of the New Pedrara Onyx Company [the Mexican company] were not delivered to said New Pedrara Mexican Onyx Company [the California company], but, on the contrary, were at said time and at all times thereafter held by the Blochman Banking Company as pledgee to secure indebtedness due it from W. R. Ramsdell and other persons, and the title to said 100 shares did not pass to said New Pedrara Mexican Onyx Company [the California company] by the contract between said L. A. Blochman and said company, set forth above, arising out of the meeting of July 3, 1906."

In its conclusions of law the trial court found that Blochman's agreement to exchange the 100 shares of the Mexican company's capital stock for all of the shares of the California company never became effective, "for the reason that said stock was not in the possession of said L. A. Blochman, and was not delivered to the said New Pedrara Mexican Onyx Company [the California company] or to anybody in their behalf, but was at all times in the custody and possession of the Blochman Banking Company as pledgee to secure an indebtedness due and owing it by W. R. Ramsdell."

The record before us is vague as to how or by whom the 100 shares of the Mexican company's capital stock were transferred on the books of that company to the Arizona company. If the stock has been sold by the bank as pledgee, at a pledgee's sale, regularly conducted, and to an innocent purchaser for value and without notice, and thus has come into the possession of the Arizona company, it may be that that corporation has received an unimpeachable title to the 100 shares, freed from all claim on the part of the California company. As to this, however, the record before us furnishes no information, and we have no means of knowing what is the basis of the Arizona company's assertion of title, save this, that defendants, in their answers, allege that—

"On or about the 29th day of June, 1911, said Blochman, for a valuable consideration to him moving, sold, assigned, and transferred all his rights in and to said stock and the whole thereof to the Pedrara Onyx Company, hereinbefore designated as the Arizona corporation, and caused a delivery thereof to be made to said last-named corporation, and said stock was transferred on the books of said Mexican corporation to said Arizona corporation."

As already stated, the trial court, after plaintiffs had introduced their evidence and rested, granted a nonsuit in favor of defendants Smith, Lea, and the Arizona company. From the formal judgment of nonsuit, entered August 13, 1915, plaintiffs have appealed. After the entry of the judgment of nonsuit, the case was continued as to the remaining defendants, the Mexican company, the California company, on whose behalf the suit is being prosecuted, and Blochman; and on February 4, 1916, a judgment on the merits was entered as to these last-named defendants. By this judgment, the trial court adjudged and decreed: (1) That plaintiffs take nothing as to the Mexican company; (2) that the California company did not acquire or become the owner of the 100 shares of the capital stock of the Mexican company, by virtue of the transaction of July 3, 1906, between it and Blochman; (3) that the rescinding resolution of June 27, 1911, adopted by the board of directors of the California company, was illegal and void, and that it be set aside and declared void as to the defendant Blochman; (4) that defendant Blochman did not receive anything of value by reason of the transaction at the meeting of the board of directors of the California corporation on June 27, 1911, and that, therefore, plaintiffs

and the California company take nothing as against the defendant Blochman; and (5) that plaintiffs recover their costs against the California corporation. Plaintiffs appeal from this judgment.

The principal question presented for our decision is this: Did the California company, by reason of its acceptance of Blochman's oral offer to exchange the 100 shares of the Mexican company's capital stock for all the shares of the California company, and Blochman's subsequent written confirmation of the exchange, acquire any title to or interest in the 100 shares of the Mexican company's capital stock?

For the purposes of these appeals, it may be assumed that the California company did not acquire any title to the 4 shares that had been issued by the Mexican company to Blochman's four codirectors. As to the remaining 96 shares, the California company, like the purchaser of any kind of personal property, could waive the deficiency in quantity and elect to receive and hold the 96 shares that stood in Blochman's name—the one that stood in his name individually and the 95 that stood in his name as trustee. Did the California company acquire any title to these 96 shares of the capital stock of the Mexican company? If it did, then as to at least three of the defendants, the three corporations, the judgment must be reversed, and the cause remanded for a retrial of the issues respecting the ownership of this stock.

Respondents contend: (1) That because the stock certificates were held by the Blochman Banking Company as pledgee, and Blochman did not indorse and deliver the certificates to the California company, the attempted exchange of stock was a nullity; (2) that Blochman's offer of July 3, 1906, and the California company's acceptance thereof, was not an executed contract of exchange, but only an executory agreement to exchange, under which no title passed; and (3) that Blochman did not own the stock of the Mexican company. In our opinion none of these contentions is tenable.

[1] Shares of stock are personal property, and there is no reason why, as between the parties, they cannot be transferred as any other personal property. Shares in a corporation are a species of incorporeal property. They exist independently of any certificate. And though it is not uncommon to hear persons speak of the certificate itself as the "stock," nevertheless, the certificate that evidences the shares is but the paper representative of the incorporeal right, and stands on a footing similar to that of other muniments of title. It is not in itself the property, but is merely the symbol or paper evidence of the property, and the property right may exist without the certificate. A share of stock being an incorporeal right, incapable of manual delivery, and the certificate being nothing more than evidence of its existence, it is obvious that, in the absence of any controlling statutory inhibition, the shares, without an assignment or delivery of the certificate, may be assigned in any manner appropriate to the transfer of incorporeal personal property, as, for example, by a bill of sale, or any mode that will suffice to pass title to a chose in action or intangible property. The jus disponendi in shares of stock is an incident of ownership, and may be exercised in any manner not prohibited by law. Lipscomb's Adm'r v. Condon, 56 W. Va. 416, 49 S. E. 392, 67 L. R. A. 670, 107 Am. St. Rep. 938.

[2] But, say counsel for respondents, where, as here, certificates, evidencing title to the shares, have been issued, section 324 of the Civil Code prohibits a transfer by any made other than by an indorsement and delivery of the certificates. That section reads:

"Whenever the capital stock of any corporation is divided into shares, and certificates therefor are issued, such shares of stock, except as hereinafter provided, are personal property, and may be transferred by indorsement by signature of the proprietor, * * * and delivery of the certificate; but such transfer is not valid, except as to the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by whom and to whom transferred, the number of the certificate, the number or designation of the shares, and the date of the transfer."

This section of the Code is intended for the protection of the corporation and those who claim under the persons to whom the certificates were originally issued. The section clearly does not cover the whole subject of transfer. Corporate stock would be transferable without such provision as that contained in this particular Code section. Civ. Code, § 1044. Says the court in Riverside Land Co. v. Jarvis, 174 Cal. 327, 163 Pac. 54, speaking through Mr. Justice Shaw:

"The provision merely prescribes a mode by which the transfer may be made. It does not prohibit a transfer by other methods, nor declare that when made in another manner a transfer may not be enforced by the party entitled to the shares."

This language of the court accords with the generally accepted rule that if a mode of assignment is provided by statute, such statutory mode is cumulative, in the absence of express words inhibiting other modes of assignment. Gardner v. Mobile, etc., R. R. Co., 102 Ala. 635, 15 South. 271, 48 Am. St. Rep. 84; 5 Corpus Juris, 898–899. For these reasons we are satisfied that even where, as here, certificates have been issued, a transfer of title, good as between the parties thereto, may be made in manner other than that recognized as a lawful mode of transfer

by section 324; that a transfer of title, good as between the parties, may be made in any manner appropriate to the assignment of choses in action or intangible personal property, and that the mode adopted by the California company and Blochman on July 3, 1906, confirmed by Blochman's written instrument of July 7, 1906, was sufficient, as between the parties thereto, to transfer to the California company whatever title Blochman may then have had in the 100 shares, or any of them.

[3] It may be that the legal title did not pass. As to this it is not necessary to express an opinion. But if the legal title did not pass, the full equitable title did, subject, of course, to the special property that had previously vested in the pledgee, if, as claimed by respondents, the California company, at the date of the contract of exchange, had notice, actual or constructive, of the prior pledge to the Blochman Banking Company. Riverside Land Co. v. Jarvis, supra; Tregear v. Etiwanda Water Co., 76 Cal. 537, 18 Pac. 658, 9 Am. St. Rep. 245; Johnson v. Kirby, 65 Cal. 482, 486, 4 Pac. 458; Lipscomb's Adm'r v. Condon, supra; Hubbard v. George, 81 W. Va. 538, 94 S. E. 974, L. R. A. 1918C, 835; Manchester St. Ry. v. Williams, 71 N. H. 312, 52 Atl. 461; Baldwin v. Canfield, 26 Minn. 43, 1 N. W. 261, 276; Prince Inv. Co. v. St. Paul, etc., L. Co., 68 Minn. 121 70 N. W. 1079; Colton v. Williams, 65 Ill. App. 466; Richardson v. Longmont, etc., Co., 19 Colo. App. 490, 76 Pac. 546; Equitable Securities Co. v. Johnson, 36 Colo. 377, 85 Pac. 840; Grymes v. Hone, 49 N. Y. 17, 10 Am. Rep. 313; Curtis v. Crossley, 59 N. J. Eq. 358, 45 Atl. 905. Though not all the cases we have cited are directly in point, all lend support to the conclusion at which we have arrived.

[4] Blochman's offer of July 3, 1906, to exchange the 100 shares of the Mexican company's capital stock for all the shares of the California company, and the California company's acceptance of the offer, coupled with Blochman's written confirmation of the exchange on July 7, 1906, was not an executory agreement to sell or to exchange, but was a completed or executed contract of exchange, whereby, as between the parties to the exchange, whatever title Blochman possessed passed to and vested in the California company.

There was an unconditional offer to exchange and an immediate and unequivocal acceptance of that offer. Upon the acceptance of the offer a completed contract came into being. That contract, in our opinion, was a contract of exchange, not a contract to exchange. "The provisions of the title on sale apply to exchanges." Civ. Code, § 1806. "The title to personal property, sold or exchanged passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not." Here the "thing" exchanged, stock of the Mexican company, was identified.

[5] Did the parties agree upon a present transfer? In determining whether title has or has not passed, the primary consideration is one of intention. In each case the agreement is what the parties intended to make it. Their intention is to be gathered from the terms of the contract and such attendant circumstances as may legitimately be considered as evidencing the intention. Certain rules have been established for determining whether a contract is a contract of sale or an agreement to sell—rules that are applicable to exchanges as well as to sales. These rules are well stated by the United States Supreme Court in the Elgee Cotton Cases, 22 Wall. 180, 188, 22 L. Ed. 863. Two of these rules have no application here, as they refer to those steps necessary to put the property into a deliverable state, or a determination of the price by weighing, measuring, and testing. The third only is significant. It is there stated in these words:

"Where the buyer is by the contract bound to do anything as a consideration, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer."

Here the contract of exchange did not require either party to do anything, precedent of concurrent, on which the passing of the property was to depend. Nothing remained to be done by Blochman. He had 96 shares standing on the books of the Mexican company in his name—1 in his name individually and 95 in his name as trustee. These 96 shares he, presumably, could have had transferred on the books of the Mexican company to the name of the California company, even if it would be necessary to cause the transfer to show that it was made subject to the prior pledge to the bank.

[6] As between the parties, delivery is not essential to a contract of sale or exchange and the passing of title. Driscoll v. Driscoll, 143 Cal. 528, 77 Pac. 471. See, also, Burkett v. Doty, 32 Cal. App. 337, 162 Pac. 1042.

Mr. Benjamin states the rule to be that—

"The presumption of law is that the contract is an actual sale, if the specific thing is agreed on, and it is ready for immediate delivery." Benjamin on Sales (7th Ed.) § 311.

"When there has been no manifestation of a contrary intention, the presumption of law is that the contract is an actual sale, and that the transfer of title takes place at once in advance of actual delivery, if the thing is agreed on, and is ready for immediate delivery." 24 Am. & Eng. Enc. of L. (2d Ed.) p. 1051.

Mr. Cook states the law thus:

"Generally the sale of stock is attended with an immediate delivery of the certificate therefor, or it is agreed that the certificate shall be delivered at some specific time in the future. If however, the vendor offers to sell his stock and the vendee accepts the offer, the contract is complete, and binds both parties, although nothing has been said as to the time when the certificate of stock shall be delivered."

[7] Further than this, Blochman, on July 7, 1906, by what we have called his written confirmation of the contract of exchange, uses language that unmistakably indicates his intention that the transaction should constitute an exchange in præsenti. He says:

"* * * L. A. Blochman, of San Diego, Cal., hereby exchanges and agrees to transfer at once one hundred shares of the [Mexican company] * * * being all of the stock of said company."

The language "L. A. Blochman * * * hereby exchanges" is not the language of an executory contract to exchange. It is the language of an executed contract of exchange, whereby an instant and immediate transfer of title is effected. It is true the words "hereby exchanges"—words importing a transfer eo instanti—are followed by the words "and agrees to transfer at once"—words that look to action in the future, even though it be the immediate future. However, the two expressions, one importing present action and the other looking to immediate future action, are in no wise inconsistent. For, without doubt, the word "transfer," used in the phrase "agrees to transfer at once one hundred shares," was intended by the parties to refer to a transfer on the books—a transfer or registration to be made "at once," in order that the exchange, already effected in fact and good as between the parties, might become effective as to all the world.

Moreover, Blochman, in his confirmatory writing of July 7, 1906, further says that he "also sells" to the California company "the option to purchase twenty-five thousand shares of the preferred stock and seventy-two thousand three hundred shares of the common stock" of that company for $160,000. By thus giving the California company the option to repurchase its shares for a stated sum, Blochman treated himself as the owner of the stock that he was to get in the exchange, thus showing that he understood that there already had been consummated an executed and completed contract of exchange whereby he had become the owner of the California company's capital stock, and, as such owner, could give that company an optional right to repurchase. Indeed, the whole course of conduct of the parties, at the date of the exchange and for a considerable period of time thereafter, points unerringly to the fact that it was their intention that the contract, from the time it was consummated by the California company's acceptance of Blochman's offer, should be an executed contract of exchange, under which title passed from one party to the other. The foregoing reasoning and our conclusion that, as between the parties, there was a present transfer of title, find support in the following authorities: Mason v. Lievre, 145 Cal. 514, 78 Pac. 1040; Majors v. Girdner, 31 Cal. App. 47, 159 Pac. 826; Beardsley v. Beardsley, 138 U. S. 262, 11 Sup. Ct. 318, 34 L. Ed. 928; State v. Whited & Wheless, 104 La. 125, 28 South. 922.

[8, 9] There is no merit in the contention that at the date of the exchange, July 3, 1906, Blochman did not own any of the stock of the Mexican company. Without doubt, he owned, at that time, the 1 share that stood on the books of the company in his name, subject, of course, to any right the Blochman Banking Company may have possessed as pledgee. As to the 95 shares that stood in the name of "L. A. Blochman, trustee," the addition of the word "trustee" does not necessarily and alone raise an implication that Blochman did not have the full right to deal with the stock as his own. Brewster v. Sime, 42 Cal. 139; Thompson v. Toland, 48 Cal. 99; Northwestern P. C. Co. v. Atlantic P. C. Co., 174 Cal. 308, 163 Pac. 47. The fact that 4 of the shares of the Mexican company's capital stock were owned by other parties, and that but 96 of the 100 shares stood in Blochman's name, either individually or as trustee, affords no reason for holding that title to none of the shares passed to the California company. If, under the contract of exchange, the California company could have insisted that it had bargained for and purchased all of the 100 shares, nevertheless, if it saw fit, it could accept, in fulfillment of the contract, fewer than 100 shares, and it would not lie with Blochman to complain or to evade his obligation because he did not or could not comply strictly with his contract. Dennison v. Chapman, 105 Cal. 447, 454, 455, 39 Pac. 61.

[10] The trial court found that all of the 100 shares had been pledged to the Blochman Banking Company. If, as that court found, this pledge was made to the bank, then when the pledge was made the bank, to whom all the certificates had been delivered as pledgee, became vested with a legal interest, a "special property," notwithstanding the pledge was not entered on the books of the Mexican company. Northwestern P. C. Co. v. Atlantic P. C. Co., supra; Fowles v. National Bank, 167 Cal. 658, 140 Pac. 271. "It is not the law of this state, nor is it the law generally, that a transfer upon the books of the corporation is essential to the creation of a valid pledge." Spreckels v. Nevada Bank, 113 Cal. 272, 278, 45 Pac. 329, 331 (33 L. R. A. 459, 54 Am. St. Rep. 348).

[11] This pledge was good as against the California company, a subsequent purchaser, if the latter had notice of the pledge at the time when it and Blochman effected the exchange of shares on July 3, 1906. Weston v. Bear River, etc., Co., 6 Cal. 425; Spreckels v. Nevada Bank, supra, 113 Cal. 296, 45 Pac. 329, 33 L. R. A. 459, 54 Am. St. Rep. 348; Seymour v. Salsberry, 177 Cal. 755, 171 Pac. 938. The trial court made no finding upon the question of notice to the California company of the prior pledge to the Blochman Banking Company. Upon this question of notice, there is a decided conflict in the evidence. Two witnesses for defendants, Smith and Blochman, testified positively that, at the first meeting of the board of directors of the California company, the directors of that company were told that the 100 shares of the Mexican company had been pledged to the Blochman Banking Company to secure an indebtedness due the bank. This was as flatly denied by witnesses for the plaintiffs. Aside from the direct evidence of actual notice to the California company, as given by defendants' witnesses, the trial court could have weighed and considered any circumstances tending to impart constructive notice to the California company. Whether such circumstances, if any there be, were sufficient to put that company on inquiry and thus impart notice to it, as a subsequent assignee, was, and on any retrial will be, a question of fact for the trial court. Northwestern P. C. Co. v. Atlantic P. C. Co., supra.

[12] From the foregoing it follows that if, at the date of the exchange, July 3, 1906, the California company had notice of the prior pledge to the Blochman Banking Company, then the only title that passed to the California company was such as remained in Blochman as pledgor. On the other hand, if the California company did not have notice of the pledge, or notice of circumstances sufficient to put a prudent person upon inquiry, it took whatever title Blochman had to the shares free and unincumbered by any claim of the bank as pledgee. In either case, however, the California company would receive some title under its contract of exchange with Blochman. For, even if that company did take the 100 shares, or any one of them, subject to the prior pledge to the bank and subject to the special property vested in the bank as pledgee, still the general property would remain in the pledgor, and that general property, to the extent that it was vested in Blochman at the date of the exchange, July 3, 1906, would, in that case, pass to the California company.

For these reasons, we conclude that the court erred in finding, as it did, that no title to the shares of the Mexican company passed to the California company by reason of the contract of exchange whereby Blochman, on July 3, 1906, exchanged the Mexican company's shares for all of the stock of the California company.

It will be the duty of the trial court, on a retrial of the question of ownership, to determine just what title, if any, did pass to the California company. If the 100 shares were pledged, as claimed by defendants, and if, at the date of the contract of exchange, July 3, 1906, the California company had actual notice of such pledge, or actual notice of circumstances sufficient to put a prudent person upon inquiry, so that by prosecuting such inquiry such person might have learned of the pledge, then, on such retrial, the court should find that, as between Blochman and the California company, the latter became vested with title to such shares as Blochman owned, subject, however, to the prior pledge and the right of the pledgee to sell and convey to a purchaser, at a pledgee's sale, full title to so much of the stock as might be necessary to satisfy the indebtedness secured by the pledge. If, on the other hand, the court shall find that there was no pledge, or that the California company had no notice thereof, actual or constructive, then, on such retrial, it will be the duty of the court to find that, as between Blochman and the California company, the latter took title to all shares owned by Blochman, unincumbered by any prior pledge to the Blochman Banking Company. It also will be necessary, on such retrial, to determine whether the Arizona company was an innocent purchaser, for value and without notice, either from the pledgee, under a pledgee's sale, or otherwise. If it was an innocent purchaser, for value and without notice, then the Arizona company, as between it and its transferor, would acquire the title—a title unincumbered and free of all prior assignments of which it had no notice, actual or constructive.

[13] It does not necessarily follow from the foregoing that plaintiffs are entitled to relief as against all the defendants, or even all the relief prayed for as against any of the defendants, even if it be a fact that the California company, under its contract of exchange with Blochman, became vested with some title to the 100 shares. By their complaint plaintiffs pray that the rescinding resolution of June 27, 1911, be annulled. This relief was granted. The judgment declares that "the transaction entered into by the board of directors" of the California company and Blochman "on the 27th day of June, 1911, was illegal and void," and adjudges that it be and is "set aside and declared void." Plaintiffs, by their complaint, also pray that Blochman, Smith, Lea, and the Arizona company be required to account for everything received by them under the rescinding resolution of June 27, 1911. This claim rests upon the erroneous theory that the 100 shares, or property of some kind, repassed from the California company to

Blochman as a necessary result of the rescinding resolution of June 27, 1911. This is an untenable theory. No shares of stock, or rights of any kind, that may have passed to the California company under the contract of exchange of July 3, 1906, could or did revest in Blochman by reason of the rescinding resolution of June 27, 1911, though many of appellants' claims are based upon the erroneous assumption that, by this rescinding resolution, the California company was wrongfully deprived of valuable property rights.

In the first place, notwithstanding Blochman's written notice of rescission on June 27, 1911, and the board's consent thereto, as expressed in the resolution complained of, appear, upon their face, to constitute a mutual rescission of a contract that had been entered into by Blochman and the California company on July 3, 1906, it is at least doubtful if the transaction of June 27, 1911, can be regarded as a rescission, or even an attempted rescission, of the contract of exchange found by the trial court to be the contract that actually was made on July 3, 1906. By his written communication of June 27, 1911, Blochman, after reciting that, on July 3, 1906, he had contracted to transfer to the California company all of the stock of the Mexican company for the sum of $160,000, proceeds to say that he gives notice that he rescinds "said contract for the sale of said stock * * * for one hundred and sixty thousand dollars." The board acted upon this notice of rescission by adopting the resolution of June 27, 1911, wherein it is recited that the board consents to a rescission of "said contract." There seems, therefore, to be ground for the contention that the transaction of June 27, 1911—the transaction evidenced by Blochman's written notice that he rescinds a contract for the sale of the shares of the Mexican company for $160,000, and the California company's resolution consenting to such rescission—was but an attempted rescission of a phantom contract, a contract that never was made. According to the court's findings, the contract that actually was made on July 3, 1906, was not the contract recited in Blochman's notice of rescission or in the board's resolution consenting thereto, but an entirely different contract.

But even if, for the purposes of this decision, we assume that, by the transaction of June 27, 1911, Blochman and the board of directors of the California company did mutually agree to rescind the contract that actually was made on July 3, 1906—the executed contract of exchange—nevertheless, that alone would not suffice to revest Blochman with title to the stock or with any property right that might be an incident of title to the stock. It appears from the resolution adopted by the board that it was the intention of the parties that something more than Blochman's mere notice of rescission and the board's consent thereto should be necessary before Blochman was to be revested with title to the stock. The board, by what we have termed the "rescinding resolution of June 27, 1911," resolved that "the officers of this corporation be authorized to make, execute and deliver all the necessary documents to carry out the purpose and spirit of this resolution." No actual or manual redelivery of the shares to Blochman was possible; such intangible property cannot be the subject of manual delivery. No constructive or symbolical redelivery of the shares by delivery of the certificates was possible, for the California company held no certificate of stock that it could redeliver to Blochman. The certificates were in the possession of the Blochman Banking Company, that claimed the stock as pledgee. And there is no evidence that title revested in Blochman through the execution by the California company of any document of any kind for the purpose of carrying out the "purpose and spirit" of the rescinding resolution. There was no deed, bill of sale, assignment, or other mode of transfer to Blochman, or to any of his associates. Unless, therefore, the purported rescission of June 27, 1911, ipso facto operated to retransfer the title to Blochman, there is no basis for an accounting or for any claim of damages based upon the theory that, solely by reason of the transaction of June 27, 1911, Blochman and his codefendants Smith, Lea, and the Arizona company became vested with title to property that rightfully belongs to the California company. Therefore, assuming that, by the transaction of June 27, 1911, there was a mutual rescission of the contract of exchange as actually made on July 3, 1906, the question that presents itself is: Did that rescission, ipso facto, effect a retransfer of title to Blochman?

[14] Where, for any reason, the title of a vendee has not been perfected, or where the contract, in any respect, remains executory, the idea of a rescission is quite appropriate; for rescission is nothing more nor less than the unmaking of a contract. But if a contract of sale or of exchange has been fully executed, and nothing remains to be done thereunder by either party thereto, the contract has fulfilled its purpose, and merely rescinding it by the mutual consent of the parties, i. e., unmaking it by mutual consent, will not alone and ipso facto, in the absence of an intent to effect a restoration of title solely by reason of the rescission, restore to either of the parties that which he may have parted with under the fully executed contract. Of course, if the sale or exchange is legally rescinded by the judgment of a judicial tribunal on account of fraud, mistake, undue influence, etc., the whole sale or ex-

change thereby becomes nullified ab initio; and in that case the property sold or exchanged is considered as never having been changed. But when the sale or exchange is honestly and fairly made, and perfected by a transfer of the title, so that the property in the article sold or exchanged is completely changed, an agreement of the parties thereafter made to rescind the contract, or to give up the bargain, as it often is expressed, amounts to no more than an executory agreement to resell or re-exchange, unless it shall appear that it was the intention of the parties that the rescission alone should operate as a completely executed contract of resale or of re-exchange. If such intention does not appear, then whatever was necessary in the first instance to constitute the original sale or exchange a legal transfer of the property is equally necessary to effect the resale or re-exchange.

[15] In short, whether the mutual rescission of the original contract of sale or contract of exchange ipso facto effects a resale or re-exchange depends, in the last analysis, upon the intention of the parties. For, unless a contrary intent appear, the mutual rescission of a fully executed contract of sale is but the equivalent of an independent agreement by the buyer to reconvey the property, and a similar independent agreement by the seller to repay whatever money may have been paid him, and title will not revest in the seller until the buyer has made a reconveyance or a redelivery with whatever formalities were necessary to pass the title in the first instance. If, therefore, from the language used by the parties to the rescinding resolution of June 27, 1911, read in the light of all the attendant circumstances, it appears that it was their intention that further formalities should be had in order to effect a re-exchange, the property did not ipso facto repass upon the making of the rescission agreement, but, to accomplish that result, the further formalities contemplated by the parties were necessary. Quincy v. Tilton, 5 Me. 277; Blanchard v. Trim, 38 N. Y. 225; Hornberger v. Feder, 30 Misc. Rep. 121, 61 N. Y. Supp. 865; Klein v. Rector, 57 Miss. 538; Miller v. Smith, 1 Mason. 437, Fed. Cas. No. 9,590; Folsom v. Cornell, 150 Mass. 118, 22 N. E. 705; 35 Cyc. 129. In Quincy v. Tilton, supra, the court stated the rule as follows:

"* * * When the sale or exchange is fairly and honestly made and perfected by delivery, the property is completely changed in the articles which are the subject of the sale or exchange; and if, after this, the parties agree to give up the bargain, as it is often expressed, and place things as they stood before it was made, * * * this object can only be effected by what, in legal contemplation, amounts to a resale or re-exchange; and whatever was necessary to constitute the original sale or exchange a legal transfer of the property from one of the parties to the other is equally necessary to constitute a legal resale or re-exchange."

The provision in the resolution of the California company's board of directors, authorizing the officers of the corporation to execute and deliver all necessary documents to carry out the spirit and purpose of the resolution, evidences an intention that something further was to be done to effect a retransfer of the title.

[16] Moreover, even if we assume that the transaction of June 27, 1911, was an attempted "rescission" of the contract of exchange as actually made on July 3, 1906, still that transaction was something more than a mere "rescission." A "rescission," and no more, would have restored each party to the status quo. But Blochman accompanied his notice of rescission with an alternative proposal, under which he was to receive more than a mere return of the shares of the Mexican company. This alternative proposal was accepted by the California company's board of directors in the board's resolution of June 27, 1911. By this acceptance of Blochman's alternative proposal there was created, not an agreement for the restoration of the status quo, but an executory agreement—an executory agreement whereby each party agreed to convey certain things to the other. It appears from the terms of Blochman's alternative proposal and the board resolution of acceptance, that it was the intention of the parties that title should not pass as to any of the several articles or things mentioned in the alternative proposal until each had done what he or it had undertaken to do. For example, by its acceptance of Blochman's alternative proposal, the California company agreed to pay the former $5,000, and Blochman agreed to release all claim to certain of the shares of the California company's capital stock, and keep the balance. This was an executory agreement. It never did become an executed contract of sale or of exchange. It was not intended that there should be an executed contract of sale or exchange until the appropriate officers of the California company should do what the resolution authorized them to do, namely, execute and deliver "all the necessary documents of every kind, nature and description to carry out the purpose and spirit of this resolution."

For these reasons we think that whatever title to the 100 shares may have passed to the California company under the exchange contract of July 3, 1906, still remains in that company, and that it has not been divested of any title by the rescinding resolution of June 27, 1911.

This being the situation, there is no basis for an accounting or for any claim of damages as against the defendants Smith, Lea, Blochman, and the Arizona company; and

since the evidence and defendants' pleadings show that Smith, Lea, and Blochman make no claim to the stock, the judgment, as to them, should be affirmed.

We think, however, that there are averments in the complaint sufficient to entitle plaintiffs, on behalf of the California company, to invoke the jurisdiction of a court of equity to compel the Mexican company so to register the shares upon its books as that their registration shall show correctly the nature and extent of whatever title thereto, if any, the California company may possess. In their prayer for relief, plaintiffs not only pray for general relief, but specifically ask that the shares of the Mexican company's capital stock be transferred to the California company on the books of the Mexican company. Where, as in this case, there is an answer to the complaint, the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issues. Code Civ. Proc. § 580. For the purpose of such relief the Arizona company is a proper, if not a necessary, party defendant; and for that reason it was error to grant its motion for a nonsuit.

[17] It is an established doctrine of equity jurisprudence that the true owner of stock may resort to a court of equity to compel the corporation to register on the books a transfer of the stock and to issue to him a new certificate; for it is the owner's right to cause the corporation's books to show truthfully the real title or claim of each and every person having any lawful interest in the stock. In such an action it is proper to bring before the court as parties to the suit all persons having an interest in the stock, whether legal or equitable, in order that they may be bound by the decree, and further litigation prevented. Howard v. Corey, 126 Ala. 283, 28 South. 682; Thornton v. Martin, 116 Ga. 115, 42 S. E. 348.

[18] Here, the California company (a claimant of the stock on whose behalf the action is prosecuted), the Arizona company (also a claimant of the stock), and the Mexican company (the corporation that is to be compelled to enter a registration that will truthfully set forth the ownership of the stock and of every lawful interest therein) are necessary parties to any determination of the question of title to the 100 shares of the Mexican company's capital stock. Moreover, it would seem that the presence of the Blochman Banking Company, as claimant of a pledgee's special property, is necessary to a complete determination of the controversy, and that therefore the court, sua sponte, should make an order under section 389 of the Code of Civil Procedure directing the bank to be brought into the action as a party defendant.

From the foregoing it follows that the case should be remanded for a retrial upon the single issue of title to the 100 shares of the capital stock of the Mexican company, and the latter company directed so to register the shares that its books shall correctly show the ownership; and, if it be found that more than one person or corporation is interested in the stock, that the company's books shall be made to show correctly the several interests of all rival claimants.

As to Blochman, Smith, and Lea, each of the judgments appealed from is affirmed. As to defendants New Pedrara Onyx Company (the Mexican company) and New Pedrara Mexican Onyx Company (the California company), the judgment in case No. 3011—the judgment of February 4, 1916—is reversed, and, as to them, the cause is remanded for a retrial of the issues respecting the ownership and proper registration of the 100 shares. As to the defendant Pedrara Onyx Company (the Arizona company) the judgment in case No. 3053—the judgment of nonsuit—is reversed, and, as to that defendant, the cause is remanded for a retrial of the issues respecting the ownership and proper registration of the 100 shares.

We concur: THOMAS, J.; WELLER, J.

48 Cal. App. 319

BANK OF NAPA v. FERGUSON BURNS ESTATE, Inc. (Civ. 2137.)

(District Court of Appeal, Third District, Division 1, California. June 26, 1920. Hearing Denied by Supreme Court Aug. 23, 1920.)

1. Pledges ⇐23—Lien for optional advances is subject to execution levied before advances were made.

The lien of a pledge given to secure future advances made by a corporation which had not bound itself to make such advances is subject to the lien of an execution levied after the pledge, but before advances were in fact made.

2. Corporations ⇐123(9)—Evidence held to show pledgee made binding agreement for advances, so that lien was prior to execution.

In an action to recover corporate stock by the purchaser at execution sale, evidence *held* to sustain a finding that the corporation had made a binding agreement to advance money to the stockholder at the time the stock was pledged to the corporation, so that the lien of the pledge was prior to that of the execution, though the advances were not in fact made until after the execution was levied, and the corporation had no record of the agreement.

3. Corporations ⇐59 — Record of corporate acts and resolutions not essential.

It is not essential to the validity of corporate acts and resolutions that they be recorded in the minutes of the corporation.

4. Pledges ⇐23—Lien for subsequent advances under prior binding agreement is entitled to priority.

The lien of a pledge for future advances has priority over the lien of execution levied on the pledged property subsequent to the pledge, but before the advances were made, if the pledgee had obligated itself to make the advances.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the Bank of Napa against the Ferguson Burns Estate, Incorporated. Judgment for defendant, and plaintiff appeals. Affirmed.

U'Ren & Beard, of Napa, and O. G. Hopkins, of Sacramento, for appellant.

Devlin & Devlin, of Sacramento, for respondent.

BURNETT, J. The action was brought to recover judgment: (1) That plaintiff is the owner and entitled to the possession of 30,000 shares of the capital stock of the defendant corporation, standing on the books of said corporation, on the 23d day of June, 1915, in the name of Dorothy A. Lawson, formerly Dorothy A. Burns; (2) that defendant be ordered and directed to cancel the certificate for said 30,000 shares and to issue a new certificate therefor to this plaintiff; (3) that in the event said stock cannot be transferred on the books of the company, plaintiff have judgment against defendant for $30,000, the value of said shares of stock. Judgment was rendered in favor of defendant for costs, and this appeal is prosecuted by plaintiff from said judgment.

It was alleged in the complaint that on January 30, 1915, in an action pending in the superior court in and for the county of Sacramento, a judgment was recovered by plaintiff against Dorothy A. Lawson for the sum of $9,485.56; that on June 21, 1915, an execution was issued out of said court, directed to the sheriff of Sacramento county, who on the 23d of June levied said execution upon defendant corporation, garnishing all of the capital stock of said corporation owned by and standing on the books of said corporation in the name of Dorothy A. Lawson. Plaintiff alleged, on information and belief, that at the time of the levy of said execution Dorothy A. Lawson was the owner of 30,000 shares of the capital stock of said corporation, represented by stock certificate No. 2. It was then alleged that on the 10th of November, 1915, the sheriff gave due notice of the sale of said stock at public auction on November 19, 1915, at which time said stock was sold to plaintiff for $3,000, which was the highest, best and only bid therefor; that in December, 1915, demand was made upon defendant to cancel said old certificate and to issue a new one to plaintiff for said 30,000 shares of stock, which defendant refused to do. The value of said stock was alleged to be $30,000.

The court found:

"(I) That on the 23d of June, 1915, Dorothy A. Lawson was the owner of 30,000 shares of the capital stock of the defendant, as evidenced by certificate No. 2, and had been such owner since the 14th day of November, 1914, and remained such owner until the 29th day of October, 1915. That her ownership of said stock was subject to a pledge as hereinafter more particularly found; said stock having been pledged to the defendant on the 14th day of November, 1914.

"(II) That on the 14th day of November, 1914, the said Dorothy A. Lawson was the owner of an undivided one-fifth interest in certain real and personal property, some of the same belonging at that time to the estate of Ferguson Burns, deceased, and some to the estate of Mary Burns, deceased; the said Dorothy A. Lawson being an heir at law and devisee of both Ferguson Burns and Mary Burns, she being a daughter of them, they having been her parents, and at such time her interest in said properties was mortgaged to sundry persons for the purpose of securing the indebtedness owing by her to them, in the sum of $6,986.21, with interest thereon, as was agreed to be paid. That the co-owners of the said Dorothy A. Lawson at said time, who were likewise heirs and devisees in the same character as aforesaid averred, were her four sisters, Charlotte M. Flood, Irene E. Cochran, Myrtle T. Caldwell, and Elinor Burns." That the interests of Irene E. Cochran and Myrtle T. Caldwell were likewise mortgaged to secure indebtednesses owing by them to sundry persons. "That it became necessary, before the estate above referred to could be closed, that an additional sum of money be borrowed for the purpose of paying debts and claims against each of said decedents, as well as the expenses of administration, and therefore, on or about the 9th day of November, 1914, it was agreed among the said five heirs at law and devisees that a corporation should be formed, to be known as Ferguson Burns Estate, Incorporated, to which corporation all of the respective interests of the said persons named be transferred, and that the said corporation in consideration of such transfer should borrow a sufficient sum of money to pay the existing claims against each of said decedents, as well as the expenses of administration remaining unpaid, and also the indebtednesses of said Dorothy A. Lawson, Irene E. Cochran, and Myrtle T. Caldwell, and thereupon 30,000 shares of stock should be issued to each one of the incorporators," and that each of the last three named would then be indebted to said corporation for the sum of money owing by her and mortgaged upon her interest, and that she should pledge her stock to the corporation as security therefor. That said agreement was carried into effect, and in August, 1915, said corporation, having borrowed money, paid the indebtedness owing by each of said three persons. That, pursuant to said agreement, said Dorothy A. Law-

son pledged her 30,000 shares of stock, represented by certificate No. 2, to the corporation to secure her indebtedness so paid off and discharged by the corporation. "The issuance of said stock to the said Dorothy A. Lawson, and the pledge thereof to the said corporation, and the agreement to pay her said indebtedness, and the transfer of her interest in said estates to defendant was a simultaneous transaction; but the said Dorothy A. Lawson never had the possession or control of the said 30,000 shares of stock, or any part thereof, or said certificate No. 2, or any other certificate, and the same was never issued to her, except as herein found."

Finding III was that the capital stock of defendant consisted of 150,000 shares, of the par value of $1 each, all of which were issued on November 14, 1914.

"(IV) On the 20th day of October, 1915, the said Dorothy A. Lawson was in default in the payment of her obligation to the said corporation, and on the 20th day of October, 1915, the corporation served upon the said Dorothy A. Lawson a demand for the performance of said obligation," which she refused and neglected to pay, and on said 20th day of October the defendant gave notice of the time and place of the sale of said 30,000 shares of stock, which was posted in three public places and personally served upon said Dorothy A. Lawson. That on the 29th day of October, 1915, at the time and place named, said shares of stock were sold at public auction to Irene E. Cochran, Myrtle T. Caldwell, and Elinor Burns for the sum of $7,067.71, "the same being the amount of the pledge indebtedness then owing from said Dorothy A. Lawson to the said corporation, and they being the highest and best bidders therefor," whereupon said certificate No. 2 was canceled, and a new certificate, numbered 6, was issued to the purchasers, who since said 29th day of October, 1915, have been the owners of said shares, and who immediately pledged the new certificate to the corporation to secure the existing indebtedness of said three purchasers to the corporation.

In finding V it was found that "plaintiff never has had, and does not now have, any right, title, interest, lien, or claim therein of any kind whatsoever."

Finding VI: "That at the time of the levy of the writ of execution referred to in the complaint, and at the time of the alleged sale under said writ, plaintiff knew that certificate No. 2 for 30,000 shares of stock was held by defendant corporation as a pledge, and had knowledge of the sale of said stock by the corporation to Irene E. Cochran, Myrtle T. Caldwell, and Elinor Burns. That on November 19, 1915, plaintiff knew that certificate No. 2 had been canceled and a new certificate issued in lieu thereof to the three parties last above named."

Finding VII: "That the said stock, or any stock, or the right, title, and interest of Dorothy A Lawson therein, was never levied upon or attached," as alleged in the complaint, "and no lien of any kind in favor of the said plaintiff, or in favor of the sheriff of the county of Sacramento, attached to the said, or any, shares of stock of Dorothy A. Lawson, or any of her right, title, and interest in and to the same."

As shown above, the court found that the attempted levy by appellant was ineffectual and invalid; but we may forego a consideration of that question since it is admitted in the opening brief that, if there was a pledge of said stock to said corporation, as found by the court, the judgment must be affirmed. Furthermore, it is conceded that the validity and sufficiency of the pledge must be determined by the answer to the question whether the promise by the corporation to pay the debts of Dorothy A. Lawson was absolute or conditional; in other words, whether it created an obligation or expressed a mere option. We may quote from appellant's brief as follows:

"The question then arises: When did defendant's alleged pledge lien attach, on November 11, 1914, or on August 25, 1915, when the money was paid? If the former, it was a superior lien to plaintiff's. If the latter it was a lien subsequent to that of plaintiff. * * * The pledge must rest, if at all, upon the proposition that on November 11, 1914, the corporation entered into an obligatory contract with Dorothy to make future advances on her behalf. * * * The understanding with Dorothy, as testified to by defendant's witnesses, was nothing more nor less than that the corporation would some time in the future, when it was able to make a loan and if it was able to make a loan, pay these debts of Dorothy. At no time between November 11, 1914, and August 25, 1915, was Dorothy in a position to compel defendant to pay her debts. In other words, she had nothing but a conditional understanding with defendant corporation, which they were not obliged to carry out, unless they saw fit to do so. The agreement, then, between Dorothy and the corporation, was merely an optional agreement for future advances."

[1, 2] If it was a mere optional agreement, as claimed by appellant, then the conclusion would follow, of course, that it could not operate to defeat a valid lien created by the levy of an execution made before the option was exercised. The authorities upon this point are cited by appellant, but the legal principle is not controverted by respondent. The trouble is, though, that in the testimony of the two distinguished members of the bar, who were witnesses for defendant, is found support for the theory that the corporation, at the time of the creation of the pledge, obligated itself to make such future advances; and the finding, based upon such testimony, cannot and should not be set aside by this court. It may be admitted that certain expressions may be found therein, which, apart from the context, lend some color to appellant's contention; but a fair consideration of the whole of the testimony leads to the conviction that the deduction therefrom made in the court below is not irrational.

Herein we may call attention to a portion of the testimony of Mr. Butler. After detail-

ing a proposed arrangement for an adjustment of the financial affairs of the two estates, in which the incorporators were the devisees and legatees, and which scheme, after further consideration, was abandoned as impracticable, the witness said:

"The plan of operation was practically reversed. Instead of the corporation giving notes to those that had not borrowed upon their equities, those that had borrowed were to have their debts paid by the corporation, and were to reimburse—to make the corporation secure by giving the corporation notes for the amounts and by pledging their stock. Dorothy Lawson was to give a note to the corporation. * * * She was to give the corporation her note for $6,600. This amount was pledged by her stock for the amount. The other girls were to do likewise—one note for $3,000, and one for $2,300. That was the final plan. That was agreed to by everybody, and that was the plan that was ultimately carried out."

He admitted afterward that he might be mistaken as to the note having been given by Dorothy Lawson, but he reiterated that "it was agreed that the corporation should pay off the personal indebtedness of Dorothy A. Lawson, and she should give the corporation a note for the amount so paid, or to be paid, as secured by her stock in the corporation," and, furthermore, in the redirect examination this appears:

"Q. You remember, when the deeds were accepted, that the corporation agreed to advance this money that the girls owed to the bank, as part of the consideration? A. Yes, absolutely; that was the understanding. Q. Don't you remember, also, that the stock was to be pledged to secure the repayment? A. Absolutely correct. Q. Don't you also remember the girls were clamoring for some ready money? A. I should say they were. Q. It was agreed that the corporation would try to borrow and give them a thousand dollars apiece? A. Yes, sir."

In the recross-examination he also testified as follows:

"Q. How long subsequent to the incorporation was the agreement under which the corporation was to pay the indebtedness of Dorothy A. Lawson made—was that at the same time, or after the corporation was incorporated? A. I would not say how long afterwards. It was practically a simultaneous act. Q. Mr. Devlin testified it was after the incorporation was carried out? A. Yes. Q. Incorporated November 10th, and this occurred on the 11th? A. Yes; I think that is correct."

From the foregoing it is a fair inference that the corporation assumed the obligation to pay said indebtedness in consideration of said conveyance of said pledge and of the promise on the part of Dorothy Lawson to reimburse the corporation. The only optional part of the corporation's engagement related to the sum of $1,000 that was needed for pressing necessities. Mr. Devlin, it may be added, testified positively to the pledging of the stock, and as to the action of the corporation. This appears in his testimony:

"Q. Was there any resolution of the corporation authorizing and empowering the corporation to pay those indebtednesses off and take this stock as security? A. There was an oral resolution—the minutes were not written up; too many lawyers in it, I guess. Q. Was there any resolution ever entered in the books or records of the corporation? A. No; never entered in the books. There was one passed that day. * * * Q. The point is that there was no formal resolution ever passed? A. Yes; there was a formal resolution passed."

He proceeded to explain why the minutes were not written up, but that is immaterial here.

[3] It is to be regretted, of course, that a more formal memorial of the proceedings was not preserved, but a record of the corporate acts and resolutions is not essential to their validity. Citizens' Securities Co. v. Hammel, 14 Cal. App. 564, 112 Pac. 731; Boggs v. Lakeport A. P. Ass'n, 111 Cal. 354, 43 Pac. 1106.

[4] We have no reason to question the good faith of the parties to the transaction or the entire ingenuousness of said testimony; and we think it cannot be doubted that the court below was legally justified in finding that the pledge was made, and that the corporation obligated itself to pay said indebtedness. Since the obligation was incurred before appellant's lien was perfected, the advances might be made thereafter, and yet relate to the prior date of the agreement, and thus be effective and take precedence over appellant's lien.

The judgment is affirmed.

We concur: NICOL, Presiding Judge pro tem.; HART, J.

48 Cal. App. 418

VALINE v. VALINE et al.

(District Court of Appeal, Third District, California. July 3, 1920.)

1. Appeal and error ⊜624—Ex parte order extending time for transcript not valid.

If Code Civ. Proc. § 473, permitting the court, after notice to the adverse party, and on such terms as are just, to extend the time for certain acts, is applicable to the filing of the transcript for appeal, it does not make effective an ex parte order by the trial court, extending the time for filing such transcript.

2. Appeal and error ⊜607(1)—Giving of notice to clerk within prescribed time is mandatory.

Under Code Civ. Proc. § 953a, the giving of notice to the clerk of the trial court by party intending to appeal within the prescribed time is mandatory, though the provisions fixing the time for preparation of the transcript by the

clerk and stenographer are directory merely, since they are not under the control of the party.

3. Appeal and error ⟸627(2)—Dismissal for delay in filing transcript.

Where the time within which a transcript on appeal could be filed either by the old or alternative method had expired before the motion to dismiss the appeal was made, and also the time for filing a printed copy of the judgment roll in the cause, and no application for default had been made, as required by Code Civ. Proc. § 473, the appeal will be dismissed.

Appeal from Superior Court, Sacramento County; Chas. O. Busick, Judge.

Action of claim and delivery by Joe C. Valine against Rosa Valine and others. Judgment for plaintiff, and defendants appeal. Appeal dismissed.

H. T. Hiatt, of Sacramento, for appellants.
Driver & Driver, of Sacramento, and G. W. Bedeau, of Marysville, for respondent.

PLUMMER, Presiding Judge pro tem. Motion to dismiss appeal. Plaintiff and respondent obtained judgment against the defendants in the superior court of Sacramento county for the sum of $1,250, or the restitution of a certain automobile, and also for the further sum of $62.40 damages and costs of suit. This judgment was entered on the 15th day of January, 1920. On January 29, 1920, defendants gave notice of motion to move for a new trial. On March 1, 1920, the court denied the defendants' motion. On March 3, 1920, the plaintiff served upon the defendants a notice of the order of the court overruling their motion for new trial, as above stated. On March 13, 1920, the defendants, Rosa Valine, Manuel Fernandez, and John Fernandez, filed in the superior court their notice of appeal. On March 16, 1920, said named defendants filed with the clerk of the superior court of Sacramento county a notice to prepare a transcript on appeal in this action, the same to be prepared under section 953a of the Code of Civil Procedure. On the same day the defendants filed with the clerk an undertaking to pay the costs of the preparation of the transcript, and also filed an undertaking to stay execution. No further action appears to have been taken toward the preparation of the transcript, but the records certified to by the clerk of said superior court to this court show that on the 8th day of April, 1920, an affidavit was filed by the attorney of record for the defendants, in which it is stated that the notice to the clerk was not filed within the 10 days prescribed by the statute; that the reason therefor was that the attorney was awaiting the return of one of the persons who subsequently signed the undertaking delivered to the clerk to cover the costs of preparing the transcript. Upon this affidavit the judge of the trial court made the following order:

"Good cause appearing therefor, it is hereby ordered, adjudged, and decreed that the clerk of the above-entitled court prepare a transcript on appeal as requested by said defendants. Done in open court this 8th day of April, 1920."

[1] No transcript on appeal has been prepared in pursuance of said notice, nor any of the other provisions of the Code relating to the old method. The time for preparing and filing a transcript under the old method had expired at the time of the hearing of the motion to dismiss, and the excuse offered for not having a transcript prepared under the provisions of section 953a of the Code of Civil Procedure is that the stenographer who took the testimony in the case was no longer an official stenographer of the court, and had been busy in other matters. No effort appears to have been made to obtain any orders extending time within which to prepare the transcript, reliance being placed upon the order of the trial court herein set forth as being a release from default in the premises under the provisions of section 473, Code of Civil Procedure. This order, however, was made without notice, appears to have been ex parte, and, if section 473, Code of Civil Procedure, applies to such cases, which it is not necessary for us to decide, it can have no application to this case, because the procedure followed herein bears no semblance to the requirements of that section.

[2] On behalf of the respondent it is urged that the provisions of section 953a, Code of Civil Procedure, as to giving of notice to the clerk by the party intending to appeal, is mandatory. On behalf of the appellants herein it is insisted that all of the provisions of said section are merely directory.

The first case relied upon by the appellant is that of Smith v. Jaccard, 20 Cal. App. 280, 128 Pac. 1023, 1026. This case was referred to and affirmed by the case of Fisher v. Oliver, 174 Cal. 782, 164 Pac. 800. An examination of these two cases reveals the fact that the point at issue before the court was not involved in either one of those actions. Delays in the preparation of the transcript were there involved. The court in both cases was dealing with the failure of officials to comply with the Code provisions relative to preparing the transcript within a certain period of time after the appellant had given his notice. The language used in section 953a, Code of Civil Procedure, in speaking of what an appellant must do, and what the clerk and stenographer shall thereafter do, reads differently. That section says that, an appellant having appealed, or intending to appeal, must, within 10 days after notice of the decision, etc., file his notice with the clerk, then, after receiving said notice, it shall be the duty of the court to require the

stenographic reporter to transcribe the phonographic report of the trial, and that the stenographic reporter shall, within 20 days after said notice has been filed with the clerk, prepare a transcript, etc. The Code provision prescribes what an appellant must do, and then follows this requirement by a statement of the duty of the court and of the stenographic reporter. The two cases above stated deal only with the official duties prescribed by the statute, over which an appellant has no personal control, but must seek relief through the courts if the prescribed official duties are not being performed, which, of course, necessitates the ruling that such provisions of the section are directory, otherwise an appellant would often be denied a hearing upon his appeal through no fault or laches of his own. But the first requirement of the Code relates to his own act, is something over which he has exclusive control, is mandatory in form, and if any rights are lost by not giving notice, it is the fault of the appellant alone.

In Des Granges v. Des Granges, 175 Cal. 67, 165 Pac. 13, where a notice was not given by the appellant as required by the Code, and the trial court held this provision of the Code directory and not mandatory, the Supreme Court, in holding that the transcript prepared without giving such notice as required by the statute could not be considered, used the following language:

"This holding [meaning the holding of the trial court that the provision requiring the giving of notice was directory and not mandatory] is clearly erroneous. It finds no support in the decisions of this court, and is in no wise justified by the scheme embodied in the alternative method of appeal. On the contrary, the application of such reasoning to the facts of this case practically nullifies the clear provisions of the Code relating thereto. The obvious conclusion is therefore that, by failing to give the notice within the time fixed by law, the plaintiff lost her right to proceed with the preparation of the transcript of the evidence on appeal in the manner provided by the section."

To the same effect is the holding of the court in the case of Fiske v. Gosbey, 168 Cal. 334, 143 Pac. 611.

In the Matter of the Estate of Keating, 158 Cal. 109, 110 Pac. 109, the court holds, in effect, as decided in the later cases, though in the Keating Case it does not appear that any notice whatever was given. The Keating Case, however, does hold that if relief from such default can be given, the requirements of section 473, Code of Civil Procedure, must be complied with, and that the relief must be sought in the trial court.

The notice of appeal, as required by section 940, Code of Civil Procedure, the notice to the clerk, as required by section 953a, Code of Civil Procedure, and the requirements of what the court and the stenographic reporter shall thereafter do, are three separate and distinct matters. Confusion appears to have arisen in the holding of some of the cases by not keeping in mind such distinction, and where such distinction is made, as appears by the decision in the Des Granges Case, the requirement that appellant must give notice within the required number of days specified in the Code is held mandatory.

[3] The time having expired when a transcript on appeal can be prepared and filed with this court either by the old or the alternative method, the time also having expired when a printed copy of the judgment roll in this cause could be filed, and no application for default having been made as required by section 473, Code of Civil Procedure, if that section can be held applicable, there remains nothing for this court to do but to dismiss the appeal, and it is so ordered.

We concur: BURNETT, J.; HART, J.

48 Cal. App. 463

Ex parte STONE. (Cr. 722.)

(District Court of Appeal, Second District, Division 2, California. July 9, 1920.)

1. Municipal corporations ⇐178 — Licensing elevator operator is not regulating "use and operation" of appliances in building.

An ordinance, requiring operators of elevators to procure a license from the board of mechanical engineers, does not conflict with a provision of the charter giving the board of public works charge of ordinances regulating the use and operation of mechanical appliances in buildings, since the licensing of operators is not a regulation of the use and operation.

2. Carriers ⇐8—Elevator operators may be licensed.

An elevator is a dangerous instrumentality unless properly managed, and it is within the power of the city council to safeguard the public against injury resulting from the incompetency of elevator operators by requiring the licensing of such operators.

3. Municipal corporations ⇐213—Council held to have power to appoint mechanical engineers.

Los Angeles Charter, § 6, empowering the mayor to appoint the officers mentioned in the charter, does not deprive the council of the power to appoint the board of mechanical engineers, which board was created under the authority of section 2, subd. 23, empowering the city to provide for the election or appointment of officers other than those designated in the charter.

4. Municipal corporations ⊂131—Charter provisions in derogation of powers of council strictly construed.

Under Los Angeles Charter, § 12, which vests all legislative power in the council, and the general rule that the power of appointment may be exercised by the legislative body in the absence of a provision to the contrary, the power of the council to appoint officers should not be restricted by inference, but a provision, claimed to have such effect, must be construed strictly according to its express terms.

Application by Charles L. Stone for a writ of habeas corpus to secure his release from custody after conviction of violation of a city ordinance. Writ discharged, and petitioner remanded to custody.

James E. Degnan and Lawler & Degnan, all of Los Angeles, for petitioner.

Emmet H. Wilson, Erwin W. Widney, City Prosecutor, and J. D. Taggart, Deputy City Prosecutor, all of Los Angeles, for respondent.

WELLER, J. Petitioner was charged with operating an elevator without a license, in violation of an ordinance of the city of Los Angeles. He now seeks to be discharged from imprisonment following conviction and sentence, claiming the ordinance to be void.

The ordinance in question provides for the creation of a board of mechanical engineers, to be appointed by the city council, and prescribes, among other things, that it shall be unlawful for any person to operate an elevator without first obtaining a license from such board. It is contended that the ordinance is void, because (1) the powers of the board of mechanical engineers, as set forth in the ordinance, encroach upon the duties of the board of public works, as fixed by the charter; and (2) the ordinance provides for the appointment of the board of mechanical engineers by the city council instead of by the mayor.

[1] 1. Section 147 of the charter is as follows:

"The board of public works shall have charge of the enforcement of all ordinances relating to the construction, alteration, repair, demolition or removal of buildings and structures in the city; and of the arrangement, alteration and repair, use and operation of all heating, plumbing, lighting, ventilating and electrical and mechanical appliances therein."

Counsel concedes in his argument that it is within the powers of the municipality to require that an elevator operator should be subjected to tests to ascertain his proficiency, and should procure a license to pursue his calling. But, petitioner argues, the expression "use and operation" includes the human as well as the mechanical agency by means of which the use and operation is accomplished, and that, under the provisions of the charter above quoted, the jurisdiction to examine and license operators should therefore be vested in the board of public works. Admitting that the operator while engaged in the performance of his duties should be held to be within the purview of the charter, it does not follow that the legislative body of the city may not prescribe the conditions under which he may be eligible to employment in that capacity.

[2] An elevator is a dangerous instrumentality, unless properly managed; and it is within the province of the council to safeguard the public against injury resulting from the incompetency of those who are to be intrusted with the operation of elevators. To that end it may impose reasonable restrictions upon the right to enter that employment, by requiring a person seeking to engage therein to procure a certificate that he is skilled in that class of work. Such a limitation does not relate to the "use and operation" of the appliance, but is in the nature of a condition precedent to such use and operation.

The charter provides (section 41) that the mayor shall be "vigilant and active in the enforcement of the ordinances of the city," and (section 50) that he shall appoint the city prosecutor, who shall be qualified to practice in all the courts of the state. It could not be successfully contended that the court which admitted the city prosecutor to the bar was invading the jurisdiction of the mayor, or that the mayor should be vested with the power to admit him, in order to qualify him for the appointment.

We therefore conclude that the ordinance, in so far as it provides for the licensing of elevator operators by the board of mechanical engineers, is not in conflict with the charter provision regarding the duties of the board of public works.

2. In support of his contention that the power of appointment of the board of mechanical engineers, should be lodged in the mayor instead of in the council, as provided by the ordinance, petitioner compares some of the old provisions of the charter with the amendments. He attempts to show that by such amendments all appointive power was vested in the mayor, and, by implication, taken away from the council. It is true that some of the officers of the city who were formerly appointed by the council were, by amendments, placed within the jurisdiction of the mayor. The question then arises, Do such amendments indicate an intention on the part of the electorate of the city to remove all power of appointment from the council?

[3] Section 2, subdivision 23, of the charter, in enumerating the powers of the city, provides:

"The city of Los Angeles, in addition to any other powers now held by, or that may hereafter be granted to it under the Constitution or laws of the state, shall have the right and power: * * * To provide for the election or appointment of officers other than those designated in this charter, whenever the public necessity or convenience may require, and prescribe their duties and fix their compensation; provided, that such duties shall not include any of the duties of any officer designated in this charter, or of his deputies or assistants."

Section 6 reads as follows:

"The Mayor shall appoint a Clerk of the Mayor, the Chief of Police, the chief engineer of the Fire Department, and the Health Commissioner. He shall also appoint, subject to confirmation by a majority of the council, the officers of the municipality mentioned in this charter whose appointments are not otherwise specifically provided for herein."

Petitioner argues that by the use of the words "mentioned in this charter" the framers of the charter meant to include, not only those officers designated by title, but also such as might be created under the grant of power contained in subdivision 23 of section 2; and that if it had not been intended to include subsequently created offices, the section should have provided for the appointment by the mayor of the officers named in the article of which section 6 is a part, and thus limit the appointive power of the mayor to the officers specifically named in that article. We do not attach so much significance to the changes in the method of appointment made by the amendments. It could as logically be construed that the provisions of the charter were meant to limit the appointive powers of the mayor by specific mention of those subject to appointment by him. The general clause was obviously intended to cover cases where by inadvertence the manner of appointment was omitted, and thus to complete the scheme of filling the places created by the charter. Several of the officers mentioned in article 2 are by the provisions of subsequent articles to be appointed by other officers or boards, thus demonstrating that it was not the purpose to cast upon the mayor the sole responsibility for the personnel of the officials of the city government.

[4] It is conceded by counsel that the power of appointment may be exercised by the legislative body in the absence of provision to the contrary, but it is claimed that the amendments which took away from the council some of the powers theretofore possessed repel the presumption of any implied power in that respect. We are not in accord with this conclusion. By the terms of the charter, all legislative power is vested in the council (section 12), and any intention to abridge that power must be made manifest by express provision to that effect. The power of the council to provide for the appointment of officers is not presumptive or implied, but is derived from the organic law which created the council and defines its authority. No inference of an intent to restrict its power generally is to be drawn from an amendment to the charter which limits its authority in a particular case. Such a provision, being in derogation of its inherent powers, is to be construed strictly according to its expressed terms, and should not be extended by implication beyond its immediate effect.

We are of the opinion that the method of appointment provided by the ordinance does not violate the charter or invade the jurisdiction of the mayor, and that therefore the board of mechanical engineers is a legally constituted body.

Writ discharged and petitioner remanded.

We concur: FINLAYSON, P. J.; THOMAS, J.

48 Cal. App. 283

BAKER v. WESTERN AUTO STAGE CO.
(Civ. 3206.)

(District Court of Appeal, Second District, Division 2, California. June 22, 1920.)

1. Evidence ⇐123(11)—Appeal and error ⇐1050(1)—A bus driver's statements immediately after collision with an automobile held not res gestæ, but harmless.

In a passenger's action against an auto stage company for injuries from an automobile collision on a public road, testimony of declarations by defendant's driver immediately after the accident were no part of the res gestæ and incompetent, but could not have caused a miscarriage of justice where driver, as witness, repeated statement as to speed and his other objectionable declarations could not have injured defendant's case.

2. Carriers ⇐300—Bus owner liable for injury to passenger in collision for not giving right of way to automobile entering street from right.

Where an auto bus was traveling at a high rate of speed on reaching a street on which an automobile was approaching from his right, the automobile had the right of way, and failure to have the bus under such control as to let the automobile pass in front of it was negligence, rendering the defendant bus owner liable to a passenger for injury from the collision.

3. Appeal and error ⇐1008(1)—Negligence in operation of bus held a question of fact for trial court.

In a passenger's action against an auto bus company for injuries resulting from a collision, it was for the trial court to say from all of the evidence under the circumstances whether defendant was or was not negligent in the operation of its bus.

4. Damages ⟸134(1) — $1,000 not excessive for injuries to able-bodied man whose earnings for seven months were lost.

Where plaintiff had a hospital bill of $55, suffered much pain up to time of trial, was incapacitated for labor, had been prior to the accident, a strong, able-bodied man, earning $4 a day as a carpenter, and during the seven months intermediate the accident and the trial was unable to earn more than $57, an award of $1,000 damages was not excessive.

5. Carriers ⟸322 — Finding of negligence without finding as to negligence of driver of vehicle with which bus collided held sufficient.

Where a passenger's complaint against his carrier alleged carelessness, recklessness, and negligence on the part of defendant's auto bus driver causing collision with another automobile, a finding of negligence following substantially the allegation of the complaint was sufficient without a specific finding that the driver of the other automobile, not mentioned in the pleadings, was negligent, though, if he was, it would be probable that the defendant was not.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by O. H. Baker against the Western Auto Stage Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Duke Stone, of Los Angeles, for appellant.

Richard A. Dunnigan, of Los Angeles, for respondent.

FINLAYSON, P. J. In this action for personal injuries, sustained in an automobile accident while a passenger on one of defendant's auto busses, plaintiff recovered judgment for $1,000, from which defendant appeals.

Defendant, a common carrier of passengers, runs auto stages or busses between Los Angeles and Bakersfield. Plaintiff was injured in a collision between one of defendant's auto busses and another automobile, a Buick, owned and driven by a man of the name of Maxwell. At the time of the collision, defendant's bus, on which plaintiff was a passenger, was travelling from Los Angeles to Bakersfield. The collision occurred in Los Angeles county, at the intersection of Glendale street and San Fernando road. Glendale street enters, but does not cross, San Fernando road. Plaintiff alleged, and the court found, that the collision was the result of the negligent driving of the auto bus by defendant's employé, William Dukelow. Immediately before the accident, Dukelow, driving defendant's auto stage, was traveling northwesterly along San Fernando road. He approached the place where that road is entered by Glendale street from his right. Maxwell, operating his Buick car, and traveling southeasterly on Glendale street, was approaching the point where defendant's auto bus would pass the intersection. Dukelow, travelling at a rate of 35 miles an hour, according to one of plaintiff's witnesses, turned his machine toward the left-hand side of the road upon which he was traveling, for the purpose of avoiding a collision with the Buick. Maxwell's car struck the stage, with the result that the stage was turned over and plaintiff thrown under and injured. One of plaintiff's witnesses, who was riding on the front seat with the driver of defendant's stage, testified that Maxwell's car came into sight when the stage was about 75 feet from the intersection. Maxwell testified, in substance, that, as he reached the place where Glendale street enters San Fernando road, he looked to his left and saw defendant's auto stage approaching at a distance of about 150 or 160 feet; that, intending to turn into San Fernando road in the direction from which the stage was coming, he proceeded across the center line of that road, at a moderate rate of speed—between 8 and 10 miles an hour—for the purpose of making the turn; that defendant's auto stage, traveling along San Fernando road, swerved to the left, and the collision occurred. Dukelow, on the other hand, testified that before reaching the point of the accident he had been traveling at a speed of about 25 to 30 miles an hour, and that, as he approached the corner where the two roads meet, he began to slow down, and when about 20 feet from the nearest curb on Glendale street he saw Maxwell's automobile; that, believing there was ample room for him to pass, he bore to the left-hand side of San Fernando road in order to allow Maxwell's car to pass; that Maxwell appeared to slow down at first, but that his automobile suddenly shot forward as the stage was passing, and struck the latter; that it appeared to him that Maxwell was an incompetent driver; and that, instead of putting on the brakes of his machine, as he evidently intended to do, he had pressed the foot throttle, with the result that Maxwell's machine darted forward and thus caused the collision.

This case and another brought by Maxwell against this defendant and Dukelow were tried together in the court below; it being there stipulated that testimony taken in the one case should be deemed evidence in the other. During the trial a witness called by Maxwell testified that, coming upon the scene shortly after the accident, he questioned the driver of defendant's auto bus, Dukelow, who, in reply, stated that he was traveling about 25 miles an hour, and later that he was not going over 20 miles an hour. In this same conversation Dukelow, when asked why he did not use the emergency brake, replied that he did not because it would have been dangerous to use it; that

he could lock his wheels with his foot brake as effectively as he could with his emergency brake, without so much danger of overturning the stage. To this testimony counsel for the defendant here objected upon the ground that, as against it, evidence of Dukelow's declarations after the accident was incompetent and inadmissible.

This brief sketch of the evidence will suffice for an understanding of the questions presented by this appeal. The grounds urged for reversal are: (1) That the court erred in admitting in evidence the declarations made by Dukelow shortly after the accident; (2) that the evidence fails to show any negligence on the part of defendant; (3) that the damages awarded to plaintiff, $1,000, are excessive; and (4) that the trial court failed to find that the accident was not due to negligence on the part of Maxwell, the driver of the Buick.

[1] Testimony as to the declarations made by the driver of defendant's auto bus immediately after the accident was doubtless incompetent as against this defendant. They were no part of the res gestæ. But the error could not possibly have been the cause of a miscarriage of justice. There was nothing in Dukelow's declarations as to the speed at which he was driving defendant's auto bus that differed materially from his own testimony. He himself, when a witness in the case, testified that he was traveling along San Fernando road at a rate of 25 or 30 miles an hour, and that, as he approached the intersection, he slowed down to approximately 20 miles an hour. So far, therefore, as Dukelow's declaration related to the speed of appellant's auto bus, it accords substantially with his own testimony given as a witness in the case. As to the remaining part of the objectionable declaration, that wherein Dukelow told the witness that he did not use the emergency brake because it was less dangerous to use the foot brake, no possible injury to appellant's case could be caused thereby. Moreover, when the evidence of Dukelow's declarations was offered, counsel for the Western Auto Stage Company, the appellant here, made a statement in reply to a remark by counsel for Baker, the respondent on this appeal, that may well have led the latter to believe that, as to his client, the objection to the evidence of Dukelow's declarations was not urged. The statement made by appellant's counsel was ambiguous, and doubtless he did not intend that it should have the meaning that respondent's counsel evidently gave it. But it was sufficient to justify the latter in inferring that the objection to evidence of Dukelow's declarations was not to apply to his client.

[2, 3] The finding as to defendant's negligence is sustained by the evidence. As Dukelow, driving defendant's auto bus, approached the intersection, traveling at a high rate of speed, according to plaintiff's witnesses, the Buick, driven by Maxwell, was on Dukelow's right-hand side. The Buick was approaching the intersection at the right of defendant's stage, its driver, Maxwell, intending to make the turn. The Buick, therefore, had the right of way—that is, the right to cross in advance of the stage—and should have been allowed by the driver of the latter sufficient time to make the crossing. Had the stage been under such control as to enable its driver to bring it to a stop before crossing Glendale street, the collision doubtless would not have occurred. There was a hedge at the first right-hand corner which the stage was approaching. The driver admitted that this obscured his vision of any vehicle that might be coming from that direction. He testified that he was within 20 feet of the first curb line when he first saw Maxwell's automobile. From all the evidence, it was for the trial court to say whether, under the circumstances, defendant was or was not negligent in the operation of its auto bus. No such clear case is presented by the record as to make it appear as a matter of law that there was negligence or the lack of it on the part of defendant's driver.

[4] As a result of his injuries, plaintiff was confined to his bed for the greater part of 3 months; he had to remain in a hospital for 12 days after the accident; his hospital bill alone amounted to $55; he suffered considerable pain, even up to the time of the trial; as a result of his injuries he was partially incapacitated for labor; prior to the accident he had been a strong, able-bodied man, earning in his trade, that of builder and carpenter $4 a day; during all of the seven months intermediate the accident and the trial, and by reason of his incapacity, due to his injuries, he was unable to earn more than $57. In view of these facts, and considering plaintiff's age, we cannot hold that the damages awarded by the trial court, $1,000, were excessive. The law governing the question of excessive damages has thus been expressed in Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 47 Pac. 1019, approved in Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 Pac. 513, and Smith v. Royer (Sup.) 183 Pac. 660:

"It is only where the verdict is so grossly disproportionate to any reasonable limit of compensation, warranted by the facts, as to shock the sense of justice and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment, that the judge is at liberty to interpose his judgment as against that of the jury."

While this rule was stated with relation to the verdict of a jury, it applies equally to the findings of a trial court when considered on appeal. We cannot say that the judg-

ment herein is "so grossly disproportionate to any reasonable limit of compensation, warranted by the facts, as to shock the sense of justice."

[5] There is no merit in the claim that the court erred in failing to make a specific finding as to whether Maxwell was or was not negligent in driving his machine. The averment of negligence in the complaint is this:

"That, * * * through the carelessness, recklessness and negligence" of the driver of defendant's auto bus, the bus "was caused to collide with and against another auto which was then and there being driven in a southerly direction on said Glendale street; * * * that by reason thereof the said bus * * * was caused to turn over * * * and plaintiff * * * was thrown under * * * and * * * thereby * * * injured."

Thus was the issue respecting defendant's negligence presented by plaintiff in his pleading. The finding upon the issue of negligence follows substantially the allegation of the complaint. No more was necessary. Though it is quite possible that, if Maxwell was negligent, defendant was not, it was not for that reason necessary to find specifically that Maxwell was not negligent in order to justify a judgment against the defendant here. The complaint presents no direct issue respecting carefulness or negligence on Maxwell's part. He is not mentioned in the pleadings. The finding of defendant's negligence substantially in the language of the complaint, and that plaintiff's injuries were proximately caused thereby, was all that was necessary.

We find no reversible error in the record. Judgment affirmed.

We concur: THOMAS, J.; WELLER, J.

48 Cal. App. 483

LEFEBVRE v. LEFEBVRE. (Civ. 2192.)

(District Court of Appeal, Third District, California. July 10, 1920.)

1. Divorce ⟹303(1)—Decree can be modified from time to time as to custody of children.

Under Civ. Code, § 138, decree of divorce can be modified from time to time as to custody of children as circumstances change.

2. Divorce ⟹298(1)—Welfare of child consideration in directing custody.

In directing custody of the child of divorced parties, the controlling and paramount consideration is the child's welfare, to be decided from all the facts of which the court has obtained knowledge in a competent manner.

3. Divorce ⟹303(1), 312—Modification of decree as to child's custody addressed to court's discretion.

Application for modification of divorce decree as to custody of child is addressed to the trial court's sound and legal discretion, and its award, though to the guilty party, will not be disturbed unless a clear abuse of its discretion appears.

4. Divorce ⟹312—Award of custody having support in evidence not disturbed.

The determination of the trial court as to custody of the child of the divorced parties cannot be disturbed on appeal, there being in the record substantial evidence, not appearing incredible, to support a rational inference that it was for the child's best interests, and nothing to impeach the fairness or good faith of the decision.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Divorce suit by Arvine Lefebvre against Henri C. Lefebvre. From order modifying the decree as to custody of the child, plaintiff appeals. Affirmed.

Meredith, Landis & Chester, of Sacramento, for appellant.

Otis & French, of Sacramento, for respondent.

BURNETT, J. On May 26, 1916, plaintiff obtained an interlocutory decree of divorce against the defendant on the ground of cruelty, and she was awarded the custody and control of Leon Lefebvre, who is now the age of six, except that the grandparents of said child and the defendant were to have his custody for a certain portion of the time. Thereafter a final decree was rendered, and subsequent thereto both appellant and respondent remarried. Appellant is living with her second husband, G. F. Schmidt, and respondent is living with his second wife. Appellant has a child by her second husband, but respondent has no other than the said Leon.

On the 20th day of August, 1919, respondent filed a petition in the superior court of Sacramento county, praying for a modification of the final decree to the extent that defendant be awarded the custody of said minor child, supported by certain affidavits filed therewith. Subsequently appellant filed counter affidavits, denying most of the allegations set forth in defendant's affidavits. Thereafter the application came on for hearing, and was submitted upon said affidavits and also the testimony of various witnesses. After consideration of said matter, the court modified its decree by making the following order:

"It is further ordered that the care, custody, and control of the minor child of said parties, to wit, Leon Lefebvre, be and the same is hereby given to Henri C. Lefebvre, the father of said Leon Lefebvre, except that plaintiff shall have the right to be with said child and take said child out one day of each week between the hours of 8:30 a. m. and 6:30 p. m.,

at which hour said child shall be returned to said defendant."

From this order modifying the final decree of divorce the appeal has been taken, and appellant urges two grounds for the reversal of the order as follows:

"That the court erred and overstepped its discretionary powers in taking the care and custody of the minor child of tender years from the mother without first requiring some evidence, however slight, of the moral or mental unfitness of the mother; that the court erred in refusing to admit evidence as to the qualifications and personal fitness of the defendant."

[1-3] As to the principles of law applicable to the situation, there is no controversy between the parties. It is sufficient to cite them as follows:

The court has the power to vary and modify its decree as to the custody of the minor children from time to time as circumstances change. Section 138, Civ. Code; Simmons v. Simmons, 22 Cal. App. 448, 134 Pac. 791; Crater v. Crater, 135 Cal. 633, 67 Pac. 1049. The controlling and paramount consideration in directing its custody is the welfare of the child, and this the court must decide from all the facts of which it has obtained knowledge in a competent manner. Miller v. Higgins, 14 Cal. App. 156, 111 Pac. 403; Beyerle v. Beyerle, 155 Cal. 266, 100 Pac. 702. All such applications are addressed to the sound and legal discretion of the trial court, and although it may award the care and custody of the children of a marriage to the guilty party, whatever may be the offense, its conclusion will not be disturbed on appeal, unless it should clearly appear that its discretion has been abused. Miller v. Higgins, supra; Black v. Black, 149 Cal. 224, 86 Pac. 505.

[4] Viewing the record in the light of the foregoing consideration, we are bound to conclude that said order must be affirmed. There is no warrant for us to say that the lower court abused the discretion committed to the trial tribunal. The rule which obtains in this class of cases is the same as in other judicial determinations of issues of fact, and similar presumptions and intendments must be indulged. In other words, if we find substantial evidence in the record to support a rational inference that the order is for the best interests of the child, and such evidence does not appear incredible, and there is nothing to impeach the fairness or good faith of the decision, it would be an excess of our authority to disturb the determination of the trial court.

An examination of the transcript would convince any one that both in the affidavits and the oral testimony is found ample evidence to show that the minor has been inhumanly treated by his stepfather, with the encouragement and connivance of the mother; that the child lives constantly under the shadow of fearful apprehension of punishment at the hands of said stepfather; that he is a nervous, sensitive boy, and does not receive the care, encouragement, sympathy, and affection of which he stands so much in need; and that his welfare would be promoted by committing him to the custody of his father.

There is no ground upon which we would be justified in rejecting such testimony or nullifying its effect, and we must hold that the trial judge exercised his discretion in obedience to a conscientious understanding and appreciation of the facts and the law and of his grave responsibility in the premises.

It is due, however, to appellant to say that she made a strong showing to the effect that the child was not abused; that the punishment administered to him was not unduly severe, but only what was needed for proper discipline and training; that both she and her husband had for the child the affection that usually exists toward their offspring on the part of parents; and that her home was an entirely suitable place for the welfare and happiness of said minor. This conflicting evidence, though, was manifestly for the determination of the trial judge and, whatever might be our judgment of its weight, it cannot be substituted for his. We deem it inadvisable to recite specifically the distressing story of the witnesses for respondent deeming it sufficient to say that it has been carefully examined in connection with the showing made in behalf of appellant.

As to the second point made by appellant, it is quite apparent from the record that she was not precluded from introducing evidence as to the unfitness of the natural father for the care and custody of the child. The court simply directed that the showing as to the qualifications of the mother be made first. It is true also that evidence on the subject both in favor of the appellant and the respondent was subsequently received without objection.

The order is affirmed.

We concur: NICOL, Presiding Judge, pro tem.; HART, J.

48 Cal. App. 355

LALLY v. KUSTER. (Civ. 3384.)

(District Court of Appeal, First District, Division 2, California. June 29, 1920.)

1. Appeal and error ⊂⊃1097(1)—Decision on former appeal law of case unless facts differ.

The decision on a former appeal is binding as the law of the case, where the evidence is the same; it being only where the facts differ that it is not conclusive.

2. Trial ⊂⊃163—Motion for nonsuit should state grounds.

If colloquy between court and counsel in regard to proposed motion for nonsuit could be deemed equivalent to a motion, the ground must be stated, in order to be available, so that the requisite evidence might be offered by plaintiff.

3. Appeal and error ⊂⊃1061(3)—Denial of motion for nonsuit held no ground for reversal.

In an action against an attorney for damage for failure to diligently prosecute a foreclosure suit, the denial of a motion for nonsuit on the ground that there was no proof that the note and mortgage had not been paid, even if technically erroneous, will not be reversed, where attorney failed to prove any payment made, for he might show a payment to establish the amount to which he was entitled to credit.

4. Trusts ⊂⊃140(1)—Mortgage passing on termination of trust by death of beneficiary not affected by mortgagor's dealings with deceased.

A beneficiary's widow to whom no trust property consisting of a mortgage is delivered by the trustee on the beneficiary's death is not estopped from enforcing the mortgage by a secret agreement between the beneficiary and the mortgagor; and if the latter has any claim against the beneficiary it must be presented against the beneficiary's estate.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Marie Lally, formerly Marie Fleming Everest Brown Eastes, against Edward G. Kuster. From a judgment for plaintiff, defendant appeals. Affirmed.

Stuart M. Salisbury, Stannard A. McNeil, and Edward G. Kuster, all of Los Angeles, for appellant.

Sidney J. Parsons, of Los Angeles, for respondent.

BRITTAIN, J. The defendant appeals from a judgment for $2,694 awarded as damages for negligence as an attorney in failing to prosecute diligently a mortgage foreclosure suit which was dismissed for lack of prosecution after the statute of limitations had expired on the mortgage debt. The case was tried once before, and resulted in a judgment for the defendant. On the appeal of the plaintiff the Supreme Court reversed the judgment, and in a lengthy opinion written by Mr. Justice Wilbur reviewed the essential and unchangeable facts. Lally v. Kuster, 177 Cal. 783, 171 Pac. 961.

The essential facts are that one George Brown, the former husband of the plaintiff, was the beneficiary of a trust under the will of his father, by which he was to come into the body of the trust estate on his reaching the age of 30 years. During the continuance of the trust he had no right to or control over the principal of the trust funds. Mrs. Marisco Brown, who was not related to George Brown, but who had been his nurse when he was a child, owned certain real property in Los Angeles burdened with a mortgage. George Brown, being in ill health, went to Los Angeles, and made his home with Mrs. Brown, who took care of him and at times gave or advanced to him small sums of money. She was old and infirm, and was disturbed by the mortgage on her property. George Brown caused her to deed the property to him, and he executed a new mortgage which was then transferred to the trustees under his father's will, and he then deeded the property back to her subject to the mortgage. The proceeds of the new mortgage, a part of the principal of the trust estate, were presumably used to satisfy the pre-existing debt. It is claimed by the defendant that it was the intention of George Brown to cancel the mortgage on coming into the trust property. Regardless of his intention in this regard, when the mortgage was accepted by the trustees it became a part of the trust property over which he had no control. He died before reaching the age of 30, and the trust was thereby terminated. The trustees were required to and did turn over the trust property to George Brown's widow, the plaintiff in this action.

The defendant was retained as an attorney by the plaintiff to collect the mortgage debt. After investigation he urged the plaintiff not to proceed with the suit he was retained to commence, and advised her that there might be a good defense to the action. After a series of delays and excuses the defendant was instructed on April 7, 1907, to push the case and get judgment as soon as possible. On January 13, 1910, the defendant wrote that the case was pending and awaiting trial. In reply to a letter complaining about the time the matter had dragged along, on January 31, 1910, the defendant wrote that the attorney for Marisco Brown had told him a demurrer had been interposed merely for time, and that he would file his answer as soon as he could get a complete statement from Mrs. Brown. The suit had been filed before October 17, 1907, for the defendant wrote on that day that he had filed suit, and would have summons served at once. An amended complaint was filed October 15, 1908, and demurrer thereto was filed on June 17, 1909. Mrs. Marisco Brown's motion to dismiss the fore-

closure suit was granted on March 16, 1912. In opposition to the motion the defendant made an affidavit of merits on behalf of the plaintiff, in which he stated that he had fully investigated the facts and circumstances, and he verily believed the plaintiff had a good cause of action against Marisco Brown.

Substantially the same facts were before the Supreme Court on the first appeal. It decided as a matter of law that the defendant had been guilty of negligence, and established the rule for the measurement of damages as the amount which could have been recovered in the foreclosure suit, less, if any, the value of the barred note and mortgage.

[1] The appellant contends that the determination of the Supreme Court on a first appeal is not conclusive as to matters of fact which may be developed on the retrial. This rule is unquestioned, but it applies only where new or additional evidence is received or offered on the second trial, the effect of which would or might be to change the ultimate facts or to show the inapplicability of the rules of law announced on the first appeal. The record in this case shows no evidence, or offer of evidence, which could have changed or modified the record which has been set forth, and it was upon this record that the Supreme Court decided, not as a matter of fact, but as a matter of law, that the defendant had been guilty of negligence. This court is bound, as was the trial court, by that determination. The instruction to the effect that there was but one question to be passed on by the jury, and that the Supreme Court had passed on all phases of the case, but the amount of damages was a correct statement of the law applicable to the case under the former decision.

[2, 3] It is contended that the defendant's motion for nonsuit should have been granted, and reliance is placed on the statement that there was no proof that the note secured by the mortgage had not been paid. The ground of the motion was not stated, if, indeed, any motion for nonsuit was made. There was a colloquy between court and counsel in regard to the proposed motion. If it be deemed equivalent to the motion, the ground should have been stated, so that if the evidence were requisite it might have been offered by the plaintiff and the oversight cured. Sanchez v. Neary, 41 Cal. 487; Millar v. Millar, 175 Cal. 797, 167 Pac. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184. Furthermore, there was no effort on the part of the defendant to show as a part of the defense that the note was paid. The negligence of the defendant was shown by the evidence that in disregard of the instructions of his client he failed to prosecute the suit to foreclose the mortgage until it was dismissed for want of prosecution after the statute of limitations on the debt had expired. Under the rule for the measurement of damages laid down on the former appeal, the parties submitted evidence in accordance with that rule. If the defendant was entitled to credit for payment made it was an element tending to reduce the amount of damages, and evidence of actual payment would have been permissible. None such was offered. Even if there were technical error in the denial of the motion for nonsuit, the judgment will not be reversed where the defendant had an opportunity and failed to make proof of the amount of any credit to which he might have been entitled.

[4] The defendant contends the trial court erred in rejecting certain evidence which he maintains would have shown that the plaintiff was estopped to maintain this suit because Marisco Brown and George Brown had so dealt with each other that it would have been inequitable for him to have sought to foreclose the mortgage, or because Marisco Brown had a valid claim against Brown which might have been set off against the mortgage debt. This contention is without force for several reasons. There were no facts pleaded to support evidence of estoppel, the holder of the mortgage was not affected by any secret negotiations between George Brown and Marisco Brown, and if Marisco Brown had any claim against George Brown it must have been asserted against his estate or have been barred.

The record has been examined carefully, and the other points relied on by the appellant have been considered, but it is not necessary further to review the evidence, nor to discuss the appellant's other contentions. The outstanding facts are that the defendant failed to prosecute the foreclosure suit, in direct violation of the instructions of his client, under such circumstances that the conclusion of negligence is irresistible. On conflicting evidence the jury determined the amount of damages in accordance with the rule laid down on the former appeal. There does not appear to have been any miscarriage of justice.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

48 Cal. App. 266

VIETTI v. HINES, Director General of Railroads. (Civ. 2051.)

(District Court of Appeal, Third District, California. June 21, 1920.)

1. Carriers ⟸303(4)—Duty of carrier to stop train sufficient time to allow passenger to alight.

When a carrier sells a ticket entitling a passenger to ride on its train to a specified destination, it is its duty to see that the passenger is afforded all reasonable means for reaching and alighting at his point of destination with safety to himself, and, having reached the point of destination, it is its duty to stop the train for a time sufficient to enable the passenger to safely leave the train.

2. Carriers ⟸347(11) — Contributory negligence of passenger alighting from moving train for jury.

In an action against a carrier for damages for personal injuries, whether plaintiff was guilty of contributory negligence in attempting to alight from a moving train, which simply slowed down for the station, *held* for the jury.

3. Negligence ⟸122(3)—Burden of proving contributory negligence on defendant.

Where contributory negligence is set up as a defense to an action for personal injuries, the burden is upon the defendant to prove such defense.

4. Carriers ⟸333(5)—Passengers not negligent per se in alighting from moving train.

Whether one alighting from a moving train, and thereby receiving personal injuries, is guilty of contributory negligence is a question which must be determined from all the circumstances and conditions surrounding the passenger immediately prior to the injury.

5. Carriers ⟸333(5) — Passenger placed in difficult position not expected to act with highest degree of prudence.

Where a passenger was placed in a difficult position, so that he was compelled to decide in an instant of time whether he would jump from a moving train or miss an important engagement, by reason of refusal of carrier to stop the train, he could not be expected to act with the highest degree of prudence, and, if it happened that he did not exercise the best judgment with that degree of prudence which he would have shown under ordinary circumstances, he would not be held to have been guilty of such negligence as would preclude him from recovery, where injury resulted to him from jumping.

6. Evidence ⟸588—Inconsistency in testimony on cross-examination goes only to credibility of witness.

Admissions of a witness on his cross-examination at variance with the testimony given on his direct examination go no further than to impair his credibility as a witness, or reduce the weight of his testimony, and it is solely the function of the trier of facts to say whether they have such an effect or may be rationally reconciled with the theory that the witness, in his testimony in chief, has told the truth.

7. Carriers ⟸347(11)—One following another in jumping off train not negligent per se.

The mere fact that a person precedes another in jumping off a moving train does not stamp the act of the latter, if he happens to sustain injury by reason of his act of so jumping, as negligence per se.

Appeal from Superior Court, Shasta County; J. E. Barber, Judge.

Action by Amedeo Vietti against Walker D. Hines, as Director General of Railroads. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank Freeman, of Willows, for appellant.
Oscar Geballe, of San Francisco, and Carr & Kennedy, all of Redding, for respondent.

HART, J. This is an appeal by the defendant from a judgment in an action for personal injuries, the cause having been tried by the court without a jury.

On April 16, 1918, plaintiff, a woodcutter, employed by Lamoine Lumber Company, at Lamoine, was visiting in Redding. He went to Redding, he testified, to take a "couple of days' lay-off." At about 5 o'clock that evening he received a telegram recalling him to Lamoine. The telegram read:

"Lamoine, California. 9:08 a. m. April 16th, 1918. A. Vietti, care of B. Vietti, Redding, California. Come up at once. We found several mistakes in the bill. Cannot wait longer. Andrew Vaconi. 9:30 a. m."

He then went to the office of the Southern Pacific Railroad Company in Redding, bought a ticket for Lamoine, for which he paid $1.40, and boarded the next train leaving Redding, which was train known as No. 14. He sat in the smoking car, the conductor took up his ticket, and gave him the usual "hat check." At Kennett, Hurtzig, another employé of the Lamoine Lumber Company, boarded the train bound for Lamoine. At about 11:30 p. m. the train reached Lamoine, which was a "flag station." The conductor of the train when he took up plaintiff's hat check, told him he would have to jump; that he could not stop, as he "had a string of cars." The train slowed to four or five miles an hour, and Hurtzig and the plaintiff started toward the platform of the car for the purpose of alighting. The plaintiff, according to his testimony, said to the conductor that he would not jump; but it appears that Hurtzig alighted while the train was still moving, and thereupon, and after having been ordered several times either by the conductor or the brakeman to jump, the plaintiff leaped to the ground. The plaintiff testified, as did also Hurtzig, that the train or the car in which they rode was, at the time the former alight-

ed, between 300 and 400 yards from the station. The plaintiff further testified that, before he attempted to jump from the car and while he was standing on the steps leading to the platform of the car, he heard the noise incident to the pulling of the bell cord, signaling, as Hurtzig testified, the engineer to speed up. He also testified that he had on a few previous occasions alighted from the same train at Lamoine in the night time when it was in slow motion, but that, before doing so or attempting to do so, either the conductor or the brakeman would first alight to the ground and have a lighted lantern so that a passenger leaving the train while it was moving could see where to alight on the ground. On the occasion of the accident, however, neither the conductor nor the brakeman left the train, he testified; nor, he further testified, did either have a lighted lantern on the platform to enable a passenger leaving the train to guide himself in making a leap so as to avoid striking some object which might be near the track. In fact, the plaintiff testified, there was no light about the station at all. He said that when he reached the ground he struck a "pebble" or a loose rock and fell to the ground, and thus sustained the injuries (a sprained ankle and bruises on and about the face) of which he here complains.

The witness, Hurtzig, testified that the train had gone about 20 feet from the time that he alighted and the time the plaintiff jumped, and that he heard "the air" and the bell cord pulled, but whether this was done before or after the plaintiff jumped he could not say.

The above embraces, in substance, a recital of the circumstances under which the injuries complained of were received.

In appellant's brief it is stated:

"That plaintiff was injured is not to be disputed, and there is no contention made that the amount of damages awarded to the plaintiff is excessive, or that any ruling respecting the admission or rejection of testimony is of sufficient importance to urge as a ground for reversal. Nor is it necessary to refer to the witnesses who testified for the defendant. Our contention is that the testimony of the plaintiff shows that he was guilty of contributory negligence that bars recovery by him."

[1, 2] In the first place, it may be laid down as a settled and indisputable rule that when a carrier of persons for hire sells a ticket entitling a passenger to ride on its train or other vehicle used for the transportation of passengers to a specified destination it is the duty of such carrier to see that the passenger is afforded all reasonable means for reaching and alighting at his point of destination with safety to himself. Having sold the plaintiff a ticket to Lamoine, it was the duty of the defendant, upon reaching that point, to have stopped the train for a time sufficient to enable the plaintiff to leave the train without, in doing so, incurring a risk to his personal safety which could not arise or exist under the usual or ordinary conditions existing or peculiar to that particular station; and, in failing to stop its train at Lamoine so as to enable the plaintiff to alight without subjecting him to some risk or danger to his personal safety, and compelling him to leave the train while it was in motion, however slow the speed of the train was diminished at that point, the defendant was guilty of the violation of a duty it owed to the plaintiff. Its negligence thus committed must be held to have been the proximate cause of the plaintiff's injuries, unless it could be held, upon a view of the evidence, as a matter of law, that the plaintiff was guilty of contributory negligence, without which the damage would not have occurred, and, we do not think we can justly so hold. Our opinion is rather that, upon the evidence, the question whether the plaintiff was guilty of such contributory negligence as would exonerate the defendant from culpable blame for the accident and the injuries received by the plaintiff as a result thereof was one for the jury to solve.

[3] It is obviously true, as is said by the Supreme Court, in Loftus v. Pac. Elec. Co., 166 Cal. 464, 467, 137 Pac. 34, 35, that—

"Ordinarily * * * the question whether a plaintiff has been guilty of contributory negligence is one of fact for the jury. It becomes a question of law for the decision of the court only where the facts are undisputed, and, even then, only where, on those facts, reasonable minds can draw but one conclusion on the issue of plaintiff's negligence. Herbert v. Southern Pacific R. R. Co., 121 Cal. 227, 53 Pac. 651; Johnson v. Southern Pac. R. R. Co., 154 Cal. 285, 97 Pac. 520; Hoff v. Los Angeles P. Co., 158 Cal. 597, 112 Pac. 53; Zibbell v. Southern Pacific, 160 Cal. 237, 116 Pac. 513. 'It has often been said by this court that it is very rare that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown. As a general rule, it is a question of fact for the jury. * * *' Seller v. Market St. Ry. Co., 139 Cal. 268, 271, 72 Pac. 1006."

And where contributory negligence is set up as a defense to an action for damages for personal injuries received through the alleged negligence of the defendant, the burden is upon the latter to prove such defense.

In this case, while the conductor and the brakeman, testifying for the defendant, gave an entirely different version of the matter from that of the plaintiff, saying that neither ordered the plaintiff to jump from the train while it was in motion, and that it was the intention to stop the train so that he (plaintiff) could alight therefrom in the usual way, this court must be guided solely in determining the question of the alleged contributory negligence of the plaintiff by the latter's testimony, it having been accepted by the trial court, to which the determination of the questions of fact was submitted, as involving a truthful narrative of the circumstances un-

der which he came to jump from the train while it was in motion.

[4] Modern authority does not sanction the proposition that it is negligence per se on the part of a passenger to alight from a moving train, the true doctrine being that, whether one alighting from a running train, and thereby receiving personal injuries, is guilty of contributory negligence, is a question which must be determined from all the circumstances and conditions surrounding the passenger immediately prior to the injury. Carr v. Eel River etc. R. R. Co., 98 Cal. 366, 373, 33 Pac. 213, 21 L. R. A. 354. In the case just named the Supreme Court said:

"That there was more hazard in leaving a car while in motion, although moving ever so slowly, than when it is at rest is self-evident; but whether it is imprudent and careless to make the attempt depends upon circumstances; and where a party by the wrongful act of another has been placed in circumstances calling for an election between leaving the cars or submitting to an inconvenience and a further wrong, it is a proper question for a jury whether it was a prudent and ordinarily careful act, or whether it was a rash and reckless exposure of the person to peril and hazard."

In 10 Corpus Juris, p. 1131, § 1502, it is said, after a review of many authorities:

"A passenger is not guilty of negligence per se in jumping from a moving train or car by the advice, direction, invitation, or order of the conductor or other authorized employé of the carrier, on whose opinion or judgment in the matter he has a right to rely, if the danger of such an act would not be apparent to a prudent man, as where the train at the time is moving slowly, and in such case it becomes the province of the jury to say how far the passenger's act may be excused, and whether or not it was negligent."

See, also, Filer v. New York Central, 49 N. Y. 47, 10 Am. Rep. 327.

In this case the testimony shows that the train had slowed down to a rate of speed which would enable the average person of ordinary alertness to alight from it with safety. Hurtzig, before the plaintiff leaped from the train, had stepped to the ground from the train in safety. The testimony further shows that the plaintiff himself, under like circumstances and in the night time, had on several previous occasions alighted from the same train while it was in motion. On these occasions, it is true, as the testimony shows, either the brakeman or conductor first alighted and held up a lighted lantern in such manner as to enable the plaintiff to see that he would or might not, in jumping, strike some object on the ground which might cause him to receive personal injuries, while on the occasion in question the conductor and the brakeman failed to provide him with any such assistance, which was, as a matter of fact, negligence on their part. It is thus very clear that there was no obvious danger in the act of the defendant in leaping from the train. In other words, it is manifest that the act of the plaintiff in jumping from the train, under the indicated circumstances, did not involve such an act of imprudence or carelessness as to justify the declaration that it amounted to negligence per se or as a matter of law.

But there is still another consideration in the evidential features of the case which possesses much significance in the determination of the question whether the plaintiff's act in leaping from the train did or did not constitute negligence per se.

[5] The plaintiff, as his testimony shows, had gone to Redding for a few days' "lay-off" from his customary employment or labor. He received a telegram immediately after his arrival at Redding, and on the day of his arrival there, urging him to return to Lamoine immediately or "at once" to attend (as we may infer from the telegram) to the correction of certain alleged mistakes in a bill or an account with which he was concerned. The telegram, it will be noticed, stated that the sender could not "wait longer"; that is, as we may also infer, that it was urgent that the mistakes should be corrected at the earliest possible moment, and that the plaintiff should be present to correct them. The importance, in his mind, of an immediate return to Lamoine is evidenced by the fact that he immediately, upon receiving the telegram, arranged to return as soon as he could conveniently do so—that is, on the first train leaving and going in the direction of Lamoine after the receipt of the message—and that in so returning he was ready and willing to forego the "lay-off" or rest to secure which was his purpose in going to Redding. The trainmen had told him that the train would not stop at Lamoine, and in fact it did not come to a stop when it reached that station, and, having been ordered several times by the trainmen to jump to the ground, there was but one of two things he could do, viz. either go on with the train beyond the point of his destination, and so fail promptly to meet the engagement which it clearly appeared it was in his mind necessary and urgent to meet with haste and promptness, or take the chances of leaping with safety to himself from the steps of the car in which he was riding. Moreover, it appears that, as he was considering whether he had better attempt to alight from the train by leaping or jumping, the bell cord was pulled by one of the trainmen and, he testified, he interpreted that act as a signal to the engineer to increase the speed of the train. Thus it is plain that the plaintiff found himself suddenly placed in a position where he was compelled to decide in an instant of time which of the two alternatives which were open or available to him he should choose; that is, whether he should attempt to alight from the train while it was in motion and before its speed was increased

or go on to the next station some distance from Lamoine. The position in which plaintiff was thus put was the result of the defendant's own wrongful act or tort; and it was, indeed, a difficult position in which the plaintiff found himself under the circumstances, and one which naturally was calculated to deprive him of his self-possession, or that cool and calm judgment which alone admits of deliberation and prudence before selecting one of two alternative courses, one of which might in his mind entail upon him an inconvenience in a business transaction or matter of great significance or importance to him, and the other attended by more or less risk of sustaining personal injury. In such circumstances a person is not to be expected to act with the highest degree of prudence, and if it happened that he has not exercised the best judgment or that degree of prudence which he would have shown under ordinary circumstances, particularly where his position has been brought about by the negligent or wrongful act of the defendant himself, he should not be held to have been guilty of such negligence as would preclude him from a recovery for such negligent or wrongful conduct of the defendant, where physical or other injury has resulted to him from the course he has, under such circumstances, elected to adopt. The rule as thus stated is well explained and aptly applied in Lawrence v. Green, 70 Cal. 417, 11 Pac. 750, 59 Am. Rep. 428. Also, what is said by the Supreme Court of Kansas in Walters v. Missouri Pac. Ry. Co., 82 Kan. 739, 109 Pac. 173, 175, 28 L. R. A. (N. S.) 1058, has cogent pertinency to the case here, and is particularly illuminating upon the point now under consideration. See, also, Kansas City, etc., Co. v. Worthington, 101 Ark. 128, 141 S. W. 1173.

[6] But appellant emphasizes the proposition that the plaintiff, on cross-examination, admitted that, having observed Hurtzig alight from the train with safety, thought he could do likewise, and that he was governed more or less in his act in leaping to the ground by the successful performance of Hurtzig in that respect. In the first place, it is to be observed that the admissions of the plaintiff thus referred to on his cross-examination were somewhat at variance with his testimony given on his direct examination, and such inconsistencies in the testimony of a witness can go no further than to impair his credibility as a witness or reduce the weight of his testimony, and it is solely the function of the trier of the facts to say whether they have such an effect or may be rationally reconciled with the theory that the witness, in his testimony in chief, has told the truth.

[7] "In passing on the legal effect of plaintiff's evidence, the examinations in chief are not to be detached from the cross-examinations" (Masten v. Griffing, 33 Cal. 111), and it may be added that in passing upon the testimony of a witness elicited on cross-examination, such testimony is not to be detached from his examination in chief or considered without reference to the latter. In other words, the testimony of the witness must be considered in its entirety to determine the weight to which it is entitled. As is said in Firth v. Southern Pacific Co., 186 Pac. 815, it is for the court or the jury to determine how far, if at all, inconsistencies in the testimony of a witness go toward weakening such testimony or in impairing the credibility of the witness. In the second place, it is to be remarked that the mere fact that a person precedes another in jumping off a moving train does not stamp the act of the latter, if he happens to sustain injury by reason of his act of so jumping, as negligence per se, or is such an act as would justify this court in this case, when considering all its circumstances, in holding as a matter of law that the plaintiff was guilty of contributory negligence. Filer v. N. Y. Central Ry. Co., 49 N. Y. 47, 10 Am. Rep. 327; Trinity Valley, etc., Co. v. Green (Tex. Civ. App.) 154 S. W. 278. Of course, if the plaintiff had voluntarily, and without being urged to do so by the trainmen, jumped from the train, a different situation would be presented, but, as we have shown, he was not only repeatedly told by the trainmen to leap from the train while it was in motion, but it was undoubtedly very plain to him that he would have to leave the train while it was moving or be taken some distance beyond his point of destination.

From all the foregoing considerations, it is obvious that it cannot justly be held, as a matter of law, that the plaintiff was guilty of contributory negligence. As stated, that question, upon the evidence presented, was one for the court, as the selected arbiter of the facts, to determine.

The judgment is affirmed.

We concur: NICOL, Presiding Judge pro tem.; BURNETT, J.

48 Cal. App. 412

FINK et al. v. LOYNES. (Civ. 3418.)

(District Court of Appeal, First District, Division 1, California. July 2, 1920. Rehearing Denied July 27, 1920. Hearing Denied by Supreme Court Aug. 30, 1920.)

1. Partnership ⊜53—Evidence held to show partnership in building business.

In an action for an accounting, testimony by plaintiffs, and the books kept by defendant's intestate, *held* conclusively to show the existence of a partnership between plaintiffs and defendant's intestate for the conduct of the building business, notwithstanding declarations and admissions that plaintiffs were foremen for intestate.

2. Appeal and error ⊜1169(3) — Judgment for defendant not sustained because of defects in complaint which were amendable.

A judgment rendered for defendant after trial on the merits will not be sustained on appeal, because the defendant's demurrer to the complaint for failure to state cause of action should have been sustained, unless the complaint could not have been amended, so as to state a cause of action.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Charles N. Fink and another against Bessie E. Loynes, as administratrix, of the estate of Richard Loynes, deceased. Judgment for defendant, and plaintiffs appealed. Reversed.

Louis N. Whealton, of Long Beach, for appellants.

Skinner & Jaques, of Long Beach, and Wheaton A. Gray, of Los Angeles, for respondent.

RICHARDS, J. This is an appeal by the plaintiffs from a judgment in favor of the defendant in an action for an accounting. Their principal contention in support of the appeal is that the findings of the court are unsupported by the evidence. The complaint set forth that the plaintiffs had entered into a copartnership or joint venture with the defendant's intestate, Richard Loynes, who died without any settlement or accounting between the parties having been arrived at, and prayed for such accounting. It is the finding of the court against this allegation of copartnership or joint venture, which is thus attacked by the appellants.

[1] The evidence in the case upon the subject of the formation and existence of said alleged copartnership is undisputed and is briefly as follows: The plaintiffs, Charles N. Fink and O. Mickelson, were brickmasons and building contractors engaged in business in and around Los Angeles. Richard Loynes was a brick manufacturer and building contractor doing business in Long Beach. In September, 1905, he invited the plaintiffs to go to Long Beach and enter into copartnership with him for the carrying on of a building and contracting business, informing them at the time that that branch of the business was getting too much for him. They acceded to his request and verbally agreed with him to enter into such copartnership, the terms of which were that the business should be conducted in the name of Richard Loynes: that the plaintiffs should devote their time to conducting the building operations, while Loynes attended to procuring contracts, keeping the accounts, and collecting moneys to become due as the result of the firm's operations. All brick used by the firm was to be supplied by Richard Loynes at the market price, if he chose to supply it, and the profits, if any, arising from the building contracts executed were to be divided equally between the plaintiffs; Loynes' profit to come from sales of brick to the firm, in which sales the plaintiffs had no interest. Loynes was also to finance the enterprise. Settlements were to be had every three months.

The plaintiffs, immediately upon the making of this agreement, removed to Long Beach, bringing with them their building paraphernalia, consisting of scaffolding, timbers, an electric hoist, a horse and wagon, etc., and during the existence of the partnership these appliances were used in its business. The building operations thereafter conducted by the parties, while quite numerous, were individually, in general, not of great magnitude, and the plaintiffs, being both practical brickmasons, acted as foremen on the jobs, and participated in the manual labor of laying the brick. When two jobs were proceeding simultaneously each supervised or acted as foreman on one of them. Each drew from the firm sums of money as he needed them, for which checks were made and signed by Loynes upon their request. These sums of money had no relation to the time each spent upon the work of building, although on some occasions, when the contract price was based upon the cost of materials and labor entering into the particular job, a record of such time was kept. Account books relating to the firm's operations were kept by Loynes, either personally or with the assistance of a bookkeeper, who, in such work, took his instructions exclusively from Loynes. In those books the plaintiffs were charged with the various sums paid to them or paid to others for their account, and they were credited with their respective shares of the profit arising from each individual contract.

The operations of the parties proceeded thus from the year 1905 to 1914. About three months after their inception the plain-

tiffs requested of Loynes an account showing what profits, if any, had arisen from the venture, but no account of such was made at the time, for the reason, given by Loynes, that no jobs were then complete. Plaintiffs made similar requests from time to time, but for one reason or another, advanced apparently, however, in perfectly good faith—sickness in the family, misplacement of a book, or the illness of Loynes himself—no settlement of profits was arrived at. The relations of the parties were intimate and perfectly harmonious; they addressing one another as Dick, or Charley, or whatever the given name might be. In 1914 a change was made in the terms of their business relations, according to which Fink thereafter had the superintendence of one piece of work, and Mickelson of the next; the profit, if any, arising from a particular contract going to the one having the superintendence of its execution. In other respects the arrangement remained the same, there being in reality now two separate partnerships, although, apparently, the significance of the change was not apparent to the parties, and we find in this an illustration of the informality which all the way through characterized their dealings.

In 1917 Loynes died; no settlement of the partnership affairs either up to 1914 or thereafter, having ever been had. The defendant, surviving widow of Loynes, as administratrix of her husband's estate, took possession of the books, assets, and properties of her husband, and of the firm of which he was a member, including building appliances belonging individually to the plaintiffs, and, being apparently ignorant of the precise nature of the business arrangements between the plaintiffs and the deceased, she denied the existence of any partnership, claimed that the plaintiffs were but employés of her deceased husband, and refused to account to them for any assets of the association.

The defendant's evidence in opposition to this uncontradicted showing was very brief, and may be narrated in detail:

W. J. Morrison, president of the bank of which the deceased was a director and in which he carried an account, was asked, "Do you know whether or not he [Richard Loynes] ever had any partners?" to which he replied, "Not to my knowledge."

A stipulation was entered into between the plaintiffs and the defendant at the trial that an absent witness, if called, would testify that the plaintiff Fink had not been introduced to him as a partner of the deceased. This evidence was offered in contradiction of a statement of said plaintiff in which he mentioned said absent witness as one of a number of persons to whom the deceased had introduced him as a partner.

Mrs. Loynes, a hostile witness, testified:

"In referring to the work such as that, he always spoke of these men as foremen."

Louis J. Kelly testified that on one occasion, when he took to the plaintiff Mickelson a number of envelopes containing the men's wages, one of such envelopes was marked with Mickelson's name.

George Phillipson testified:

"I have heard Mr. Fink state at one time him and Mr. Mickelson was foremen for Mr. Loynes for a great number of years. * * * That was the time they were dissolving the partnership, * * * the day that Fink and Mickelson dissolved partnership."

Finally, the defendant's son, a boy, testified:

"There was a man on the pier, and he said to another man, 'Whose boat is that?' And this other man told him: 'That is Charley Fink's, foreman for Dick Loynes. He is a brick man. He don't know anything about boats.' But after that I was down looking at the boat, and I said to Mr. Fink, 'This man out here don't think much of your ability as a sea captain;' and he says, 'How is that?' so I told him that this man had said that you were Charley Fink, Dick Loynes' foreman, and didn't know anything about boats, and he laughed. He did not contradict, when I told him he was a foreman."

It will thus be seen that the entire evidence upon which the finding of the court, that the alleged partnership did not exist, is based, is that a certain business associate of the deceased did not know of it; a denial by another person that one of the plaintiffs had been introduced to him as a partner; the fact that in conversation with his wife the deceased, in referring to certain work, spoke of the plaintiffs as foremen; the incident of the sending to Mickelson of an envelope with his name upon it and containing money; the statement, attributed to Fink, that he and Mickelson were foremen for the deceased for a great many years; and the boatman's quizzical reference to Fink as a poor sailor, in which he designated him as Dick Loynes' foreman.

It requires no critical analysis of this testimony offered by the defendant to demonstrate that there is nothing therein contradictory of the formation and existence of the alleged partnership, directly testified to by the plaintiffs, and conclusively established by the books of account of the deceased. It appears to us that there was nothing anomalous in the firm's business being conducted in the name of Richard Loynes exclusively. It was an established, going concern at the time of the plaintiff's admission to it. Loynes was financing the undertaking, and great informality characterized the dealings of the parties all the way through. Except for the purpose of satisfying the amour propre of the plaintiffs (of the existence of

which to any marked degree there is no evidence in the record), there was no reason why they should desire the name by which the business was already known to be changed. The fact that they sometimes referred to themselves as foremen for Loynes, and that the latter also at times so designated them, is sufficiently explained by the circumstance that they in fact, throughout the duration of the partnership, acted in this capacity. It is obvious that by so doing their contractual relations to Loynes were not changed. No inference contrary to the existence of the alleged partnership is to be drawn from the receipt by Mickelson of an envelope containing money, as testified by Kelly; for it is made clear by the testimony of Mickelson that at times, when in charge of a job, a laborer would leave his employment before the end of the week, in which case Mickelson, instead of sending him to the office for the money due him, would himself pay him, and would be reimbursed for this outlay in the manner indicated by Kelly. And, finally, the boy's narration to Fink of his conversation with the boatman, and which testimony was offered as an admission against interest, was in fact no such admission, as the circumstances under which the narration was made were not such as to call for any response from Fink.

The whole of this evidence offered by the defendant is entirely consistent with the existence of the copartnership claimed by the plaintiffs; and in our opinion it affords no foundation for the finding of the court in question. This view of the evidence necessitates the reversal of the judgment, unless the respondent is correct in her contention that it should be affirmed, for the reason that the complaint fails to state a cause of action, and that her demurrers thereto, general and special, were improperly overruled.

[2] Without stopping to consider what effect should be given to the circumstance that the record on appeal discloses no such demurrers, nor order of the court thereon, it is settled by recent decisions of our Supreme Court that the respondent in an appeal, in whose favor a judgment has been rendered after a trial upon the merits, cannot protect his judgment by urging that his demurrer to the complaint ought to have been sustained, unless such complaint were incapable of amendment so as to state a cause of action. In this respect he is not in the position he would be, if he were himself appealing from the judgment. Ransome-Crummey Co. v. Bennett et al., 177 Cal. 560, 171 Pac. 304, and cases cited.

Judgment reversed.

We concur: WASTE, P. J.; WELCH, Judge pro tem.

48 Cal. App. 393

CRUICKSHANK v. VOGH et al. (Civ. 3381.)

(District Court of Appeal, First District, Division 2, California. June 30, 1920. Hearing Denied by Supreme Court Aug. 26, 1920.)

1. Deeds ⟸211(3)—Deeds and contracts of elderly persons annulled after death of one party only upon clearest evidence.

While courts are disposed to relieve elderly persons from their improvident acts on any substantial showing of overreaching or fraud, still they cannot from motives of sympathy either annul deeds or make contracts after the death of one of the parties, except upon the clearest evidence, both upon the subject of the existence of the contract and its terms.

2. Appeal and error ⟸1011(1)—Findings of trial court on conflicting evidence conclusive on appeal.

The appellate court cannot substitute its judgment for that of the trial court on the facts; the trial judge, who saw and heard the witnesses, being the best qualified to determine questions of fact based on conflicting evidence, under Code Civ. Proc. § 1847, and section 2061, subds. 2, 3, and 6.

3. Deeds ⟸210—Finding that plaintiff failed to prove lack of consideration for grant of remainder supported by evidence.

In an action to quiet title and to have a remainder dependent on a life estate in plaintiff annulled, evidence *held* sufficient to support a finding that the plaintiff failed to prove to the satisfaction of the court that an alleged contract for support of plaintiff was made and that there was no consideration for the conveyance.

4. Appeal and error ⟸1010(1) — Judgment supported by findings supported by evidence not disturbed.

Appellate court cannot disturb a judgment, when it is supported by findings which are themselves sustained by the evidence.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Sarah Arnold against Alice Bertha Vogh, as administratrix of the estate of Valentine Arnold Vogh, deceased, and others. Plaintiff dying after trial, her executor, Lewis Cruickshank, was substituted as plaintiff. Judgment for defendants, and plaintiff appeals. Affirmed.

Lewis Cruickshank and Vincent B. Vaughn, both of Los Angeles, for appellant.

Jesse R. Shafer, of Los Angeles, for respondents.

BRITTAIN, J. The plaintiff appeals from a judgment in a suit to have it determined that a remainder dependent on a life estate in Sarah Arnold, deceased, be annulled. In the complaint the original plaintiff, Sarah Arnold, set up three causes of action. Her death occurred after the trial, and the appellant as the executor of her will was sub-

stituted as plaintiff. The facts beyond dispute are that the plaintiff was an elderly and sick woman, but of undiminished mental ability. She was the aunt of Arnold Vogh, and had lived with him or he with her until he was about 13 years of age. He also was sick. He had married the principal defendant. Mrs. Arnold had come to California from Mississippi, and was living with the Voghs. They treated her kindly and took care of her. She paid the grocery bills. Vogh was employed in a mill, and his health was failing. Mrs. Arnold was advised to go to the mountains, and the Voghs accompanied her. She purchased for $4,500 the property in suit, causing the deed to be made to her as the life tenant, with remainder over to Vogh. She purchased lumber for two small dwellings, which Vogh had practically completed, when, a short time after he had given up his position, he went to the hospital to undergo an operation. He died on October 1, 1911. The deed was dated September 4, 1911, acknowledged September 7, and recorded September 22, 1911.

In the first cause of action the plaintiff alleged that the consideration for causing the remainder to be conveyed to Vogh was his promise that he would take care of her for the remainder of her life, and that by reason of his death without having made provision for her care, and because of the failure of his wife and of his estate to provide for her, the consideration for the conveyance had wholly failed. The second cause of action was based on allegations of fraud and undue influence, and it has been abandoned by the appellant. The third cause of action contained the formal allegations of a suit to quiet title to the property, of which the plaintiff alleged she was the owner. She also alleged that the defendants claimed some interest adverse to her, without right. The prayer was that the provision of the deed, which was set up as an exhibit, vesting an estate in remainder in Vogh, be declared void, and that the plaintiff's title be quieted. The court found that the first and third causes of action were barred, that Vogh did not agree to give the plaintiff personal care and attention through life, and that there was a sufficient consideration for the conveyance. The appellant attacks each of these findings, and makes no other contention. If the findings in regard to the contract and the consideration for the conveyance are supported by the evidence, the error, if error there were, in applying the bar of the statute, is immaterial.

The only direct evidence concerning the contract for support is that of the plaintiff. She testified that Vogh promised to care for her during her life, and that when she went to the office of the title company, and directed the deed to be made to her, he took her out into the hall and told her he would not go onto the place, he and his wife, unless she put his name in the deed with his wife's. Subsequently, on learning of pending divorce proceedings between Mrs. Vogh and her husband, the plaintiff directed the deed to be made in its final form. At the time of the conversation, she testified, in reply to a direct question as to whether he had made any promises or not, that he said:

"You know you need care and attention, and we are willing to give it to you; that is what I want to do."

Mrs. Travels, formerly Mrs. Vogh, testified that Mrs. Arnold had said:

"She had provided for the rest of them—that is, that she had done something for the rest of them—and that her husband had promised to give Mr. Vogh something for the name of Arnold, and she would buy a home, and then give it to him. She didn't say where then, until somebody told her to go to the mountains. * * * And after we moved up there with her, she said she would buy some cows and put him in the dairy business. That is all that was ever said; that is, the same thing talked over every time. There was never anything said in my presence by Mrs. Arnold or Mr. Vogh about him giving his personal care and attention during the rest of his life; she said, when she got better, she was going back to Mississippi, to her home."

Another witness for the defendant testified that—

"She said she would give him a place if he would come up there, and she told him she bought the lumber to build the house, and if he built two houses it would be to his advantage, for when she got better she was going back to Mississippi, where she came from, and then it would all be his, or to be her house; he would have it, if he would build the two houses. It would be no disadvantage to him is the way I remember it now. That is what I heard her say to him, him to her, and they were talking between each other. That is as far as I know about that."

[1] Mrs. Arnold was not recalled to rebut this evidence of Mrs. Travels. Parts of the testimony of Mrs. Arnold in regard to when she first learned that she could not sell the property after the death of Vogh and in regard to other collateral matters were shaken by cross-examination and were contradicted by other witnesses. She gave some testimony which could only have been addressed to the second cause of action, based on fraud and undue influence; but it was of so weak a character that those claims were abandoned. While it is unhappily true that elderly persons far too often make the mistake typified by that of King Lear, and courts are disposed to relieve them from their improvident acts upon any substantial showing of overreaching or fraud, still courts cannot from motives of sympathy either annul deeds or make contracts after the death of one of the parties, except upon

the clearest evidence, both upon the subject of the existence of the contract and its terms. As was said by the Supreme Court, speaking by Mr. Justice Van Fleet:

"The plaintiff's case depended entirely upon oral testimony as to transactions with the deceased Blythe. That testimony was of such a nature as to make direct contradiction absolutely impossible. No documents of any kind were produced to substantiate it, nor was it corroborated by any independent fact. Plaintiff's claim was never heard of until more than a year after the appointment of an administrator on Blythe's estate, not even by parties who were jointly interested in the alleged commissions." Mattingly v. Pennie, 105 Cal. 523, 39 Pac. 203, 45 Am. St. Rep. 87.

Mrs. Vogh was appointed administratrix of the estate of Vogh on October 31, 1911. No claim was made by Mrs. Arnold against the estate. The suit was not commenced until August 30, 1915, nearly 4 years after Vogh's death. Regardless of any bearing the delay might have had upon either the question of laches or that of limitations, it was a circumstance which the trial court was warranted in considering in weighing the testimony of Mrs. Arnold.

[2-4] Even though this court might have reached a different conclusion in regard to the existence of the agreement alleged by the plaintiff or in regard to the consideration for the conveyance, it could not substitute its judgment for that of the trial court in such a case as this. The judge, who saw and heard the witnesses, was best qualified to determine whether or not the presumption that Mrs. Arnold told the truth in regard to the single conversation out of the hearing of all other persons was repelled by the manner in which she testified or by the character of her testimony. Code Civ. Proc. § 1847, and section 2061, subds. 2, 3, and 6. There was sufficient evidence to support the findings to the effect that the plaintiff had failed to prove to the satisfaction of the court that the alleged contract for support was made and that there was no consideration for the conveyance. This court cannot disturb the judgment, when it is supported by findings which are themselves sustained by the evidence.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

48 Cal. App. 389

GOULD v. CRAWFORD et al. (Civ. 3359.)

(District Court of Appeal, First District, Division 2, California. June 30, 1920. Hearing Denied by Supreme Court Aug. 26, 1920.)

1. Mortgages ⟸581(5)—Attorney's fee held reasonable on foreclosure.

On foreclosure of a mortgage, where judgment was for nearly $6,500, and counsel presented to the court practically every technical problem the law permitted, an allowance of attorney's fees in the sum of $250 *held* reasonable.

2. Appeal and error ⟸1073(5) — Filing of order nunc pro tunc held harmless, if error.

In a foreclosure proceeding, where mortgagors in writing waived notice of further proceedings after service of the original complaint, and the attention of the court was called to waiver on a certain date when a motion was made to amend the complaint, and the bill of exceptions shows such facts, an order, permitting the waiver to be filed nunc pro tunc as of the date on which it was called to the attention of the court, added nothing to, and did not militate against, the effect of the judgment and junior incumbrancers, and, if erroneously entered, was harmless.

3. Appeal and error ⟸900—Every intendment in favor of regularity of exercise of jurisdiction.

On appeal from a judgment of a court of general jurisdiction, every intendment is in favor of the regularity of the exercise of the jurisdiction shown by the record.

4. Appeal and error ⟸496, 913(1)—Service of amended pleadings presumed on appeal, and need not appear in judgment roll.

On appeal from judgment, proof of service of amended pleadings need not appear in the judgment roll, as it will be presumed, in the absence of affirmative showing to the contrary, that they were regularly served, and that evidence thereof was before the court when it made its judgment.

5. Appeal and error ⟸918(1)—Insufficient waiver held not to overcome presumption of service of amendment.

In a mortgage foreclosure, an insufficient waiver of further notice after service of original complaint does not prevent the operation of the presumption on appeal that proper service of amendments to the complaint were made.

6. Mortgages ⟸401(4)—Mortgagee may exercise option of declaring entire debt due by suing.

Under a mortgage providing that on default of interest the mortgagee might declare the entire debt due, mortgagee could exercise his option of declaring the entire debt to be due simply by suing for it.

7. Pleading ⟸354(2)—Cross-complaint in mortgage foreclosure properly stricken out.

Where matters set forth in cross-complaint in an action to foreclose a mortgage, seeking to bring in parties, were not in any way responsive to the cause of action of the plaintiff for the foreclosure of her mortgage, and did not affect in any way the rights of defendants in the matter of priorities as between the plaintiff and the defendants, nor as between the defendants and the other parties, court properly struck it out.

8. Trial ⟸404(1)—Finding that allegations were untrue is finding that defendant did not prove same.

In an action to foreclose a mortgage, a finding that allegations of the answers were untrue

was only a finding that defendants did not prove what they alleged under oath, and was not a finding that certain defendants, who alleged in their answer that they were owners by reason of a certain conveyance, and not simply junior incumbrancers, were merely junior incumbrancers and not owners.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Mary C. Gould against Frances E. Crawford and others. From a judgment for plaintiff and an order entered nunc pro tunc, defendants George E. Mills and Belle Haecker Mills appeal. Affirmed.

Geo. E. Mills and Alfred H. McAdoo, both of Los Angeles, for appellants.

J. H. Merriam and Merriam, Rinehart & Merriam, all of Pasadena, for respondent.

BRITTAIN, J. George E. Mills and Belle Haecker Mills, sued as junior incumbrancers, appeal from a judgment decreeing the foreclosure of a mortgage on real property and from an order made after judgment permitting the filing, nunc pro tunc, of a waiver of notice, signed by the original mortgagors and called to the attention of the court before the amendment of the complaint, in regard to which the appellants make their principal contention.

[1] It is contended that the court erred in allowing attorney's fees in the sum of $250. The evidence was that the plaintiff agreed with her attorney that the court was to fix the amount of the fee, but that if the plaintiff should be compelled to buy the property at the foreclosure sale to protect her interest the attorney was to receive $100. The judgment was for nearly $6,500, and of the 50-odd defendants, the appellants were the only ones who actively engaged in the litigation. Their activities in the suit were most diligently carried forward. Their counsel, acting in their behalf, presented to the court practically every technical problem the law permitted. Upon a consideration of the entire record the amount of attorneys' fees allowed appears both reasonable and in conformity with the agreement.

[2] The appeal from the nunc pro tunc order is without merit. The essential facts are that the mortgagors in writing waived notice of further proceedings after the service of the original complaint, and that the attention of the court was called to the waiver on November 2, 1917, when the motion was made to amend the complaint. The bill of exceptions on the appeal from the judgment printed in the appellants' transcript shows these facts. The order permitting the waiver to be filed as of the date on which it was called to the attention of the court added nothing to, and did not militate against the effect of the judgment. If the order was erroneous the appellants were not injured by it.

[3-5] The appellants' main contention is that the lien of the mortgage was not extinguished by the foreclosure decree. The original complaint was served on the mortgagors as well as the appellants. The former defaulted, and signed the waiver of notice of all further proceedings. The appellants demurred successfully to the complaint, and the plaintiff was given leave to amend. In the original complaint it was alleged that default had been made in the payment of interest. The mortgage provided that in the event of such default the mortgagee might declare the entire indebtedness due. In the amendment to the complaint it was alleged that no payments had been made on the principal of the note, nor on account of accrued interest. The appellants contend that without service of the amendment they would not have been protected had they bought at the sale. The record shows the service of the original complaint and the default of the mortgagors. The judgment recites these matters, and it contains nothing to show whether or not the amendment was served. The judgment is of a court of general jurisdiction, and every intendment is in favor of the regularity of the exercise of the jurisdiction shown by the record. "The statute concerning the contents of the judgment roll in such cases does not require the proof of service of amended pleadings to appear therein, * * * and in our opinion it must be presumed—in the absence of affirmative showing to the contrary—that the amendments were regularly served, and that evidence thereof was before the court when it made its decree." Riverside County v. Stockman, 124 Cal. 222, 56 Pac. 1027. If the contention is that the waiver of notice prevents the operation of this presumption the appellants are not benefited. If the waiver was sufficient, service of the amendment on the mortgagors was not required. If it was not sufficient, then the presumption of such service as was necessary becomes operative, in the absence of showing that service was not made.

[6] It is contended that the mortgage was not due. It provided that on default of interest the mortgagee might declare the entire debt due. The plaintiff alleged the default in payment of interest in the original complaint when she sued for foreclosure. She could not more effectively have exercised her option of declaring the debt to be due than by suing for it. Trinity Bank v. Haas, 151 Cal. 553, 91 Pac. 385.

[7] The plaintiff joined as defendants certain parties, alleging that, by reason of their actions in dealing with certain water rights and stock in a water service company in a manner appurtenant to the land mortgaged, her rights under the mortgage ought to be adjudicated. Subsequently the plaintiff amended her complaint by striking out these allega-

tions and dismissing the action as to these parties. The appellants filed a cross-complaint, in which they repeated substantially the allegations of the complaint, and sought to bring in the parties who had been dismissed from the suit. On motion of the plaintiff the cross-complaint was stricken out. The matters set forth in the cross-complaint were not in any way responsive to the cause of action of the plaintiff for the foreclosure of her mortgage, nor did they affect in any way the rights of the appellants in the matter of priorities as between the plaintiff as the holder of the superior lien and the appellants, nor as between the appellants and the other parties named. The cross-complaint was filed without leave of the court, and on the motion to strike it out it properly determined that the parties were not necessary to the determination of the cause before it. Alpers v. Bliss, 145 Cal. 565–570, 79 Pac. 171.

[8] The appellants alleged that they were the owners of the mortgaged land under a conveyance from the original mortgagors subsequent in date to the mortgage. On the trial the appellants, who were the only defendants who had not defaulted, refused to introduce any evidence. The court made specific findings sufficient to support the judgment, and also found that the allegations of the answers were untrue. On this appeal the appellants contend that this general finding is a determination that they did not receive the conveyance they alleged under oath that they did receive, and that, therefore, it must be assumed they are simply junior incumbrancers and not the owners of the property. From this it is argued that by reason of the errors which it is claimed the trial court made the original mortgagors as owners may attack the decree. The effect of the general finding was merely that the appellants did not prove what they alleged under oath. Upon the record made they cannot be heard in this court to stultify themselves.

The judgment and the order are affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

48 Cal. App. 468

Ex parte HOLDER. (Cr. 731.)

(District Court of Appeal, Second District, Division 2, California. July 9, 1920.)

1. Habeas corpus ⟸54—Portion of petition held surplusage, a legal conclusion.

The quoted portion of the petition for habeas corpus that H. is imprisoned by virtue of an indictment charging him with embezzlement, "under Pen. Code, § 506, as amended by St. 1919, p. 1090," is mere surplusage, being at most an averment of a legal conclusion.

2. Habeas corpus ⟸54—Averment of petition, constituting legal conclusion, not admitted by failure to deny.

Averment of petition for habeas corpus, constituting surplusage, a legal conclusion, that indictment charging embezzlement was under a certain section of the Code, is not admitted by failure to deny.

3. Habeas corpus ⟸92(1)—What the ultimate proof will be not considered.

What the ultimate proof will be cannot be considered on application for habeas corpus by one in custody under indictment.

4. Habeas corpus ⟸30(2)—Not ground for release that indictment erroneously states section of Code.

The indictment under which petitioner for habeas corpus is held, by its allegations of facts substantially charging embezzlement under Pen. Code, § 503, is no ground for release that it alleges not a violation of that section, but of another, claimed to be unconstitutional.

Original application by W. H. Holder for writ of habeas corpus. Writ discharged, and prisoner remanded.

John S. Cooper, M. G. Phillips, and Bennett, Collings & Cooper, all of Los Angeles, for petitioner.

Thomas Lee Woolwine, Dist. Atty., and A. H. Van Cott, both of Los Angeles, for respondent.

THOMAS, J. This is an application for a writ of habeas corpus. The petition alleges, among other things, "that W. H. Holder is imprisoned, detained, confined and restrained of his liberty" by the sheriff of Los Angeles county "by virtue of an indictment charging him with embezzlement *under section 506 of the Penal Code of the State of California, as amended in 1919*, a copy of which indictment is herewith attached and made a part hereof." (Italics ours.)

The indictment is in two counts, identical in form, but relating to separate offenses of the same class. For our present purposes we quote the preamble to the indictment and the first count only, which are as follows:

"W. H. Holder is accused by the grand jury of the county of Los Angeles, state of California, by this indictment of the crime of embezzlement, a felony, committed at and in the county of Los Angeles, state of California, and before the finding of this indictment, as follows, to wit: That the said W. H. Holder, on or about the 17th day of November, 1919, at and in the county of Los Angeles, state of California, was then and there a contractor by virtue of a contract entered into by and between Harry Scholl and Alva M. Scholl, and the said W. H. Holder for the erection and construction of a dwelling house, and was then and there by virtue of said contract relation and contractor, intrusted with and there came into the possession, care, custody, and control of him, the said W. H. Holder, money of the value of $2,000, lawful money of

the United States, of the value of $2,000 in gold coin of the United States, and of the personal property of the said Harry Edward Scholl and Alva M. Scholl. And he, the said W. H. Holder, after the said money had come into his possession, care, custody, and control, as aforesaid, did then and there, to wit, on or about the 17th day of November, 1919, at and in the county of Los Angeles, state of California, unlawfully, fraudulently, and feloniously convert, embezzle, and appropriate $1,500 of the said $2,000 to his own use, and to uses and purposes not contemplated by his said contract, contrary to his trust and contract and contractor's relation as such contractor, servant and agent of the said Harry Edward Scholl and Alva M. Scholl."

The writ was issued and made returnable before this court, and on the return day the sheriff of said county filed his return, which, in words and figures, is as follows:

"I, John C. Cline, sheriff of the County of Los Angeles, state of California, in obedience to the order contained in the within writ, do hereby return to the honorable district Court of Appeal, in and for the Second District of the state of California, that before the coming to me of the within writ, the said W. H. Holder was arrested and held on a grand jury indictment, nevertheless, I have the body of the said defendant before you at the time and place mentioned."

On the issues thus presented, the respective parties presented their arguments, and the cause was submitted. It was admitted at the time of argument that the "indictment" referred to in the sheriff's return was the same "indictment" referred to in and made a part of petitioner's application for the writ.

[1-3] It is contended by petitioner that the italicized portion of the first paragraph of this opinion is admitted by a failure to deny the same on the part of respondent; also that said section 506 is unconstitutional, and that therefore the restraint is illegal and void. The first question, perhaps, that should be decided by us is, therefore: Does such failure to deny the statement italicized by us admit the truth thereof? It is our opinion that the portion referred to is mere surplusage, and, hence, redundant and immaterial, being at most but an averment of a legal conclusion. We think that a failure to deny such an averment cannot be treated as an admission thereof. 31 Cyc. 90; Gates v. Salmon, 46 Cal. 361, 379; McCaughey v. Schuette, 117 Cal. 223, 46 Pac. 666, 48 Pac. 1088, 59 Am. St. Rep. 176. It follows from this reasoning, therefore, that for our present purposes we are concerned, not with the question whether section 506 of the Penal Code as amended by St. 1919, p. 1090, is or is not constitutional, but, rather, in ascertaining from an examination of the allegations of fact in the indictment itself whether any public offense is charged and, if so, what that offense is. We cannot concern ourselves as to what the ultimate proof may be. Re Kennedy, 144 Cal. 634, 78 Pac. 34, 67 L. R. A. 406, 103 Am. St. Rep. 117, 1 Ann. Cas. 840; People v. Goodrich, 142 Cal. 216, 75 Pac. 796; Re Leonardino, 9 Cal. App. 690, 100 Pac. 708; Ex parte Ruef, 150 Cal. 665, 89 Pac. 605.

[4] Section 503 of the Penal Code defines embezzlement as follows:

"Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted."

Viewed in the light of this section, we think the indictment under which petitioner was arrested and by virtue of which he is held by the sheriff as aforesaid, sets forth the essential elements of embezzlement, which, as we understand them to be, are: (1) The fiduciary relation arising where one intrusts property to another; and (2) the fraudulent appropriation of the property by the latter. We think, too, that notwithstanding the surplusage contained in the indictment, it alleges, substantially, the crime denounced by section 503. Petitioner is distinctly charged with having received the money for and on account of the Scholls, and with having feloniously embezzled and converted it to his own use, and not in the due and lawful execution of his trust. For the reasons stated in the Matter of Rogers, 160 Cal. 764, 118 Pac. 242, it is of no consequence to petitioner that a violation of section 506 of the Penal Code was charged in the indictment, instead of section 503, supra, under which the facts bring the offense. The case is within the doctrine enunciated in Re Avdalas, 10 Cal. App. 507, 102 Pac. 674, a habeas corpus proceeding, where, contrary to the contention of petitioner here, the court holds that—

"The writ of habeas corpus cannot be made to serve the office of a demurrer, * * * and will not lie, when the court has jurisdiction of the kind of offense charged, and there is an attempt, however defective, and however subject to a demurrer, to state a public offense, and the facts alleged squint at a substantive statement of such offense."

The writ is discharged, and the prisoner remanded.

We concur: FINLAYSON, P. J.; WELLER, J.

48 Cal. App. 328

FRITZ v. MILLS et al. (Civ. 3327.)

(District Court of Appeal, First District, Division 1, California. June 28, 1920. Hearing Denied by Supreme Court Aug. 26, 1920.)

1. Property ⟸9—Evidence held to show that money deposited in court to pay mortgage belonged to plaintiff.

Evidence that plaintiff in an action for specific performance borrowed the money deposited in court to pay off a mortgage on the property, as required by the court's decree, which was later reversed, *held* to show that the money belonged to plaintiff, and not to her attorney.

2. Equity ⟸65(2)—Unsuccessful litigation by plaintiff held not to establish want of clean hands.

Where plaintiff had sued for specific performance and paid a mortgage on the premises, as required by the court's decree for specific performance, which was later reversed, contracts of sale by plaintiff and litigation defended by her in good faith on grounds which, though not sustained, there was legal cause for advancing, do not show that plaintiff came into court without clean hands, so as to be deprived of the right to subrogation, especially where defendant had received through the litigation full compensation for the use of the premises and the satisfaction of a mortgage thereon by plaintiff.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Charles Wesley Reed, for whom Mary A. Fritz was substituted as plaintiff, against Laura J. E. Mills and another. From a decree subrogating plaintiff to the rights under a mortgage and directing foreclosure and sale, defendants appeal. Affirmed.

See, also, 170 Cal. 449, 150 Pac. 375.

F. H. Dam, of San Francisco, for appellants.

Arthur H. Barendt, Charles J. Heggerty, Charles Wesley Reed, and George H. Pippy, all of San Francisco, for respondent.

KNIGHT, Judge pro tem. This is an appeal by the defendants, Laura J. E. Mills and Frederick J. Mills, from a judgment rendered in favor of the plaintiff, Mary A. Fritz, subrogating plaintiff to the rights of a mortgagee and awarding judgment against the defendants for the amount of the lien, with the usual decree of foreclosure and order of sale. This is the third appeal of this action and a recital of the history of the litigation seems necessary in order to clearly state, and afterwards to intelligently discuss, the points raised on this appeal.

The action was commenced on October 31, 1906, by Charles Wesley Reed, to compel the specific performance by the defendants of a contract for the sale to Reed of certain real property situate in the city of San Francisco, which, at the time, was mortgaged to the Mechanics' Building & Loan Association for the sum of $5,000. On October 24, 1907, the mortgagee commenced foreclosure proceedings. On May 19, 1908, the present plaintiff, Mary A. Fritz, was in the action at bar substituted as party plaintiff in the place of Reed. On May 18, 1908, pursuant to an interlocutory judgment to the effect that it would be equitable for plaintiff to deposit with the clerk of the court the sum of $6,988.99, to cover the amount due said defendants under said contract of sale, including a rental of $35.83 per month from April 9, 1906, from which time plaintiff had occupied the premises, plaintiff tendered to the clerk that amount, and, on May 29, 1908, the court entered a finding to that effect. Thereafter, on June 9, 1908, the court rendered its final decree in favor of plaintiff, and it was, among other things, decree that defendants should, within five days, deposit with the clerk of said court a deed of said premises to plaintiff, or, upon their failure to do so, the clerk should execute said deed and deliver the same to plaintiff, and that upon the delivery of said deed the clerk should pay said mortgage, including certain counsel fees and costs, to said Mechanics' Building & Loan Association, and, after making certain other payments, should pay the remaining money to the defendants. It was provided, however, that before making any of said payments said defendants should execute and deliver to the clerk a satisfaction of the judgment in the action. The defendants refused to execute said deed, and, on July 14, 1908, the clerk of the court executed a deed to plaintiff and delivered it to plaintiff's attorney. It was filed for record the following day. Before the delivery of the same, however, the clerk obtained from plaintiff's attorney a written waiver of that part of the judgment which required defendants to execute a satisfaction of said judgment prior to the disbursement of said money. Thereafter, on August 5, 1908, the court directed the treasurer, to whom the money had been paid by the county clerk, to pay off the amount of said mortgage of said Mechanics' Building & Loan Association, amounting to $5,707.17, which was done, and said mortgage was then satisfied of record accordingly. No bond for a stay of execution of the judgment was ever given by defendants, but on December 1, 1908, they took an appeal

On appeal the judgment was, on December 3, 1909, reversed (Fritz v. Mills, 12 Cal. App. 113, 106 Pac. 725), upon the ground that the complaint in the action declared upon a written agreement for the sale of real estate, whereas the findings and judgment were based upon an equitable estoppel in pais,

which had not been pleaded. The effect of the reversal of the judgment was to nullify plaintiff's deed to the premises.

After the cause was remanded to the superior court the plaintiff filed a third amended complaint and also a supplemental complaint. In the supplemental complaint all of the proceedings taken by the court and the parties after the first trial, relating to the execution of the deed, the payment of the money, and the satisfaction of the mortgage, were set out substantially as they are hereinabove recited. The prayer was that plaintiff be reimbursed for such payments and be subrogated to the rights of the mortgagee, in case plaintiff should not obtain a conveyance of the property, and for such other and further relief as should be just and equitable. On the second trial the judgment was in favor of the defendants. The court denied the prayer of the third amended complaint for specific performance, and in reference to matters pleaded in the supplemental complaint held that the payment of the money into court by plaintiff and the satisfaction of the mortgage were voluntary acts on her part, and she was therefore entitled to no relief. A motion for a new trial was made by plaintiff, and the court denied the motion as to that part of the judgment which denied specific performance, but granted the motion as to the supplemental complaint, "solely upon the ground that in the opinion of the court the payment of the mortgage by Reed was not a voluntary payment, and that plaintiff is entitled to relief on account of such payment." Appeals were then taken by both plaintiff and defendants, and, on June 21, 1915, the Supreme Court (Fritz v. Mills, 170 Cal. 449, 150 Pac. 375) sustained the views of the lower court on the motion for a new trial. In doing so the Supreme Court declared in unmistakable language that the facts pleaded in the supplemental complaint entitled plaintiff to be subrogated to the rights of the mortgagee, and that she should be granted relief accordingly.

The next trial resulted in a judgment in favor of the plaintiff, in accordance with the views expressed by the Supreme Court. The plaintiff was subrogated to the rights of the Mechanics' Building & Loan Association, and was given a decree of foreclosure and order of sale for the amount of her lien.

The decision of the Supreme Court, speaking through an opinion written by Mr. Justice Shaw, in which all of the Justices concurred, is full and comprehensive, and, in our opinion, disposes of all of the important questions arising on this appeal. After a full recital of the facts the decision reads:

"Upon these facts, we are of the opinion that the plaintiff is entitled to relief on account of the payment of said mortgage out of the money deposited in court, if it shall be finally determined that she is not entitled to specific performance. The allegation that the payment was made pursuant to the orders and decree of the court is true, and the finding to the contrary is without support in the evidence. The payment was made in good faith for the purpose of complying with the judgment given by the court and with the agreement which that judgment purported to enforce. The plaintiff cannot justly be made to suffer loss by such compliance, and it would be inequitable to allow the defendants to profit by a successful appeal taken after the plaintiff, relying on that judgment, had complied with its terms by paying money on the defendant's debt which the plaintiff was otherwise under no obligation to pay.

"We are also of the opinion that the court has power, under such a supplemental complaint, to declare that the plaintiff shall be subrogated to the lien of the mortgage and to enforce such lien in her favor by an appropriate judgment in the action, in case it should conclude that the plaintiff was not entitled to enforce the alleged agreement of sale. The matters upon which the supplemental complaint were based all took place in the course of the proceedings in the main case and in pursuance of the orders and judgment made by the court. The acts of the plaintiff were both authorized and required by the court itself, and, when the matter was regularly brought to its notice before final judgment, the court could and should, in justice, give appropriate relief in the action in which the payments were made, in order, so far as it is able to do so, to restore to plaintiff the money she had paid for the defendants in pursuance of its own erroneous judgment. For these reasons, we hold that, so far as the matters presented by the supplemental complaint are concerned, the new trial was properly granted."

And in conclusion the court said:

"For these reasons we think the court below should have limited its order for a new trial to the matters presented by the supplemental complaint and the answer thereto, and that it was correct in denying the new trial so far as the merits of the case of the plaintiff for specific performance is concerned. The order granting a new trial operated to vacate the judgment provisionally, in the event that the order should be sustained on appeal. In the existing circumstances, we think the judgment should stand vacated in order that the court below, upon the going down of the remittitur, may proceed to a retrial of the issues arising upon the supplemental complaint, and, after determining the rights of the plaintiff thereunder, may proceed to enter an appropriate judgment for the relief therein claimed, simultaneously with a re-entry of the judgment denying the plaintiff's case for specific performance, that the new trial shall not embrace a retrial of the issues arising upon the third amended complaint, but that the findings already made shall stand as the final decision thereon."

[1] Appellants now contend, however, that during the last trial certain additional evidence was presented which was not considered by the Supreme Court at the time it ren-

dered its decision, and it is claimed that such evidence renders the effect of the decision of the Supreme Court, in so far as it holds that plaintiff was entitled to subrogation, inapplicable to the merits of the present appeal. In this respect it is first claimed that the money deposited with the clerk and paid on the mortgage was Reed's money, and not that of Mrs. Fritz. The evidence shows to the contrary. Reed, on May 1, 1908, executed an assignment and transferred all of his interest to Mrs. Fritz, and that assignment was filed in court on May 4, 1908. The interlocutory decree, requiring the deposit to be made, was rendered and filed on May 16, 1908, and two days afterwards, on May 18, 1908, Mrs. Fritz personally borrowed $6,800 from the First National Bank on her promissory note, and delivered the money to Reed, as her attorney, to pay into court, and Reed deposited the money with the clerk of the court accordingly. Afterwards Mrs. Fritz personally paid the note at the bank. Whatever Reed may have said about the money being his money was merely his opinion, and is contrary to the established facts. He admitted that Mrs. Fritz had obtained the money in the manner testified to by her, and it was conclusively shown that at the time he made the deposit he had legally transferred all of his interest in the case, and he expressly admitted while testifying that he claimed no interest as a party in the litigation.

[2] It is next contended that plaintiff's case is without equity, and that she does not come into court with clean hands. In support of this contention appellants rely principally upon certain acts of plaintiff in relation to two other suits which grew out of this transaction. On September 30, 1908, after Mrs. Fritz had obtained a deed to the property, she entered into an installment contract to sell it to Isabella Laing. During the life of that contract, to wit, on June 30, 1909, plaintiff commenced suit under the McEnerney Act to perfect the title. In that suit it was alleged in the verified petition of Mrs. Fritz that she was the owner in fee and in the actual and peaceable possession of the property. Her affidavit contains substantially the same statement, and further states that there were no subsisting mortgages, deeds of trust, or other liens on said property, and that any claim of Mrs. Mills was without foundation or right. The remittitur of the District Court of Appeal on the first reversal of the action at bar was filed on February 10, 1910, and afterwards, on April 30, 1910, Mrs. Fritz, assuming to act as the owner of the property, entered into a further agreement with Mrs. Laing for the sale of the property. The two suits above referred to, in the defense of which the acts of Mrs. Fritz are assailed, were both in ejectment, instituted by Mrs. Mills for the restitution of the premises and for damages for their use and occupation. The first suit was commenced against Reed and Mrs. Fritz on April 8, 1911, subsequent to the date of the first reversal. In the answer in that action Mrs. Fritz alleged that since April 9, 1906, she had been and was then the owner of the premises and entitled to the possession thereof. That action was dismissed on December 2, 1915, for want of prosecution. On December 4, 1915, two days afterwards, Mrs. Mills commenced the second action in ejectment against the Laings, to whom Mrs. Fritz had contracted to sell the property. This action was commenced a few months subsequent to the date of the decision of the Supreme Court. The Laings were represented in that action by an attorney employed by Mrs. Fritz, and Mrs. Fritz financed the defense of the action. Among the defenses urged were those of adverse possession and the statute of limitations. On June 27, 1916, Mrs. Mills recovered a judgment against the Laings for $4,535.70, with interest and costs, for damages on account of the withholding of the possession of said premises from December 4, 1910, to the date of judgment. An appeal was taken by the Laings, and the judgment was afterwards, on November 26, 1918, affirmed by the District Court of Appeal of the First Appellate District. Mills v. Laing, 38 Cal. App. 776, 177 Pac. 493, Mrs. Fritz financed the appeal, and afterwards paid the judgment, together with the interest and costs.

The position of Mrs. Fritz throughout the course of the prolonged litigation above mentioned and the matters pleaded by her in the defense of those actions, and the assumption by her of the ownership of the property subsequent to the reversals, together with other acts done and performed by her incidental to the litigation, the importance of which is not sufficient to here discuss, is claimed by appellants to be contrary to equity and good conscience and sufficient to deprive Mrs. Fritz of the right to seek any relief in a court of equity. With this contention we cannot agree. In 1908 Mrs. Fritz borrowed $6,800 to invest in a perfectly legitimate transaction, which afterwards developed into a complicated and seemingly endless subject of litigation. In the course of that litigation, in order to protect her legal rights, it was necessary for her to present her cause in the manner advised by legal counsel. It was not until November 26, 1918, at the time the District Court of Appeal affirmed the judgment in Mills v. Laing, that it was definitely determined that Mrs. Fritz and her successors were not the owners of the property or entitled to the possession thereof, and until that question was definitely decided her attorneys were entitled to make and present any defense which they believed to be consistent with the law. The discussions contained in the opinions of the appellate courts show that while those defenses were not sustained, there was suffi-

cient legal ground for urging them. Mrs. Fritz has been compelled to pay the judgment recovered against the Laings, which, with interest and costs, amounted to upwards of $5,000, which compensated the appellants for the use of the premises from December 4, 1910, to December 4, 1915, and there has also been deducted from the judgment in the instant case upwards of $5,000 for the use of the premises from April 9, 1906, to December 4, 1910. She has also repaid to the Laings the amount paid by them on the purchase price of the property, and, furthermore, Mrs. Fritz has met the expenses of three trials in the superior court and the cost of two appeals, and now, at the conclusion of 12 years of continuous litigation, she will recover the net sum of $7,443.75. On the other hand, defendants at the commencement of the litigation were the owners of an equity in this property, over the amount of the mortgage interest, of approximately $1,100. During the 14 years they have been out of the possession of the property they have received cash and credit to adequately compensate them for the use of the property. If plaintiff shall now be denied the amount of money originally invested by her in this transaction, which is represented by the present judgment, and if appellants are allowed to take the property free and clear of a lien, toward the liquidation of which they contributed nothing, it would be manifestly unjust and contrary to the established principles of equity and justice. We can find no merit in the contention of appellants that the respondent does not come into court with clean hands.

The other points raised by appellants are either immaterial or they have been disposed of by the decision of the Supreme Court.

The judgment is therefore affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

48 Cal. App. 383

McPHAIL v. NUNES et al. (Civ. 2152.)

(District Court of Appeal, Third District, California. June 29, 1920.)

1. Appeal and error ⊂=1099(3)—Decision on former appeal as to binding effect of judgment law of case.

A decision on former appeal of the same action that a prior judgment was not binding on plaintiff is the law of the case thereafter.

2. Taxation ⊂=710—Though tax deed was void, redemption money must be paid purchaser instead of state.

Though a tax deed was void, yet where the purchaser had paid the state the entire amount of taxes and penalties so as to be entitled to a deed, the owner cannot, by paying such amount to the state, redeem; the state having parted with its interest.

3. Quieting title ⊂=44(4) — Prima facie title conclusive as against defendants having no interest.

Proof of a chain of title from the patentee down to plaintiff, establishing a prima facie title, was conclusive as against defendants, who were not in possession of the land, and whose tax deed was void.

4. Taxation ⊂=814(1)—Refusal of tender by holder of invalid tax deed does not warrant judgment without provision for payment.

Under Pol. Code, § 3898, subd. 5, as amended by St. 1917, p. 715, relating to invalid tax titles, judgment should not be entered for the owner of land, where the tax deed was invalid, without provision for payment to the purchaser of the amount of the taxes, and this is so though the purchaser in open court declined the tender of such amount.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by Hugh McPhail against A. F. Nunes and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded, with directions.

Lamberson, Burke & Lamberson, of Visalia, for appellants.

John G. Covert, of Hanford, for respondent.

NICOL, Presiding Judge pro tem. This is an action brought by plaintiff to quiet title to a certain tract of land in Kings county, Cal., particularly described as the northeast quarter of section 3, township 24 south, range 18 east, Mount Diablo base and meridian, and to have set aside and declared null and void a certain judgment entered in the superior court in Kings county on the 10th day of June, 1909, in the case of Nunes v. Copper et al. The complaint was filed June 19, 1915.

Defendants answered, and in the second amended answer denied that plaintiff was the owner of the lands in question, and denied that the judgment in the case of Nunes v. Copper et al. was void and of no effect, but admitted that they claimed an interest and ownership in the lands, and alleged in that respect that they were the owners of said land.

Defendants as a separate defense alleged: (1) That the sum of $87.12 by them paid for said lands had not been returned to them by plaintiff, nor offer made to return the same; (2) that defendants and their immediate predecessors had acquired title by prescription; and (3) that said action was barred by section 318 and subdivision 4 of section 338 of the Code of Civil Procedure.

On issue joined by the pleadings the case came on for trial on March 23, 1916, and the court made and entered its findings and gave judgment for defendants, quieting their title

to said lands. However, the court found against defendants upon prescriptive title, bar of the statutes, and a certain tax deed under which defendants claimed, but found that the judgment rendered in the case of Nunes v. Copper, on the 10th day of June, 1909, was a valid and subsisting judgment, and on this finding entered judgment, quieting title in defendants as above stated.

From this judgment plaintiff Hugh McPhail appealed, and on the 7th day of November, 1918, this court reversed the judgment of the lower court, and remanded the cause. McPhail v. Nunes, 38 Cal. App. 557, 177 Pac. 193. On the second trial judgment was entered in favor of plaintiff, and from the judgment so entered defendants have appealed.

[1] As appears from the above statement the court on the first trial held that plaintiff's cause of action was not barred by the provisions of the statute of limitations, and that defendants had no title by virtue of a certain tax deed under which they claimed, but that defendants had title by virtue of the judgment rendered in favor of defendant Nunes in the case of Nunes v. Copper et al., in which action service of summons was made by publication, and which service this court held to be invalid, and by reason of such invalid service reversed the judgment. McPhail v. Nunes, 38 Cal. App. 557, 177 Pac. 193.

This decision upon the question of the service of summons has become the law of the case, and it is therefore unnecessary for us to enter into any further discussion of the matter.

The point is made by appellants upon this appeal that plaintiff cannot maintain this action, for the reason that the property had been sold to the state of California, and that the plaintiff had not redeemed from such sale to the state, and that plaintiff is in no position to maintain an action to quiet title.

[2] It appears from the record that the real property was sold to the state for delinquent taxes on the 27th day of June, 1900, and that the state received a deed for the same on the 8th day of July, 1905; that on the 26th day of July, 1907, a deed from the state was made by the tax collector of Kings county on behalf of the state to defendant A. F. Nunes, pursuant to a sale at public auction, noticed for and held on the said 26th day of July, 1907. This deed was held to be invalid for the reason that no proper notice was given of the sale as required by law, which defect rendered the said deed void. But the said defendant paid to the state all taxes and penalties necessary to entitle him to a deed. Under these circumstances, we agree with the respondent that—

"The plaintiff could not redeem from the state, after the state had been fully paid, and the money due from the plaintiff for these taxes was no longer due to the state, but to the defendant who had paid the state."

Defendants, in support of their claim that plaintiff is in no position to maintain an action to quiet title, cites the cases of Sears v. Willard, 165 Cal. 12, 130 Pac. 869; Schroder v. Aden Gold Mining Co., 144 Cal. 628, 630, 78 Pac. 20; Maginnis v. Hurlbutt, 34 Cal. App. 508, 168 Pac. 368; Klumpke v. Henley, 24 Cal. App. 35, 140 Pac. 289, 313, and Rockey v. Vieux, 179 Cal. 681, 682, 178 Pac. 712. None of these cases support this contention. In Sears v. Willard the facts are different from the facts of the case at bar. There the plaintiff sued to quiet title to two lots of land. Defendants answered, denying plaintiff's title; setting up their own title by conveyance as well as by open and exclusive possession of the property and payment of taxes thereon, and pleading the bar of the statute of limitations. The court found that plaintiff was not the owner of nor entitled to the possession of the land in question; that for more than five years after their entry thereon under a certain tax title pursuant to certificates of sale of said premises for nonpayment of city taxes for the year 1900 defendants had held exclusive possession of, and had paid all taxes upon, said property, and that plaintiff had not repaid, nor offered to repay, any of the amounts so expended.

In the case at bar the answer alleges that the defendants are in the possession of the land, but it is found by the court that the defendants have not, nor have their predecessors in interest, for five years prior to the filing of the complaint, or at all, been in the possession of said land, or any part thereof, under any claim of right, and have not paid all the taxes levied and assessed upon said real property during said five years.

In the case of Schroder v. Aden Gold Mining Co., supra, the court simply announced the rule that a plaintiff must obtain judgment upon the strength of his own title, and not upon the weakness of that of the defendants, and to the same effect are the cases of Maginnis v. Hurlbutt, 34 Cal. App. 504, 508, 168 Pac. 368, Klumpke v. Henley, 24 Cal. App. 35, 36, 140 Pac. 289, 313, and Rockey v. Vieux, 179 Cal. 681, 682, 178 Pac. 712.

[3] The plaintiff's title to the land, as shown at the trial, was proven as follows:

"It was stipulated by the respective parties that title to the lands described in plaintiff's complaint as the northeast quarter of section 3, township 24 south, range 18 East, Mount Diablo base and meridian, were conveyed by patent from the United States to Grant Copper; and by deed conveyed by Grant Copper to Jennie V. Copper. A deed was then offered by plaintiff and admitted in evidence without objection, whereby Jennie V. Copper and John A. Copper, her husband, conveyed to plaintiff Hugh McPhail said lands, which deed was properly ac-

knowledged and executed and recorded in the office of the county recorder of the county of Kings, state of California, on August 18, 1913, in Book 52 of Deeds at page 50 thereof."

This record, under the circumstances in this action, surely establishes a prima facie case of ownership in plaintiff, and, the defendants not being in possession of the property, or any part thereof, and having no title whatever in themselves, are in no position to attack this prima facie case made by the plaintiff. Williams v. City of San Pedro, 153 Cal. 44, 49, 94 Pac. 234. Mr. Justice Shaw, in his concurring opinion in Williams v. San Pedro, 153 Cal. at page 50, 94 Pac. at page 237, says:

"The rule is elementary and practically universal that no party will be permitted to interpose to defeat the prima facie title of another party to the thing, derived by him from a third person, unless such attacking party pleads, or shows in some authorized manner, that he has some right, title, or interest in the thing. A defendant who does not himself claim some right, title, interest, or possession, has no status to question the validity of a conveyance of the property by a third person to the plaintiff."

[4] It was stipulated at the trial and the court found that the defendants had paid to the tax collector of Kings county for the purchase of the lands $87.12, and that this sum was the accrued costs, including back taxes and the accrued interest at that time, and that since the time of the said purchase the defendants have paid the further sum of $91.50 for taxes.

Section 3898, subdivision 5, of the Political Code as amended by St. 1917, p. 715, provides:

"Whenever in any action at law, it has been or shall be determined by a court that the sale and conveyance provided for in this and the preceding section or in section three thousand seven hundred seventy-one of this Code heretofore or hereafter made are void for any reason, and that the purchaser from the state may not be finally awarded the property so purchased, no decree of the court shall be given declaring a forfeiture of the property until the former owner, or other party in interest, shall have repaid to the purchaser the full amount of taxes, penalties and costs paid out and expended by him, to be determined by the court, in pursuit of the state's title to the property so sold. * * *"

There is no provision in the judgment entered in this action, providing that said judgment should not take effect until payment by the plaintiff to defendants of the amount of taxes paid by said defendants upon the property. While it is true that at the trial of this action the plaintiff offered in open court to pay defendants the full amount of taxes, penalties, and costs paid out and expended by them in pursuit of the state's title to the property in question, together with interest thereon at the rate of 7 per cent. per annum from the time such payments were made, to the date of the trial, and that this offer was by the defendants in open court refused, nevertheless, we are of the opinion that under said section 3898, subdivision 5, of the Political Code it was incumbent upon the court, in rendering its judgment in favor of plaintiff, to provide that said judgment should not take effect until plaintiff made such payments. Said section 3898 of the Political Code provides positively that no decree shall be made until this relief is granted to the purchaser of a tax title. Smith v. Golden State Syndicate, 185 Pac. 209. The mere fact that the defendants refused to accept the said offer made by plaintiff prior to judgment to reimburse them for their expenditures did not constitute a waiver on their part of the provisions of subdivision 5 of section 3898 of the Political Code, nor deprive them of any of their rights under said section.

The judgment appealed from is reversed, and the cause remanded, with directions to the court below to enter judgment upon the findings in favor of plaintiff, conditioned that the judgment shall not take effect until payment by the plaintiff to the defendants of the amount of taxes, penalties, and costs paid by the said defendants upon the property.

We concur: HART, J.; BURNETT, J.

48 Cal. App. 422

AAROE v. CROSBY et al. (Civ. 3494.)

(District Court of Appeal, First District, California, Division 2. July 6, 1920. Hearing Denied by Supreme Court Sept. 2, 1920.)

1. Licenses ⟸11(1)—Plumbing work so related to public health that license may be required.

Generally speaking, plumbing work is so related to the public health that the Legislature may, under its police power, make reasonable regulations governing it, and for that reason may provide for the examination and license of those engaged in such work.

2. Monopolies ⟸4—Statute creating monopoly in plumbing trade cannot be sustained as health regulation.

An act, designed for the purpose of controlling the plumbing trade and creating a monopoly in favor of those able to pay the tax, cannot be sustained as a health regulation, and for that reason St. 1917, p. 73, providing for the examination, certification, and registration of plumbers, which by its terms relates solely to master and journeymen plumbers, and merely

prohibits any journeyman or master plumber in specified localities from personally installing any plumbing unless he shall first obtain a temporary permit, and does not apply to itinerant plumbers, etc., cannot be sustained as a health regulation.

3. Licenses ⊂=11(1)—Lawful occupation may be subject to license.

A lawful and useful occupation may be subjected to regulation in the public interest, even though the regulation involves in some degree a limitation upon the exercise of the right regulated, and the test for determining the validity of such an act is whether the limitation is by way of regulation for the purpose of throwing reasonable safeguards in the public interest around the exercise of the right.

4. Constitutional law ⊂=208(6)—Statute regulating plumbers invalid as discriminatory.

St. 1917, p. 73, providing for the examination, certification, and registration of plumbers, which relates solely to master and journeymen plumbers, making it unlawful for any journeyman or master plumber, who is one having an established place of business and who works by contract, to personally install any plumbing or drainage system, is discriminatory in favor of the employing master plumber against one who has an established place of business and performs plumbing work himself, the effect of the act being that the employing master plumber can operate without any license or fee, while one who works individually under contract is required to pay an annual license, and may be deprived of his means of livelihood at the caprice of examining board.

5. Statutes ⊂=81—Act regulating plumbers invalid as class legislation.

St. 1917, p. 73, purporting to regulate plumbing in designated municipalities, which applies only to journeymen and master plumbers having an established place of business and who work by contract, requiring a license if they personally install any plumbing, is invalid as special legislation, because it allows the larger contractor to escape all restriction if he employs but one licensed plumber to supervise unlicensed helpers and apprentices, while every contractor who performs his own work must comply with the act.

6. Statutes ⊂=81—Discrimination in later act held not removed by earlier act.

The discriminatory feature of St. 1917, p. 73, purporting to regulate the business of plumbing trade, which in effect allowed master plumbers having an established place of business and working by contract to escape all regulation, is not removed, but is rather emphasized, when read in connection with Act March 3, 1885 (St. 1885, p. 72), as amended March 9, 1887 (St. 1887, p. 58), which requires every person engaged in the business or labor of master or journeyman plumber in any incorporated city to obtain a license, to be issued on examination, the license provided for being irrevocable and issued with charge.

Application by H. N. Aaroe for writ of mandate to be directed to Daniel Crosby and others, as the Plumbers' Examining Board of Alameda County, requiring them to examine petitioner. Application denied, and alternative writ discharged.

John L. McNab, of San Francisco, Charles E. Snook, of Oakland, J. C. Macfarland, of Los Angeles, and Geo. M. Naus, of Oakland, for petitioner.

G. E. Rodman, of Oakland, for respondents.

Daniel A. Ryan, of San Francisco, amicus curiæ, for Journeyman Plumbers' & Gas Fitters' Local No. 442.

NOURSE, J. An alternative writ of mandate was issued out of this court on application of the petitioner, requiring respondents, as members of the plumbers' examining board of Alameda county, to show cause why they should not order an examination of petitioner as to his competency under the statute of April 6, 1917 (St. 1917, p. 73), entitled "An act providing for the examination, certification and registration of plumbers, prescribing powers and duties of the state board of health in reference thereto, and penalties for a violation of the provisions hereof." The answer of respondents is that the act is unconstitutional for various reasons, and that they are therefore not qualified to examine petitioner, or to issue to him the license or certificate of competency required by the act.

Petitioner contends that the statute is constitutional upon the broad ground that it is an exercise of the police power of the state designed for the protection of the public health, and that for this reason the alleged discriminatory features of the statute do not render it void.

[1, 2] Generally speaking, plumbing work is so related to the public health that the Legislature may, under its police power, make reasonable regulations governing it, and for that purpose may require the examination and licensing of those engaged in such work. Such legislation has been sustained by the great weight of authority. Commonwealth v. Beaulieu, 213 Mass. 138, 99 N. E. 955, Ann. Cas. 1913E, 1080; People v. Warden, 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718; State v. Benzenberg, 101 Wis. 172, 76 N. W. 345; Ex parte Smith, 231 Mo. 111, 132 S. W. 607. But where an act has no such relation to the public health, and is designedly for the purpose of controlling the plumbing trade, "to shut out competition, create a monopoly and force those unable to pay the tax and possessing a knowledge of the business to look to the ones in control of the monopoly for employment," it cannot be sustained as a health measure. Wilby v. State, 93 Miss. 767, 47 South. 465, 466, 23 L. R. A. (N. S.) 677; State v. Smith, 42 Wash.

237, 84 Pac. 851, 5 L. R. A. (N. S.) 674, 114 Am. St. Rep. 114, 7 Ann. Cas. 577.

The act in question does not pretend to be a health measure. It is entitled "An act providing for the examination, certification and registration of plumbers," etc. By its terms it relates solely to master and journeymen plumbers, the first being defined as one who has an established place of business and works by contract, and the latter as "one who, as an employé, personally installs plumbing work." The only prohibitory feature of the act is that "it shall be unlawful for any journeyman plumber or master plumber in any city or town maintaining a public sewer system to personally install any plumbing or drainage system or portion thereof unless he shall first obtain a temporary permit or a certificate of competency." The examining board created by the act is required to issue a temporary permit to every applicant, valid until the examination is held and the certificate of competency granted or denied. Certificates of competency are issued for one year, upon examination, subject to renewal annually upon payment of the required fee and subject to revocation for violation of the rules of the examining board or of the regulations of any municipal building, plumbing or sanitary ordinance.

[3] A mere reading of the act disposes of the contention that it is a health measure. It is plainly designed to control those engaged in the plumbing trade in certain localities. It has no application to the itinerant plumber or other artisan who has no established place of business if he works upon contract. Thus a plumber who has no established place of business or a person without any skill as a plumber might do all the acts prohibited to a master plumber having an established place of business. However, it is not necessary that the act should be a health measure to sustain its validity. As said by the Supreme Court in Riley v. Chambers, 185 Pac. 855, 856:

"It is equally true that a lawful and useful occupation may be subjected to regulation in the public interest, and that all regulation involves in some degree a limitation upon the exercise of the right regulated. The test is whether or not the limitation imposed is really by way of regulation only; is one whose purpose and effect go no further than throwing reasonable safeguards in the public interest around the exercise of the right. If the limitation is of this character, its imposition is a proper exercise of the police power resident in the Legislature, and whose exercise is one of the latter's most important functions."

[4] But the statute is attacked because it discriminates against the master plumber who has an established place of business and in favor of the one who has no established place of business, and because it discriminates in favor of the employing master plumber and against the one who from an established place of business individually performs plumbing work by contract. This is so for two reasons: (1) The prohibitory features of the act relate solely to the personal installation of plumbing work; and (2) they do not relate to a helper working under one who has a license. The effect of these provisions of the act is that the employing master plumber can operate without any license or fee and free from all penalties of the act, while the one who works individually under contract is required to obtain a license, pay the annual renewal fees, and subject himself to all penalties of the act, including that of being deprived of his means of livelihood, at the caprice of the examining board.

[5] But beyond all this the fatal defect in the act is that the large contractor escapes all restriction if he employs but one licensed plumber, who may supervise an unlimited number of unlicensed helpers and apprentices, whereas each contractor who performs his own work must comply with the act. The individual contractor must therefore choose between subjecting himself to all the restrictions of the act or letting himself out as an employé of one who has an established place of business and who works by contract. Here is therefore a discrimination between those engaged in the same trade without any reasonable basis for a classification. For this reason the act offends the constitutional inhibition against special legislation and is void. In re Raleigh, 177 Cal. 746, 751, 171 Pac. 950, and cases there cited.

[6] It is argued that this objection is removed by reading the act in connection with the act of March 3, 1885 (St. 1885, p. 72), as amended March 9, 1887 (St. 1887, p. 58), which requires a license for every person who engages in the business or labor of master or journeyman plumber in any incorporated city. But if the earlier statute was not intended to be repealed by that of 1917, it merely emphasizes the unlawful discrimination made in the later act. By the act of 1887 all persons who engaged in the business or labor of master or journeyman plumber in any incorporated city were required to procure a license from the local board of health or health officer. But the license was required to be issued upon examination before the board of health or health officer without charge, without an annual renewal fee, and without power of revocation. Having such a license, one could engage in the business or labor of master or journeyman plumber in any incorporated city, free from any restriction under the act of 1917, unless he was a master having a fixed place of business and doing his work personally under contract, or unless he was a journeyman not working as a helper under the direct personal supervision of another.

Other points raised do not require consideration. The petition is denied and the alternative writ discharged.

We concur: LANGDON, P. J.; BRITTAIN, J.

48 Cal. App. 504

FRASER v. CUMMINGS, City Clerk. (Civ. 3519.)

(District Court of Appeal, First District, Division 2, California. July 14, 1920.)

1. Mandamus ⟸164(4)—Allegations in return conclusive when not controverted.

The petitioner for mandamus to compel certification of a recall petition having the burden of proof, the determination of the clerk that certificates were not properly verified cannot be disturbed, where the return to the writ, setting forth improper verification, was not controverted by petitioner, pursuant to Code Civ. Proc. § 1091.

2. Municipal corporations ⟸159(1)—Election in which mayor selected held last general municipal election within recall proceedings.

Where the number of signatures to a petition for recall of an official of the city of Oakland was under the charter to be determined on the basis of the total vote cast for all candidates for mayor at the last preceding general municipal election at which a mayor was elected, the estimate may be based on the last preceding primary municipal election at which the mayor was selected, under a charter provision that a candidate at a primary election, who receives the majority of votes cast, shall be deemed elected.

3. Municipal corporations ⟸159(1)—Petitioner for recall of officer need not sign entire name.

One signing a petition for recall of a municipal officer may sign his usual signature or use his initials without appending his entire name as it appears on the registration records.

4. Municipal corporations ⟸159(6)—Sufficiency of recall petition held for city clerk.

Where the charter of the city of Oakland prescribed a form for certificates to signatures to a recall petition, and provided that the clerk should examine and ascertain whether or not the petition conformed to the requirements of the charter, the question whether the certificates gave the addresses of the signers is for the clerk, and his action cannot be reviewed by the court unless there is a showing of an abuse of discretion, even though the clerk reached a decision different from that which the court might reach.

5. Mandamus ⟸76—Writ lies where city clerk refuses to determine sufficiency of recall proceedings.

Where the clerk of a municipality refuses to determine the sufficiency of the recall petition, which was his duty under the charter, the court may, by mandamus, compel him to act.

Application by L. C. Fraser for a writ of mandate to be directed to L. W. Cummings, as Clerk of the City of Oakland, County of Alameda, to require him to certify a certain recall petition. Application denied.

See, also, 192 Pac. 100, 102.

De Lancey C. Smith and Clinton G. Dodge, both of Oakland, for petitioner.

H. L. Hagan, City Atty., and T. Ledgwich, Asst. City Atty., both of Oakland, for respondent.

NOURSE, J. [1] This is an original proceeding in mandamus. The petition alleges that on the 19th of May, 1920, the petitioner filed with respondent, as city clerk of the city of Oakland, a petition for the recall of a commisioner of said city containing something over 10,000 individual certificates, and that respondent, within the time prescribed by the municipal charter, examined said certificates, and on the 29th of May determined that they were insufficient to constitute a recall petition. Of the certificates so filed it is alleged that the clerk found 4,364 defective solely because the signers thereof failed to name the streets between which they resided; that others were found defective because the verification deputy used his initials only in signing his name to the verification; that others were found defective on both of these grounds; and that a small number were found defective because the signers thereof did not sign their names in full as they appear on the records of registration. The truth of the foregoing facts is admitted in the return, except as to the certificates rejected because of defective verification. As to these, the return alleges that the verification deputy in each case "signed by a different name, or in a different manner, or with a different signature than that of any regularly appointed and qualified verification deputy." These allegations of the return were not controverted by proof or otherwise by petitioner as he might do. Section 1091, Code Civ. Proc. Of course, if the certificates are not verified by the true signature of a regularly appointed and qualified verification deputy, they are invalid. The certificates are not before the court, and it is impossible to determine what number were rejected for that reason. The burden being upon petitioner to show the sufficiency of the petition, the determination of the clerk that some of the certificates were invalid because of defective verification cannot be disturbed.

[2] Another issue is raised by the pleadings, which is, however, a pure question of law. That is whether the number of signa-

tures required should be estimated on the basis of the total vote cast for all candidates for the office of mayor at the last preceding general municipal election at which a mayor was elected, as provided by section 7, subdivision 2, of the charter, or whether the vote cast at the last preceding primary municipal election at which a mayor was elected should form the basis. The controversy arises because after section 7, subdivision 2, was enacted, the charter was amended to provide that any candidate at the primary election who received a majority of all the votes cast for all candidates for any particular office should be deemed elected to that office, otherwise the election should be deemed to be a nominating election only. Acting upon the theory that votes cast at the last preceding general municipal election should form the basis of estimate, the city clerk determined that 6,475 signatures were necessary. Upon the basis of votes at the last preceding primary but 5,319 signatures would be required. It is undisputed that the last preceding municipal election at which a mayor was elected in the city of Oakland was that held in 1917, and generally designated as a primary or nominating election. The successful candidate, having received a majority of all the votes cast at said election for all candidates for the office of mayor, was declared elected. If he had not received such a majority the election would have been deemed a nominating election, and the two highest candidates would have been required to run again at a second or final election. Section 5, subd. 21, Charter. Having been elected, the clear inference is that as to him it was a final election, and hence the "last preceding general municipal election at which a mayor was elected" within the terms of section 7, subdision 2. The vote at that election should therefore form the basis for the number of signatures to the petition presented.

[3] The petitions which were rejected upon the sole ground that the signers did not sign their full names, but used one or more initials, should have been counted, if the signature used was sufficient to identify the signer and was otherwise unobjectionable. It is not necessary that an elector in signing a petition should use his full name, as it appears upon the records of registration. He may sign with his usual signature or use his initials. Opinion of Justices, 116 Me. 557, 103 Atl. 761; Conn v. City Council, 17 Cal. App. 705, 713, 121 Pac. 714, 719.

[4, 5] The petition would have contained a sufficient number of signatures if those signatures which failed to indicate the streets between which the signer resided had been counted. The controversy over these certificates arises from the fact that in the form of the certificate prescribed by the charter the following appears: "I reside at No. ——— street, between ——— street and ——— street." On more than one-half of the certificates filed the signer, though filling in the blank showing his street address, failed to fill the other blanks showing between which streets he resided. The charter provides that the certificates shall substantially follow the form prescribed. The respondent ruled that these certificates did not substantially comply with the form prescribed, and rejected them for that reason. It may well be said that this provision is for the aid of the clerk only, and that, if satisfied with the genuineness of the signatures, he might have counted them, waiving the technical defect in the form. Conn v. City Council, 17 Cal. App. 705, 121 Pac. 714, 719; Osborn v. Board of Supervisors, 27 Cal. App. 85, 148 Pac. 970. On the other hand, it should be borne in mind that the charter prescribes the same form for other certificates such as those for the nomination of candidates for office (section 5, subd. 3), the initiative (section 163), the referendum (section 181) as well as the recall (section 7, subd. 3). Ordinarily such a petition or certificate is required to indicate the voting precinct of the signer in addition to his home address, and a petition failing in that respect has been held insufficient. Thompson v. Vaughan, 192 Mich. 512, 159 N. W. 65, 69. See, also, In re Referendum Petitions, 78 Okl. 47, 186 Pac. 485, 487.

But in any event it is the clerk, and not the court, which must determine whether the certificates substantially comply with the requirements of the charter. By the provisions of subdivision 4 of section 7 of the charter the clerk is directed to examine the petition "to ascertain whether or not it conforms to all the requirements of this charter." This examination must be commenced immediately upon the presentation of the petition, and "within ten days after such presentation he must finally determine whether or not it so conforms and shall forthwith attach to said petition his certificate showing the result of his examination."

In a similar case our Supreme Court has said that the power conferred upon the registrar of voters by the San Francisco charter to finally determine whether the petition is signed by the requisite number of voters means that he "must complete his investigations as to the conformity of the petition to legal requirements, and as to the number of lawful signatures, and thereupon * * * finally determine both propositions, and that his decision is final. Baines v. Zemansky, 176 Cal. 369, 378, 168 Pac. 565, 569. And again in the same case (176 Cal. 379, 168 Pac. 570) the court say:

"But that the registrar's decision upon such evidence as he may take is to be final upon both propositions, that is, whether the petition conforms to all legal requirements, and whether it contains sufficient genuine signatures, is evident."

To the same effect is Watts v. Superior Court, 36 Cal. App. 692, 697, 173 Pac. 183.

In Fickert v. Zemansky, 176 Cal. 443, 446, 168 Pac. 891, the Supreme Court say:

"Unquestionably the registrar is required to examine these affidavits as well as the several sections of the petition, to ascertain whether or not they conform to the legal requirements of the charter. The time allowed is very short, and his inquiry must necessarily be of a summary character. The extent of the inquiry and the nature of the other evidence he may take in respect to these matters are not specified. The subject is left to his discretion."

Where the city clerk refuses to act as required by the charter, or where there is a showing of such an abuse of discretion as would indicate that no discretion was exercised, the courts may by mandamus compel the clerk to perform his duty under the charter. But here the showing is that the clerk did perform his duty and if, in the exercise of that duty, he reached a different conclusion from what this court might reach on the question of the necessity of showing the cross streets, this court has no jurisdiction to substitute its judgment for his. In other words, the people of the city of Oakland have in their charter conferred upon the city clerk the exclusive power to finally determine whether a recall petition conforms to all requirements of the charter, and they have thereby denied to the courts the power of reviewing such determination in a proceeding of this kind. It is the function of the courts to interpret the law as they find it, and to leave to the municipal officers the duty of executing the law as enacted. Where the people have conferred upon a ministerial officer an exclusive power to determine for them a certain fact, it is not the province of the courts to substitute their judgment for that of the officer so chosen. To do so would be to set aside the plain dictates of the law. What might be done in a case where fraud is shown need not be determined, because the petition here does not pretend to allege any fraud on the part of the clerk.

For the reasons given the petition is denied, and the alternative writ discharged.

We concur: BRITTAIN, J.; RICHARDS, Judge pro tem.

48 Cal. App. 796

FRASER v. CUMMINGS, City Clerk.
(Civ. 3520.)

(District Court of Appeal, First District, Division 2, California. July 14, 1920.)

Application by L. C. Fraser for a writ of mandate to be directed to L. W. Cummings, as Clerk of the City of Oakland, County of Alameda, to require him to certify a certain recall petition. Application denied.

See, also, 192 Pac. 100, 102.

De Lancey C. Smith and Clinton G. Dodge, both of Oakland, for petitioner.

H. L. Hagan, City Atty., and T. Ledgwich, Asst. City Atty., both of Oakland, for respondent.

PER CURIAM. The above-entitled cause presents the same issues as those involved in Fraser v. Cummings, No. 3519, 192 Pac. 100, this day decided, and for the reasons therein given the petition is denied, and the alternative writ discharged.

48 Cal. App. 797

FRASER v. CUMMINGS, City Clerk.
(Civ. 3521.)

(District Court of Appeal, First District, Division 2, California. July 14, 1920.)

Application by L. C. Fraser for a writ of mandate to be directed to L. W. Cummings, as Clerk of the City of Oakland, County of Alameda, to require him to certify a certain recall petition. Application denied.

See, also, 192 Pac. 1021.

De Lancey C. Smith and Clinton G. Dodge, both of Oakland, for petitioner.

H. L. Hagan, City Atty., and T. Ledgwich, Asst. City Atty., both of Oakland, for respondent.

PER CURIAM. The above-entitled cause presents the same issues as those involved in Fraser v. Cummings, No. 3519, 192 Pac. 100, this day decided, and for the reasons therein given the petition is denied, and the alternative writ discharged.

48 Cal. App. 400

McDOWELL et al. v. TITLE GUARANTEE & TRUST CO. (McDOWELL et al. Interveners). (Civ. 3079.)

(District Court of Appeal, Second District, Division 1, California. July 1, 1920. On Petition for Rehearing, July 24, 1920. Hearing Denied by Supreme Court Aug. 30, 1920.)

1. Appeal and error ⊜607(1)—Knowledge of entry of judgment starts running of time for giving notice to clerk of appeal.

Knowledge of entry of judgment, though no written notice has been served starts the running of the time for filing notice with clerk that party intends to appeal and demand for transcript, in accordance with Code Civ. Proc. § 953a.

2. Appeal and error ⊜628(3)—Payments held not to show waiver of right to undertaking fees so as to permit late filing of transcript.

Where appellants did not serve notice on clerk and demand for transcript, in accordance with Code Civ. Proc. § 953a, within 10 days after they learned of entry of judgment, and it did not appear that their payments on account to the reporter were sufficient to pay the fees in full, or that they obtained a waiver of his right to be secured by an undertaking, to be filed pursuant to section 953b, the transcript of the testimony, filed some years after entry of judgment, will not be considered.

3. Appeal and error ⊜607(1)—Default in filing notice to clerk of appeal cannot be excused more than six months thereafter.

Default in filing notice to clerk that party intended to appeal and demand for transcript of testimony cannot be excused by the trial court under Code Civ. Proc. § 473, more than six months after it had occurred.

On Petition for Rehearing.

4. Limitation of actions ⊜180(6), 182(5)—Defense cannot be asserted for first time in appellate court.

The defense that the complaint did not state a cause of action, because it showed on its face it was barred is waived, where not in some manner asserted in the trial court, either by demurrer or answer.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by F. C. McDowell and Frank D. McDowell against the Title Guarantee & Trust Company, in which Charles O. McDowell and another, executors of the estate of Hattie N. McDowell, intervened. From judgment for defendants, plaintiffs appeal. Affirmed.

Elon G. Galusha and Isador Morris, both of Los Angeles, for appellants.

W. G. Cooke, E. W. Sargent, and John F. Keogh, all of Los Angeles, for defendant and respondent.

Jones & Weller and Walter F. Keen, all of Los Angeles, for interveners and respondents.

CONREY, P. J. In this action judgment in favor of the respondents was entered on December 3, 1915. On the 24th day of January, 1916, plaintiffs filed notice of appeal from the judgment. The clerk's transcript on appeal was filed on June 27, 1919, and it appears therein that on April 11, 1919, the plaintiffs by their attorney filed with the clerk of the superior court a notice, requesting that a transcript of the testimony, etc., at the trial be made up and prepared. No bond to secure the reporter's fees for the transcript was filed, but the notice stated that the plaintiffs "have made arrangements with the court reporter to pay for the cost of the same." The reporter's transcript, containing 218 pages, was certified by the reporter, and on the 11th day of October, 1919, the truth and correctness thereof was certified by the judge who tried the case. This transcript was filed on the 23d day of October, 1919. The appellants' opening brief was filed on the 26th day of August, 1919. All of the grounds of appeal presented therein depend upon contents of the reporter's transcript. It thus appears that at the time of the filing of appellants' brief, and during the entire time allowed by the rules of court for filing of respondents' brief, the reporter's transcript referred to in that brief was not on file, and therefore there was nothing in the records of this court furnishing data upon which respondents could base any reply in their briefs. Respondents have filed no brief, and at the hearing they have objected to consideration of the matters presented in appellants' brief and to consideration of the appeal on its merits.

In the judge's certificate to the reporter's transcript statements are made showing that the reporter's transcript was filed by the reporter in the superior court on May 9, 1919, and that the judge refused to grant a certificate thereto; that thereafter, on August 15, 1919, pursuant to notice, appellants moved for an order vacating the order of May 14, 1919, whereby the court declined to certify to said transcript, which motion was opposed, and the court refused to vacate the order of May 14th, and again refused to certify to the transcript; that thereafter, on October 11, 1919, pursuant to notice, plaintiffs again moved the court to vacate said order of May 14th, which motion was granted, and the court then made the certificate as requested by plaintiffs. By recitals in the certificate it appears that the order as finally made was based upon an affidavit showing that on December 18, 1915, plaintiffs "ordered the reporter who reported the above-entitled action, at the trial thereof, to prepare his transcript to be used on appeal, and paid said reporter therefor, on said date, $5 on account of his charges for the preparation of said transcript; and that, thereafter, on December 29, 1915, said plaintiffs and appellants paid said reporter, on account of his charges in preparing said

transcript, the further sum of $30. The defendants, interveners and respondents, by counsel, opposed said motion on all grounds heretofore urged, among said grounds of opposition being that the court has no jurisdiction of this case; that the court has no jurisdiction to grant the motion of plaintiffs and appellants; that plaintiffs and appellants have been guilty of unreasonable delay and inexcusable neglect."

[1-3] Section 953a, Code of Civil Procedure, provides that the notice to the clerk, stating that the party demanding a transcript of the testimony desires or intends to appeal, or has appealed from the judgment, and requiring that a transcript of the testimony, etc., be made up and prepared, "must be filed within ten days after notice of entry of the judgment. * * *" In Fiske v. Gosbey, 168 Cal. 334, 143 Pac. 611, it was held, in accordance with previously established decision, that the filing of the notice of appeal from a judgment is conclusive evidence that the appellant knew of the judgment and its contents at the time of the filing of the notice, and that this fixed the beginning of the time to give notice to the clerk, in the absence of anything to show that he had notice thereof theretofore. "It is explicitly declared that a written notice of the entry of the judgment or order is not necessary to start running the time for filing said notice to the clerk, when the appellant has actual knowledge thereof." It was further held that by failing to give such notice within the time fixed by law the appellant loses his right to proceed with the preparation of his transcript on appeal in the manner provided by section 953a.

This record shows by the statement made by the judge indicating the evidence produced before him that the plaintiffs, according to their own showing, admitted that on the 18th day of December, 1915, they had actual knowledge of the entry of the judgment. The statements concerning payments on account made by the plaintiffs to the reporter are not sufficient to show, either that they paid the reporter's fees in full, or that they obtained credit from him or a waiver of his right to be secured by an undertaking to be filed, as required by section 953b, Code of Civil Procedure. If the appropriate notice to the clerk required by section 953a, Code of Civil Procedure, had been filed, it would have become the duty of the reporter to prepare the transcript and file the same with the clerk of the superior court within 10 days after the notice to prepare transcript, with the appropriate undertaking, was filed with the clerk. But, as we have seen, no such notice was filed with the clerk, nor was any further proceeding taken by the plaintiffs to obtain a transcript until more than three years after the notice of appeal was filed. According to the provisions of the Code, the time within which the plaintiffs were entitled to have the reporter's transcript prepared expired 10 days after appellants had knowledge of the entry of judgment, and, as above stated, they have admitted having such actual knowledge as early as December 18, 1915. If the order of October 11, 1919, and allowance of the transcript at that time by the judge, be regarded as an attempt to grant relief under section 473, Code of Civil Procedure, it was in excess of the jurisdiction of the court, since the period of six months after default, within which such relief might be granted, had expired more than three years before the order was made.

Upon the facts and in accordance with the law above stated, this court will not now regard said reporter's transcript as a part of the record on appeal. Since appellants do not rest their appeal upon any claim of error shown by the judgment roll, no question on the merits of the case remains to be considered.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

On Petition for Rehearing.

PER CURIAM. Presenting their petition for a rehearing, appellants challenge the statement made in the opinion filed by this court that all of the grounds of appeal presented by them depend upon the contents of the reporter's transcript. They insist that there are errors on the face of the judgment roll, which are mentioned on pages 31 to 34 of their brief, which they say that we have overlooked. It is true that they were overlooked, but by a very excusable inadvertence. Under the general heading "Points of Law," the brief contains a long list of such points, most of them not accompanied by any attempt to apply them to the case at bar. The items now designated by petitioners were buried in the mass of print, like needles in a haystack.

[4] Now considering the points on their merits: Appellants claim that the complaint in intervention did not state a cause of action because it shows on its face that it is barred. This defense was not made, either by demurrer or answer. Unless such defense is in some manner asserted in the trial court, it is waived. Bliss v. Sneath, 119 Cal. 526, 51 Pac. 848. Counsel for appellants assert that such defense was made in their answer to the complaint in intervention. The clerk's transcript does not contain any answer by appellants to the complaint in intervention. It is next suggested by counsel that the answer of defendant was a sham. Inspection of the answer shows that it was made in the usual direct form, and not for want of information or belief, and it met the issues tendered. Counsel say that "the answer does not deny that defendant had a mortgage to F. C. McDowell." The answer of the defendant denied that the said note and mortgage were made in favor of F. C. McDowell, and alleged

that, on the contrary, they were executed in favor of Hattie N. McDowell. The findings follow the answer in the determination of this matter. There are two or three other items directed to alleged errors shown by the judgment roll, but, as they have no greater merit than those already discussed, a further statement of them would be useless.

Concerning the matters which were discussed in the original opinion filed herein, we are satisfied with the decision as made.

The petition for a rehearing is denied.

48 Cal. App. 442

FARMERS' EXCH. NAT. BANK v. DREW.
(Civ. 3382.)

(District Court of Appeal, First District. Division 2, California. July 8, 1920. Hearing Denied by Supreme Court Sept. 2, 1920.)

1. Husband and wife ⊂=267(4)—Husband has right to mortgage community property.

Under Civ. Code, § 172, a husband has the right to mortgage community property to pay community debts, as those incurred in the conduct of his business, which business is presumably conducted for the benent of the community.

2. Husband and wife ⊂=272(1)—Acquisition of former community property by husband as separate property gives divorced wife no rights.

Where the husband mortgaged community property for more than its value to obtain funds to carry on his business, the fact that the identical property, after divorce, passed to him on distribution of the assets of a corporation handling the estate of his father, will not, the husband having obtained it as his separate property, give the divorced wife any rights therein.

3. Husband and wife ⊂=263(1)—Debts community debts.

Generally speaking, obligations incurred during marriage are community debts.

4. Husband and wife ⊂=268(2)—Husband controls community.

All community property is liable for the husband's debts, and subject to his disposal.

5. Divorce ⊂=252—Community property to be distributed on divorce, is residue after payment of debts.

The community property to be distributed on dissolution of marriage by divorce is the residue which remains after the discharge of the community obligations.

6. Husband and wife ⊂=278(1)—Representation that there was no community estate held to give wife no right of action.

Where, on dissolution of marriage, the debts exceeded the value of the community property, the most valuable property being mortgaged in excess of its value, the husband's representation that there was no community estate will not give the wife any right to rescind agreement for settlement, for there was no damage.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action to quiet title by the Farmers' Exchange National Bank against Helen E. Drew. From a judgment for defendant, for one-half the land, plaintiff appeals. Reversed.

Leonard, Surr & Hellyer, of San Bernardino, for appellant.

Victor T. Watkins and Anderson & Anderson, all of Los Angeles, for respondent.

LANGDON, P. J. This is an appeal by the plaintiff from that portion of the judgment awarding to defendant a one-half interest in certain real property in Los Angeles. The action was brought for the purpose of quieting title to this property. Defendant answered, claiming an interest in the property, as community property of herself and her former husband, Arthur L. Drew.

Defendant and Arthur L. Drew were married in 1895, and in 1903 the husband purchased the property in controversy, and built a residence thereon, which was occupied by the husband and wife as their home until about the time of their divorce. It appears that before October 28, 1910, defendant and her husband had been having domestic difficulties and were contemplating divorce. On that date, an agreement was executed by the defendant, Helen E. Drew, and her husband, by which he agreed to pay to her $150 per month for the support of herself and child, and in which she agreed that she would make no demand upon him other than for this amount. On December 19, 1910, a decree of divorce was obtained by the husband in Nevada. The record in this divorce action was introduced in evidence in the present case by Helen E. Drew, the defendant, and it appears therefrom that the complaint in that action, filed by the husband, contained an allegation that there was no community property; and the answer of Helen E. Drew specifically admitted this allegation, and the court found that all the allegations of the complaint were true. It is, however, defendant's contention in the present action that she was induced to sign the agreement of October 28, 1910, above referred to, by which she was to receive $150 each month, and was induced to sign the answer in the divorce action, admitting that there was no community property, because of the false representation of her husband that there was no community property. She alleged, in the present action, and the trial court found, that she relied upon such representation, and that such representation was false. The trial court proceeded, evidently, upon the theory that there had been no division of the community property by the decree of divorce, and that the parties

to the divorce action, therefore, became tenants in common of the community property; that the agreement for $150 a month for maintenance of the wife in lieu of all other property rights was obtained by fraud on the part of the husband, and so could be set aside, and defendant, Helen E. Drew, restored to her one-half interest as tenant in common in this property, which the court found was community property.

Without deciding whether or not the judgment in the divorce action foreclosed all inquiry into the question of the community property rights of the parties, and assuming, for the purpose of this decision, that the trial court was correct in its theory upon this point, let us examine the situation to see whether even under such a theory, the defendant is entitled to any interest in the property in controversy.

The trial court was not deterred in reaching its conclusion by the fact that no offer to restore the consideration paid under the maintenance agreement had been made by Helen E. Drew when she sought to rescind the said agreement because of fraud, although it appears in the record uncontradicted that Drew paid under such agreement, $5,557.82 for the support of the divorced wife, and $545.30 to her account of the maintenance of her child, and that $2,602.52 was paid by him for the upkeep of the house, which they were permitted to occupy without the payment of rent. Added to this, the testimony is that Drew gave various amounts in cash at different times, over and above the amounts set out above, of which he kept no record, and that the house which Mrs. Drew occupied, rent free, was of the rental value of $100 a month during this period of years.

The fact that the suit was not between the parties to said agreement, but was between one of the parties thereto and a subsequent purchaser of the property, which purchaser would not have been entitled to a return of such consideration to it under any circumstances, and that the person entitled to a return of the consideration upon a rescission was not a party to the action, may possibly be of weight in connection with this point so ably urged by the appellant. We need not, however, discuss this question here, nor many of the other interesting questions of law and fact presented by the record, as a discussion of all of them would extend this opinion unduly and unnecessarily. The appellant discusses in its briefs the question of the alleged misrepresentations, whether of law or fact, the question of the defendant's laches in asserting her claim, the question of the estoppel to assert the existence of community property because of the admissions in the pleadings in the divorce action, and many others. We are of the opinion, however, that it is necessary to discuss only one question of law involved. That question goes to the merits, and is the one first logically to be considered, i. e., whether or not at the time of the divorce between the defendant Helen E. Drew and her husband, there was any community property in which, under any circumstances, defendant might have claimed an interest.

To ascertain this, it will be necessary to consider in detail the uncontroverted evidence regarding the financial affairs of Arthur L. Drew at the time of the divorce. Practically all of the testimony upon this subject was given by Arthur L. Drew himself, who was not a party to this action, and who appeared on behalf of the defendant, Helen E. Drew. The property in controversy was purchased by Drew in 1903. The purchase price was $4,500, $400 of which amount was paid by a check drawn upon his personal funds. There is no dispute that to the extent of the $400 the property was community property. The remaining $4,100 of the purchase money was borrowed by Arthur L. Drew from a bank, upon the note of said Drew, indorsed by his mother. There is a contention made by appellant that this $4,100 was separate property of Arthur L. Drew, because from other evidence in the case, it appears that the bank loaned the money upon the credit of Mr. Drew's separate property which he had inherited from his father, and which property was held by the Drew Company, and included stock in the creditor bank; and that the bank also made the loan upon the credit of Drew's mother, who also owned stock in the said bank. Appellant relies upon the authority of Flournoy v. Flournoy, 86 Cal. 292, 24 Pac. 1012, 21 Am. St. Rep. 39, and Dyment v. Nelson, 166 Cal. 40, 134 Pac. 988, from which it appears that it is not necessary for separate property to be actually pledged to secure a loan in order that the loan so obtained shall become separate property; but that it is sufficient if the loan be made upon the credit of the separate property. However, whether this $4,100 be considered as community or separate property of the husband would not affect the conclusion which we have reached, and so we may consider such money for the moment as community property, and thus meet the respondent's position upon this point. After the purchase of the ground, Drew constructed a house upon the property at a cost of about $15,000. This was in 1903. The cost of construction of the house was paid by Drew out of the profits of his business, and from money borrowed from the bank. At the time of the purchase of the property, Drew was engaged in the contracting and building business, and during the year 1908, after the house had been completed, he was engaged in building a large dam in the San Bernardino Mountains. This construction work extended over several years, and caused him to become heavily involved financially. In order to carry on this work, it became necessary for him to borrow money from time to time, and

on August 24, 1908, he borrowed $5,000 from the Drew Company, and executed his note therefor, securing said note by a mortgage of the property in controversy then occupied by himself and wife as their home. This mortgage was executed to secure what money he already owed to the company, and also to secure all other sums that he might thereafter borrow, not to exceed in the aggregate $20,000, exclusive of the $5,000 note set forth in the mortgage. The Drew Company—the mortgagee—was the company holding the assets of the estate of Drew's father. Drew and his brothers and mother owned all the stock in said company, which stock represented their proportionate shares of said estate. Part of the money secured by this mortgage to the Drew Company was borrowed during the year 1908, prior to making the mortgage, and the balance was borrowed subsequently, but all of it was borrowed while the defendant, Helen E. Drew, and Arthur L. Drew were living together as husband and wife. All the money so borrowed was used in the contracting business of Drew, and notes were from time to time executed by him to the Drew Company to evidence the loans secured by the mortgage. These notes were as follows: $5,000, dated August 24, 1908; $5,000, dated September 21, 1908; $10,000, dated November 28, 1908, upon which $4,500 was paid, leaving a balance of $5,500, and $3,000, dated February 15, 1909. All of these facts appear clearly from the testimony of the defendant's own witness, Arthur L. Drew, and from the testimony of the officers of the Drew Company, and are nowhere contradicted.

[1] It would appear, therefore, as asserted by the appellant, that the finding of the trial court that the mortgage was executed "for the purpose of taking said place from (Helen E. Drew), and of hindering her in the assertion of her claims thereto" (which finding follows the allegations of the answer) is unsupported in any way by any evidence, or by any possible inference from the evidence. The husband had the right to mortgage the community property, even though we concede that no part of the money used for the house was his separate property. The money secured upon the mortgage was used to pay the community debts—that is, the debts incurred by the husband in the conduct of his business, which business was, presumably, conducted for the benefit of the community. For these debts, the community property, clearly, was liable. Oregon Imp. Co. v. Sagmeister, 4 Wash. 710, 30 Pac. 1058, 19 L. R. A. 233; Ballinger on Community Property, 161, 162; Schuyler v. Broughton, 70 Cal. 282, 11 Pac. 719; Tibbetts v. Fore, 70 Cal. 242, 245, 11 Pac. 648; Adams v. Knowlton, 22 Cal. 283. The husband had the right to mortgage the property. Civ. Code, § 172; Bay City Building Ass'n v. Broad, 136 Cal. 525, 69 Pac. 225. From the evidence it appears that the property was mortgaged for nearly $23,000 and interest, amounting in all to over $25,000, at the time of the execution of the contract of October 28, 1910, between the husband and wife, and at the time of the divorce. The defendant does not contend that the property was ever worth more than $25,000 (and the court found its value to be about $20,000). So it appears that at the time of the divorce it was mortgaged to the Drew Company for more than its full value. Therefore defendant had no substantial interest left in this property as community property or otherwise. If the Drew Company had foreclosed upon the mortgage, no question could possibly have arisen regarding Mrs. Drew's rights in connection with the property. However, after the divorce in 1910, Helen E. Drew requested of her former husband that she and her child might be permitted to live in the house. He told her that she might do so, provided that she would move out when there was an opportunity to rent or sell the same. She moved into the property under this arrangement, and has occupied it continuously ever since, refusing to vacate upon the repeated demands of Arthur L. Drew, and later, of the purchaser of the same. During all of this time, Drew, or the Drew Company, paid the taxes and repairs and insurance upon the property. In 1912, Drew being unable to pay the debt secured by the mortgage, the mortgagee, instead of foreclosing the equity, accepted from Drew and his second wife a deed to the property in payment of the mortgage, and had the mortgage released of record. In 1913, the mother of Arthur Drew having died, it became desirable to distribute the assets of the Drew Company to Drew and his brothers, the only stockholders. In this distribution the stock of other corporations held by the Drew Company and the real estate held by it were transferred to the stockholders in proportion to their respective holdings in said company. Arthur L. Drew accepted the property in controversy as a part of his share, at a valuation equal to the amount it had cost the company to acquire it—something over $25,000. After the distribution was agreed upon, deeds were issued by the company to the Drew brothers, transferring the properties allotted to each, and it was agreed that the properties allotted to Arthur L. Drew, as his proportionate share should remain in the Drew Company, and all of the stock of said company should then be transferred to said Arthur L. Drew by his said brothers, except one share each to qualify them as directors. In other words, Arthur L. Drew, from the time of the distribution of the assets of the Drew Company, used that company as a convenient business arrangement for holding title to his separate property inherited from his father and mother. Under this arrangement, the title of the property in controversy remained in the Drew Company until April 12, 1915.

At that time the Savings Bank of San Bernardino desired to have other security for a note of $5,000 signed by Arthur L. Drew, which it held, and which was at that time secured by a pledge of some of Drew's stock in the Drew Company. Accordingly, the Drew Company—which was in reality Arthur L. Drew—executed a deed of trust to the property in controversy to secure a new note signed by Arthur L. Drew for $5,000, which note was given by him in payment of his old note for a like amount, and the collateral securing the former note was returned to him. This deed of trust contained a provision for future advances, and under this provision the bank later (May 7, 1915) advanced to Arthur L. Drew the further sum of $1,500.

[2] It was upon the sale under this deed of trust that the plaintiff regularly purchased the property in October, 1917, for $7,120. Unless this defendant had some interest or equity in the property at the time it was conveyed to the Drew Company in payment of its mortgage, she can under no possible theory have any interest in the property now. As we have stated, the property was mortgaged to the Drew Company for an amount greater than the highest value placed upon it by defendant's witnesses; the mortgage was given to secure community debts, contracted to carry on the business of the husband of the defendant. The fact that long after the divorce the property again came into the hands of Arthur L. Drew clear of incumbrances under the distribution of the assets of the Drew Company, representing an asset of the estate left by his father, cannot give the defendant a right to a one-half interest in it free and clear of the incumbrance it carried at the time of the divorce. The property, when received by Arthur Drew from the Drew Company as his separate property, was distinctly different from the property owned at the time of the divorce, in so far as defendant's rights in it were concerned. The accident of physical identity has nothing to do with the legal questions involved. In other words, defendant's rights in the property, if any, are measured by the value of her equity in the property as it stood at the time such rights came into existence (which would be at the time of the divorce); and it appears that at that time the property was mortgaged in excess of its value. Any award to her under any circumstances would have to be in relation to these facts, and subject to her share of the burden of this mortgage.

[3-5] Lest it be supposed that any injustice was done to Helen E. Drew in any way by a failure to award to her any community property in the divorce action, and that the judgment of the trial court in the present action in a broad way corrects this injustice, we shall refer to the evidence further in order to demonstrate that the record shows that after subtracting the community debts from the community assets there was no community property left at the time of the divorce in which she could have been given an interest, and that her husband's representations to her that there was no community property were substantially true. The only property which could possibly have been considered to be community property under any of the testimony in the record was the following: The property in controversy, highest valuation, $25,125; 100 shares Nuevo Land Company stock, market value, $10,000; Phillips Contracting Company stock, worthless; contracting outfit, highest valuation, $3,000; an automobile and minor miscellaneous articles, value $500—making a total of $38,625.

On the other hand, Mr. Drew had borrowed $19,000 from the Drew Company; $8,500 interest was due upon this amount at the time of the divorce; he owed $5,000 to the bank, and $17,000, plus interest, to his mother's estate—making a total of nearly $50,000 in obligations. Generally speaking, all obligations contracted during marriage are community debts. 6 Am. & Eng. Enc. of Law (2d Ed.) 339; 21 Cyc. 1676, 1681; Oregon Imp. Co. v. Sagmeister, 4 Wash. 710, 30 Pac. 1058, 19 L. R. A. 233; Calhoun v. Leary, 6 Wash. 17, 32 Pac. 1070. It is also well settled that all community property is liable for the husband's debts, and subject to his control and disposition. McDonald v. Badger, 23 Cal. 394, 399, 83 Am. Dec. 123; 21 Cyc. 1676; Schuyler v. Broughton, 70 Cal. 282, 11 Pac. 719. It is obvious, therefore, that all of this community property of the Drews was liable for the debts of the husband, and that not only did the mortgage indebtedness on the property in controversy then exceed its value, but the aggregate value of all of the community property did not equal the total indebtedness of the husband. Therefore, as a matter of practical mathematics, there was no community property, and Drew's representations to his wife were substantially correct. The community property to be distributed upon a dissolution of the community by divorce is the residue which remains after the discharge of the community obligations. Frankel v. Boyd, 106 Cal. 608, 614, 39 Pac. 939.

[6] Furthermore, although it be conceded that under a strict technical construction, the representation was false, because, accurately speaking, there was in existence some community property, albeit the same was of a value considerably less than the amount of the debts for which it was liable, nevertheless the defendant has not suffered any damage by reason of the contract induced by said technically false representations. And this is because, as stated in Frankel v. Boyd, supra, the community property to be distributed upon the dissolution of a marriage by divorce is the residue of such property after payment of the community debts. Under this rule the defendant could have been awarded nothing even though the contract had not been executed. Unless damage can be shown

by reason of the alleged false representations, there is no right of rescission. Bailey v. Fox, 78 Cal. 389, 398, 20 Pac. 868; Marriner v. Dennison, 78 Cal. 202, 20 Pac. 386; Morrison v. Lods, 39 Cal. 381.

We do not consider it necessary, as stated before, to discuss at length the question of whether or not, even had there been a loss suffered by the defendant by reason of the false representation as to the existence of community property, this representation would have been such an one as to avoid the contract entered into between them, because we are of the opinion that under all the facts the representation was, in effect, true. However, in passing, we call attention to the case of Champion v. Woods, 79 Cal. 17, 21 Pac. 534, 12 Am. St. Rep. 126, where it was decided that such representations are generally representations of law, and a wife contemplating divorce has no right to rely thereon. However, as stated, we need not decide whether under the facts of this particular case such representation, if false, would have furnished ground for relief, for, we think, the evidence shows the representation to have been substantially true at the time. Mr. Drew testified that his representation was made in good faith, and that as the community debts exceeded the community assets, he believed he was stating the truth in telling his wife that there was no community property. There is nothing in the record to contradict this. On the contrary, we believe that the record clearly shows that the only property which the husband had at the time of the divorce, over and above the community debts, was his stock in the Drew Company, which, it is undisputed, came to him as an inheritance from his father and mother. This being true, the defendant Helen E. Drew had no right at the time of the divorce, under any circumstances, to any community property, and therefore has no interest now in the property in controversy.

The portion of the judgment appealed from is reversed.

We concur: BRITTAIN, J.; NOURSE, J.

48 Cal. App. 473

WESTERN INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 3378.)

(District Court of Appeal, Second District, Division 2, California. July 10, 1920.)

Master and servant ⊂⊃417(4½)—Petition for certiorari denied for want of reply to answer.

A petition for certiorari to review an order of the Industrial Accident Commission in a proceeding under the Workmen's Compensation Act will be denied, where the petitioner neglects the privilege, under Supreme Court rule 26, subd. 4 (183 Pac. viii), of filing a reply to the commission's answer showing that the findings complained of are sufficiently supported by evidence.

Application by the Western Indemnity Company to review an order of the Industrial Accident Commission of California, in which Will J. French, A. J. Pillsbury, and A. H. Naftzger were named as respondents. Application denied.

Duke Stone, of Los Angeles, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

PER CURIAM. The Industrial Accident Commission has served and filed an answer, from which it appears that the findings of which petitioner complains are sufficiently supported by the evidence. Petitioner has neglected to file a reply to the answer, though the privilege of such a reply is accorded him by the rules promulgated by the Supreme Court (subdivision 4, rule 26, 183 Pac. viii).

Petition denied.

48 Cal. App. 472

PETTIT v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA. (Civ. 3387.)

(District Court of Appeal, Second District, Division 2, California. July 10, 1920.)

Master and servant ⊂⊃417(4½)—Petition for certiorari, not stating material evidence, denied.

A petition for certiorari to review order of the Industrial Accident Commission on ground of want of evidence to warrant finding as to disability, not stating the material evidence relative to such point, as required by Supreme Court rule 26, subd. 4 (183 Pac. viii), will be denied.

Application for certiorari by T. J. Pettit against the Industrial Accident Commission of California, to review an order of the Commission. Petition denied.

Archie D. Mitchell, of Ontario, for petitioner.

A. E. Graupner, of San Francisco, for respondent.

PER CURIAM. The petition, in substance and effect, is based upon a want of evidence sufficient to warrant the conclusion of the commission that petitioner's disability terminated September 8, 1919. No attempt is made to state "all the material evidence" relative to this point. The petition, therefore, fails to comply with the rules promulgated by the Supreme Court (subdivision 4, rule 26, 183 Pac. viii).

Petition denied.

48 Cal. App. 308

MADISON v. WEYL-ZUCKERMAN & CO.

(Civ. 2801; Sac. 3130.)

(District Court of Appeal, Second District, Division 1, California. June 25, 1920. Opinion of Supreme Court, in Bank, Denying Hearing, Aug. 24, 1920.)

1. Sales ⟸61—Transaction a sale and not agreement to sell.

A contract relating to a sale of potatoes, providing that the buyer might at its option restore title to seller and return part *held* a sale, and not an agreement to sell.

2. Sales ⟸175—Seller excused from delivery on refusal of buyer to accept.

Where a certain number of sacks of potatoes in the ground were sold and title passed, seller being made agent for the delivery of the same, buyer having option to return any not of the specified quality and restore title of such part to seller, and seller offered potatoes that were not of the specified quality, and on complaint of buyer offered to re-sort and deliver them within the time specified, and the buyer stated that, "If there was any bad potatoes, not to take any," there was a refusal of buyer to accept the performance tendered, and, under Civ. Code, §§ 1440, 1515, and since upon such notice of repudiation and refusal to accept performance the actual delivery thereof would have been futile, seller was excused from such performance.

3. Sales ⟸92—Seller by selling goods at private sale to third person thereby assented to rescission.

Where potatoes were sold and title passed to buyer, seller being made agent for delivery, sorting, etc., and buyer refused to accept delivery, the seller, by selling the property at private sale without notice to the buyer, thereby assented to a rescission of the contract, under Civ. Code, § 3310.

On Hearing in the Supreme Court.

4. Sales ⟸332—Vendor, after passage of title on refusal of buyer to accept, can sell property only in manner prescribed by statute.

The vendor of personal property to which title has passed, and which the vendee has wrongfully refused to accept and pay for, may, under Civ. Code, § 3049, sell the property and bind the vendee by the result of the sale only where the sale is made in the manner prescribed by section 3005 for the sale of property by a pledgee.

Appeal from Superior Court, Tulare County; M. L. Short, Judge.

Action by Charles Madison against Weyl-Zuckerman & Company. Judgment for plaintiff, and defendant appeals. Reversed in the Court of Appeals, and hearing denied in the Supreme Court.

Shelton & Levy, of San Francisco, for appellant.

Murry & Knupp, of Porterville, for respondent.

SHAW, J. This action, as shown by the complaint, was to recover damages for the defendant's alleged breach of a contract. In accordance with the verdict of the jury which tried the case, judgment was entered for plaintiff, from which defendant appeals.

On June 19, 1917, at which time plaintiff had in the ground a crop of potatoes then ready for harvesting, he and defendant entered into a written contract as follows:

"Weyl-Zuckerman & Co., a corporation, purchases and Chas. Madison sells the following product, to be sound, merchantable, of quality as follows on arrival at Porterville, to wit: 600 sks. Early Rose Potatoes—free from scab and fork holes.

"If any thereof is not of specified quality, buyer may, at its option, restore title of such part to seller and return same, expense of sorting and returning to be borne by seller. Said product is located as follows: 4½ West of Porterville, owner and grower—Chas. Madison and is hereby identified as the subject-matter of this sale, and the title thereto is hereby transferred and delivery thereof is hereby made by seller to buyer. Said product shall henceforth be deemed, in the possession of buyer, and seller shall, at his expense, and as agent of buyer, transport and load it in cars at Porterville as follows: To be delivered on or before June 30, 1917."

[1] Analyzing this contract, it appears therefrom that plaintiff sold the potatoes so grown to defendant, and by express terms of the contract it was vested with complete title thereto, which plaintiff, as agent of such owner, was to haul and load upon cars at Porterville, at which time the balance of the purchase price was to be paid. In making the sale plaintiff warranted that the potatoes sold, consisting of 600 sacks and weighing approximately 65,000 pounds, should, upon delivery, be sound and merchantable, free from scab and fork holes; and, in addition to any rights accruing to defendant to recover damages for breach of the warranty, defendant in lieu thereof, at its option, was given the right, at plaintiff's expense for resorting and shipping, to transfer back to him the title to such part thereof as did not measure up to the warranty. In other words, the transaction was a sale, not an agreement to sell. Defendant was the owner of the potatoes purchased upon a warranty as to quality, and plaintiff had assumed the duty, as defendant's agent, to harvest and load them upon the cars at Porterville on or before June 30th. Until such delivery, and in the absence of a revesting of the title, plaintiff held the property in his possession as agent of defendant. Thus construing the contract, it was plaintiff's duty to deliver the potatoes as provided therein, unless prevented from so doing by some act of defendant.

[2] The potatoes were not delivered, the

reason therefor being that, on June 28, 1917, after they were taken from the ground and assembled in sacks, defendant sent its inspector to examine them, who, after such examination, pronounced them unmerchantable, claiming that they had not been properly sorted and some of the sacks contained potatoes that were "sticky." Notwithstanding the fact that some of the sacks contained small potatoes, rendering them unmerchantable, the quantity thereof was sufficient from which to obtain the number of sacks purchased by defendant, and plaintiff then offered to re-sort and deliver them within the time specified in the contract. The inspector left plaintiff, saying that he would have to phone defendant, and later in the day said to him that defendant had instructed that, "if there was any bad potatoes, not to take any." Clearly this was a refusal of defendant to accept the performance tendered by plaintiff, and under sections 1440 and 1515, Civil Code, and since upon such notice of repudiation and refusal to accept performance the actual delivery thereof would have been futile, he was excused from such performance. Remy v. Olds, 88 Cal. 537, 26 Pac. 355.

[3] No further communication was had between the parties until July 2d, when plaintiff, recognizing that by the terms of the contract title to the potatoes had vested in defendant, wired it as follows:

"Under contract dated June 19th I now have in my possession sixty-five thousand pounds of potatoes belonging to you wire instructions as to delivery immediately or I will sell the potatoes for your account in order to prevent loss"

—to which defendant replied:

"You are not holding any potatoes for this company as potatoes purchased were rejected by Engelhardt account not up contract grade they contained small cut sunburned and unmerchantable stock therefore we rejected."

On July 5th plaintiff, by his attorney, wired defendant as follows:

"I am still holding your potatoes you did not reject potatoes on account of scab or fork holes demand balance of purchase price. Potatoes are all good merchantable potatoes and not sunburnt your only reason for rejecting is fall of purchase price will sell potatoes and hold you for all damages unless you want to come through."

Thereafter plaintiff, at private sale and without further notice to defendant sold the potatoes to other parties at a price much less than the balance of the purchase price which defendant had obligated itself to pay. The evidence received on the part of plaintiff and as found by the jury, showed that in quality the potatoes complied with his warranty, and, since by reason of defendant's notice that it would not accept them he was excused from making delivery thereof, the contract imposed upon defendant the obligation to pay the price in consideration of which title was vested in it. Plaintiff, however, did not stand upon the terms of the contract and insist upon payment of the balance of the purchase price of the goods, which was the detriment caused by defendant's breach of the agreement. Section 3310, Civ. Code. On the contrary, when defendant by its act in the nature of a rescission refused to accept performance of the contract on plaintiff's part, he by his act in exercising the rights of owner and selling the property, title to which admittedly was vested in defendant, at private sale and without notice to defendant, thereby assented to the rescission.

Assuming, however, there was no rescission, in which event title remained vested in defendant, then, since as vendor plaintiff had possession of the property when the price became due, his only interest therein, as provided in section 3049, Civil Code, was a special lien thereon for the amount due from defendant, and his right to enforce the same was like that of a pledgee of personal property as prescribed in section 3005, Civil Code, by a sale at public auction in the manner and upon notice given as in sales of such property upon execution, in which event, if the proceeds were insufficient to pay the debt, an action would lie to recover the deficiency. Plaintiff had no right to enforce his lien by selling the defendant's property at private sale without notice, and, as said by this court in Bennett v. Potter, 16 Cal. App. 183, 116 Pac. 681, wherein the facts were similar to those here involved:

"If the automobile belonged to defendant and title thereto had passed, as alleged by plaintiff and found by the court, then the act of the plaintiff in selling it amounted to a conversion of defendant's property, damages for which might be recovered."

Respondent cites a line of cases among which are Cuthill v. Peabody, 19 Cal. App. 304, 125 Pac. 926, Gay v. Dare, 103 Cal. 454, 37 Pac. 466, and Lillie v. Weyl-Zuckerman & Co., 188 Pac. 619, to the effect that in executory contracts for the purchase of personal property the vendor, where the purchaser refuses to take and pay for the property, may resort to one of three courses, namely: (1) He may store or retain the property for the vendee and sue him for the entire purchase price; (2) or keep the property as his own and recover the difference between the market price at the time and place of delivery and the contract price; (3) or sell the property, acting as the agent of the vendee for that purpose, and recover the difference between the contract price and the price obtainable on such sale. These cases, however, involved executory contracts in which the title to the property remained vested in the ven-

dor, and the right last mentioned, which appears to have been that adopted by the plaintiff in this case, cannot be invoked in cases where the purchase is complete and the title to the property sold vested in the defendant. Hence the trial court erred in instructing the jury to the effect that it was optional with plaintiff as to the manner in which he sold the property, provided only that the sale was made in good faith and in a mode calculated to produce the best price obtainable therefor and within such time as would suffice with reasonable diligence to effect such sale, and that it was not necessary that the same should be made at public auction or any notice given of the time and place of the sale.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

Opinion of Supreme Court, in Bank, Denying Hearing.

PER CURIAM. [4] In denying the petition of the respondent for a hearing before this court we did so upon the ground stated in the opinion of the District Court of Appeal that the vendor of personal property which the vendee has wrongfully refused to accept and pay for may, under section 3049, Civil Code, sell the property and bind the vendee by the result of the sale only where the sale is made in the manner prescribed by section 3005, Civil Code, for the sale of property by a pledgee. We withhold, however, our approval of the portion of the opinion of the District Court of Appeal which states in effect that a sale in any other manner by a vendor under the circumstances stated works a rescission, meaning thereby apparently a rescission of the contract of sale itself. A decision of the question so presented is not necessary, and we express no opinion upon the point.

OLNEY, SHAW, LAWLOR, WILBUR, and LENNON, JJ., concur.

48 Cal. App. 542

H. CRUMMEY, Inc., v. HOWE. (Civ. 3343.)

(District Court of Appeal, First District Division 1, California. July 15, 1920.)

1. Municipal corporations ⟸289(2) — More than one work may be included in resolution of intention.

The fact that more than one work was included in a resolution of intention to improve streets under San Francisco street improvement ordinance of 1913, and that a crossing work at the intersection of streets was not separated from work on one of the streets, did not make the proceedings void, nor deprive the landowner of the right or power to protest the work.

2. Municipal corporations ⟸321(3) — Landowner may appeal where resolution of intention, containing several works, increased cost.

Where a resolution of intention to improve streets included more than one work, and thus resulted in increased costs, the remedy of a landowner was by appeal to the supervisors, under San Francisco street improvement ordinance of 1913.

3. Municipal corporations ⟸475—Assessment for street improvements could be divided into six installments.

San Francisco street improvement ordinance of 1913 did not require that work be paid for in 10 installments, and there was no error in dividing an assessment into 6 installments.

4. Municipal corporations ⟸46 — Charter amendment did not affect street improvement proceedings commenced.

San Francisco City Charter, art. 6, c. 2, § 33, as amended, prohibiting installments in excess of 25 per cent. of assessed value of property, was not applicable to an assessment for street improvements, where the street proceedings had not only commenced, but had continued up to the letting of the contract, before the amended section went into effect by approval by the Legislature and being filed with the secretary of state.

5. Municipal corporations ⟸571—Matter not in record not considered.

On appeal from a judgment foreclosing a lien on property for street work, a complaint against provisions of the ordinance, requiring property owners to sign a bond for installments, cannot be considered, where the provisions of the ordinance complained of are not in the record, and appellant cites no authority or reason against such provisions.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by H. Crummey, Incorporated, against W. S. Howe. Judgment for plaintiff, and defendant appeals. Affirmed.

E. M. Galvin, of San Francisco, for appellant.

Randolph V. Whiting, of San Francisco, for respondent.

KOFORD, Judge pro tem. This is an appeal from a judgment foreclosing the lien of plaintiff on defendant's property, for street work done under the provisions of the San Francisco street improvement ordinance of 1913.

The appellant advances a great many points in support of his appeal. Many are without merit, and many have been previously passed upon. The points are poorly pre-

sented by E. M. Galvin, who styles himself as trustee, but we will pass upon such as we think may deserve mention, ignoring those which are unintelligible and without any merit whatever.

[1] The resolution of intention seems to be in the customary form. It covered work on Farallones street, between Capitol and Plymouth avenues, and on Newcomb avenue, between Keith and Lane streets, including the crossing of Newcomb avenue and Lane street. The fact that more than one work was included in the resolution of intention, and that the crossing work at Lane street and Newcomb avenue was not separated from the work on Newcomb avenue, does not make the proceedings void, nor deprive appellant of the right or power to protest the work. Los Angeles L. Co. v. Los Angeles, 106 Cal. 157, 162, 39 Pac. 535; Bates v. Twist, 138 Cal. 52, 53, 70 Pac. 1023.

[2] This method would be more likely to decrease than increase incidental costs, but if it resulted in increased costs the remedy of appellant was by appeal to the supervisors. Ahlman v. Barber Asphalt Paving Co., 181 Pac. 238; Hutchinson v. Coughlin, 184 Pac. 435.

[3, 4] The assessment was divided into six installments. Neither the charter nor the improvement ordinance requires 10 installments, but annual installments not exceeding 10 years. The amended section 33, chapter 2, article 6, of the city charter, prohibiting installments in excess of 25 per cent. of assessed value of the property, is not applicable to this assessment. The record shows that the street proceedings had not only commenced, but had continued up to the letting of the contract, before the amended section went into effect by approval by the Legislature and being filed with the secretary of state.

[5] Appellant complains against the provisions of the ordinance requiring the property owner to sign a bond for the installments. The provisions of the ordinance complained of are not in the record, and appellant cites no authority or reason against this alleged provision. We cannot, therefore, consider it.

The record does not show any defect in the proceedings with respect to the posting or publishing of the resolution of intention. The resolution of intention seems from the record to have been regularly passed, posted, and published, and we see nothing in the remaining points mentioned by appellant meriting comment.

No legal reason has been advanced for a reversal of the judgment, and the judgment is therefore affirmed, respondent to recover costs.

We concur: WASTE, P. J.; RICHARDS, J.

48 Cal. App. 495

HOGUE-KELLOGG CO. v. PETIT.

(Civ. 3380.)

(District Court of Appeal, First District, Division 2, California. July 14, 1920. Hearing Denied by Supreme Court Sept. 10, 1920.)

1. Sales ⊂=156—Seller must notify buyer under which of several contracts he is making delivery.

Seller, who had agreed to deliver beans grown on one tract of land at a certain price, and by other contracts had agreed to deliver beans grown on other tracts at a different price, if entitled to payment for each delivery of beans, was required to specify contract under which deliveries were made, and on refusal or inability to so do was not entitled to payment.

2. Sales ⊂=156—Contract to deliver beans grown on specified land not performed by delivering beans from other tracts.

Seller, who had contracted to deliver beans grown on one tract at specified price and by other contracts had agreed to deliver beans grown on other tracts at different price, could not deliver beans grown on one tract in performance of contract relating to other tract, notwithstanding Civ. Code, § 1479.

3. Sales ⊂=156—One selling crops grown on certain land cannot substitute other crops.

One who contracts to deliver entire crop grown at a specific place cannot substitute beans grown in other place, and recover under the contract, notwithstanding Civ. Code, § 1479.

4. Sales ⊂=150(1)—Seller must show performance or tender thereof.

Under Civ. Code, § 1439, seller could not recover for goods delivered under contracts without showing a performance or readiness to perform any of the contracts on his part.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by the Hogue-Kellogg Company against W. J. Petit in which defendant interposed a counterclaim. Judgment for defendant on counterclaim and plaintiff appeals. Reversed.

Robert M. Clarke and Fred N. Arnoldy, both of Los Angeles, for appellant.

Samuel Poorman, Jr., Hunsaker & Britt, and Leroy M. Edwards, all of Los Angeles, for respondent.

BRITTAIN, J. The plaintiff corporation appeals from a judgment entered on the verdict of a jury for $3,984.32, upon a counterclaim set up by the defendant in a suit for the breach of certain contracts, the counterclaim being for the reasonable value of certain beans delivered by the defendant to the plaintiff under the contracts upon which the suit was brought.

On October 23, 1916, the parties entered into a written contract under which the de-

fendant agreed to grow 50 acres of Henderson bush beans, during the farming season of 1917, on land near Encino in this state, known as the Petit ranch, and "to deliver the entire crop product thereof." Broadly speaking the contract was in the ordinary form usually adopted in such cases. The price at which the beans were to be delivered as soon as possible after threshing properly recleaned and sacked, f. o. b. cars at Owensmouth, Cal., was $4.50 per hundred pounds. On February 23, 1917, the parties entered into two similar contracts for beans to be grown and delivered in that year, one being for the entire crop to be grown on 80 acres of land situated near Van Nuys, Cal., known as Encino ranch, and the other for the entire crop to be grown on 235 acres of land near Van Nuys, known as the Encino ranch, except seed and one-third rental. The price of the beans under the last two contracts was $7 per hundred pounds.

In its complaint the plaintiff set out three separate causes of action for breach of the contracts respectively, claiming as damages the difference between the contract prices and the market price at the time of the breach, alleging on information and belief the total quantity of beans grown and cleaned in each of the three crops. The defendant denied the breach of any of the contracts, alleged that all three had been broken by the plaintiff, and by counterclaim demanded judgment against the plaintiff for the reasonable value of some 84,000 pounds of beans delivered to the plaintiff. The reasonable value was fixed by the defendant's demand at a rate of something over 12½ cents a pound.

While the evidence was marked by sharp conflict in regard to some matters, there was no evidence in conflict with that given by the defendant himself upon certain controlling phases of the case. With much evasion on his part he was brought finally to testify that at the three places indicated he had or controlled land which was planted in beans of the type required by the contracts, and that at the three places respectively he had in such beans more than 50, 80, and 235 acres. The crops were weighed and cleaned on each of the three tracts, but the yield per acre was not the same on the three parcels of land. In other words, the entire crop under each contract could not be determined by any computation based on the total quantity of beans raised on the defendant's three tracts of land. So far as the evidence shows the entire crop on the 50 acres of land for which the plaintiff had contracted at 4½ cents per pound might have been in excess of the entire crop raised on the 235 acres for which the plaintiff had contracted to pay 7 cents a pound.

The defendant testified positively that he did not know and had never kept any account of the quantity of beans grown or cleaned upon any one of the tracts. This evidence was strengthened by that of the man in charge of the threshing machine. He stated that the defendant on the completion of the threshing gave him orders not to tell any one the amount of beans he had threshed. From uncontroverted evidence it appears that the defendant produced on the three tracts in all some 4,000 sacks of beans, and from the defendant's evidence that on the 50 acres he produced at least 300 sacks.

[1] The defendant made three deliveries of beans at the Owensmouth warehouse, respectively, on September 22, October 15, and October 16, 1917. Each of the contracts required that the beans be delivered as soon as threshed and cleaned. The defendant did not so deliver the beans but held a quantity back from delivery. The three deliveries aggregated 84,400 pounds, contained in 1,183 sacks. In reliance on the contracts the plaintiff sold beans and in fulfillment of its selling contracts accepted, and on October 18, 1917, shipped, the beans theretofore delivered by the defendant. About October 26th the defendant requested or demanded payment of $3,000. There is some conflict in regard to the exact language in which this demand or request was couched as there is in regard to the exact language used by the agents of the plaintiff in then refusing to make the payment. It is the theory of the defendant and respondent that the demand or request for $3,000 was simply a demand for payment for the beans already delivered, and it is the theory of the appellant that the request was for a payment on account of an amount to which the defendant would become entitled upon completion of the contracts respectively. The respondent claims that the refusal to make payment upon this demand was upon the sole ground that the contracts were entire and not severable, and that the appellant's agent in stating that payment would not be made until delivery was completed broke each of the three contracts. It is claimed by the appellant that the refusal to pay at that time was because the respondent refused then to give any information in regard to the probable quantities of beans which would be delivered under the three contracts, or to tell under which of them the 1,183 sacks of beans had been delivered. Lengthy argument is addressed to the court upon the question of whether each of the contracts was entire or severable. If the respondent's contention upon this matter be conceded for the purpose of the present case, and it be assumed he was entitled to payment for each delivery of beans at the contract price, before he was entitled to payment for any beans, it was incumbent upon him to specify under which contract deliveries had been made and under which contract he claimed payment. Upon his refusal or inability so to specify, he was not entitled to payment under any of the contracts, nor could he, while refusing to

specify under which contract he demanded payment, lay the foundation for an anticipatory breach of all the contracts by a statement concerning the reason why he was not then paid what he was not then entitled to have.

The appellant's first specification of error is based upon an instruction given to the jury which reads as follows:

"If the plaintiff, Hogue-Kellogg Company, without excuse, refused to pay the defendant in whole or in part of the beans delivered to the plaintiff, amounting to 84,400 pounds, after request for such payment by the defendant, the plaintiff by such conduct first breached the contracts with the defendant, and was not thereafter entitled to claim the further delivery of beans from the defendant, and would not be entitled to recover damages for the failure of defendant, if he did fail, to make further deliveries. It is for you to determine under the evidence that you have heard whether there was any excuse for failing to pay for the beans that had actually been delivered."

This instruction was clearly erroneous. In the first place it is incumbent for one who seeks payment under any contract to show that he has performed that contract. There is no evidence in the record to show under which of the three contracts the three deliveries were made. Accepting the respondent's theory of the severability of each of the contracts, on the evidence before the court, it followed as a matter of law that the defendant had not proved the partial performance of any one of the three contracts which would have entitled him to payment. It was error to submit to the jury the question of whether the plaintiff was excused from payment, and it was error to instruct the jury that if they believed the plaintiff had refused to pay without an excuse that plaintiff "by such conduct first breached the contract." Argument based on the proposition that the respondent was entitled to $3,000 regardless of which of the contracts on which the claim was based is extremely specious. None of the contracts provided for advances or partial payments. When the refusal to pay was made, the appellant would have been unsafe in making the payment because if it had paid for the beans delivered at 4½ cents per pound, the respondent might thereafter have claimed that the appellant had broken the contract upon a showing that the beans delivered were grown as a part of the crop covered by one of the two 7-cent contracts. If, on the other hand, the appellant had paid at the rate of 7 cents per pound, the respondent might thereafter have shown that the beans were really 4½ cent beans.

[2, 3] The respondent contends that when he refused to specify under which contract his deliveries were being made, it was the right of the appellant to apply the beans delivered to the satisfaction of any of the contracts, and upon the failure of the latter to do so, deliveries would be considered as having been made under the 7-cent contracts, which required the earliest deliveries. The statement of this contention under the facts of this case show its fallacy, because the appellant did not contract to pay for beans generally, but it did undertake to pay for the specifically defined entire crop of beans raised respectively on each of the three tracts. Delivery of beans grown on the 235 acres did not fulfill any of the conditions binding upon the respondent under the contract relating to the 50 acres, neither did the delivery of beans grown on the 50 acres in any way satisfy his obligations to deliver the entire crop of beans grown on the 80-acre or the 235-acre tracts. The trial court apparently accepted the theory of the defendant in regard to the application of section 1479 of the Civil Code to the facts of this case. It provides, in substance, that where a debtor is bound by several obligations to make payment, and at the time of payment fails to designate upon which of the obligations it is to be applied, the creditor may elect, and if he does not do so that the law will apply the payment to the obligation first to be performed. This section in every case called to the attention of the court has been applied to payments of money generally. It certainly has no application to a case where a party to a contract is obligated to deliver merchandise under entirely distinct contracts, fixing a different price to be paid for the merchandise, and definitely requiring that the merchandise delivered under each contract should be the entire output of a particular producing unit. Upon this branch of the case the appellant specifies as error the giving of an instruction reading as follows:

"The defendant was under no obligation to specify which of the three contracts mentioned in the plaintiff's second complaint, whether one or more of them, was the agreement upon which the delivery of the 84,400 pounds of recleaned beans was made. If the defendant did not direct the application of the delivery made by him upon any one or more of said three contracts, then the plaintiff had the right to make such application within a reasonable time as it saw fit; and, if the plaintiff made no such application, then the law applied such delivery ratably to the extinction of the obligations to deliver beans under the two contracts of February 23, 1917, under both of which the price to be paid for beans was $7 per hundredweight, so that if the defendant gave no direction for the application of the delivery of beans made by him under any of the three contracts, and plaintiff made no such application within a reasonable time, then it is deemed by the law that the delivery of 84,400 pounds was to be paid for by the plaintiff at the rate of $7 per hundredweight, and the amount which became payable for such delivery was $5,908, less deductions for bags, seed, and interest."

The error of this instruction is so clear and so prejudicial that the judgment would

have to be reversed upon it alone. It is not the law that where one contracts to deliver the entire crop of beans grown at a specific place, he may substitute beans grown in some other place and recover under the contract. In dealing with money generally under section 1479 of the Civil Code, the law can apply money which has no earmarks to the extinction of one or another obligation, but the law cannot apply to the performance of a contract to deliver specific merchandise any other merchandise.

[4] Upon the erroneous assumption of the trial court that, where no performance of any contract was shown by the defendant, the question of whether there was excuse for the plaintiff in refusing payment was one of fact and not of law, and the further assumption on the part of the trial court that section 1479 of the Civil Code was applicable to the facts of this case, the jury were instructed that if they should find for the plaintiff, the amount of its recovery would be $6,925.49, and in case the finding should be for the defendant the amount of the recovery would be $3,984.32. To reach these figures, the court not only assumed as a matter of law that deliveries of beans which may have been grown under the contract providing for a payment of 4½ cents a pound were applicable to one or both of the contracts for entirely different beans to be paid at the rate of 7 cents a pound, but entirely ignored plaintiff's cause of action based on the contract for delivery of the 4½-cent beans. If the entire delivery, as a matter of fact and not as a matter of law, was of 7-cent beans, and there is no evidence that such was the fact, it follows that there was no delivery under the 4½-cent contract. It has already been shown that the statements, made at the time the respondent was rightly called upon to designate under which of the contracts he was making deliveries, were not sufficient to constitute as a matter of law an anticipatory breach of any of the contracts. The respondent could not recover for beans delivered without showing a performance or readiness to perform any of the contracts on his part. Civ. Code, § 1439; Barron v. Frink, 30 Cal. 486; Karales v. Los Angeles Creamery Co., 36 Cal. App. 171, 171 Pac. 821, and cases cited therein.

It is further contended that the evidence was insufficient to justify the implied finding that the plaintiff refused to pay for beans delivered, and that it was insufficient to sustain the implied finding that there is due and unpaid from the plaintiff to the defendant the sum of $3,984.32. In view of what has been said it is not necessary to make any further analysis of the evidence, but it is the opinion of this court that each of these specifications is well founded. Neither is it necessary to discuss other matters of law presented by the briefs. An examination of the entire record shows that the defendant contracted to sell beans in November, 1916, at 4½ cents. In February, 1917, the market price had increased to 7 cents a pound. In his counterclaim the defendant demanded payment for the beans delivered at what he asserted was their reasonable value at the time deliveries were due under these contracts, at a rate of a little over 12 cents a pound. A portion of the beans which he admitted grew on the three tracts of land were held back from delivery and were burned. He settled with the insurance company for the burned beans at the rate of 12½ cents per pound and after his refusal to make deliveries he sold his crop at 13 cents a pound or over. A statement made in the case of Herzog v. Purdy, 119 Cal. 99, 51 Pac. 27, might well have been made in anticipation of this appeal. It was there said:

"The whole case tends to show that defendant was ready and willing, prompt and eager, not to perform the contract on his own part, but to take advantage of a slip of the plaintiff and avoid performance."

The judgment is reversed.

I concur: NOURSE, J.

Mr. Presiding Justice LANGDON, deeming himself disqualified to act in this case, on stipulation of counsel made in open court, it was submitted to the court for decision by Justices BRITTAIN and NOURSE.

48 Cal. App. 586

SAN FRANCISCO-OAKLAND TERMINAL RYS. et al. v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al. (Civ. 3492.)

(District Court of Appeal, First District, Division 2, California. July 20, 1920.)

1. Justices of the peace ⟸159(6)—Qualification of surety provable by any evidence, regardless of statute.

Code Civ. Proc. § 1057a, enumerating what may be accepted by the court as conclusive evidence of the sufficiency of a surety on appeal from justice court, does not attempt to change the ordinary rules of evidence, and accordingly, if a surety does not elect to make proof of its sufficiency in the manner therein permitted, it may justify by any competent evidence proving that fact, the same as other sureties may do.

2. Justices of the peace ⟸159(6)—Superior court may not dismiss appeal for insufficiency of evidence of qualification of surety.

The superior court may dismiss an appeal from justice court, if the sureties do not justify before the justice or judge before the time prescribed, on notice to the adverse party, under Code Civ. Proc. § 978a; but where, after due notice and hearing within the time prescribed, the justice finds as a matter of fact

that the sureties are sufficient, and accordingly approves the bond, the superior court is without power to dismiss the appeal on motion, based solely on the ground that the evidence heard by the justice was insufficient.

3. Mandamus ⟹31—Will issue to compel court to try case.

Where superior court dismisses an appeal from justice court without jurisdiction to do so, it may be compelled to do so by mandamus issued out of the District Court of Appeal.

Application by the San Francisco-Oakland Terminal Railways and the Maryland Casualty Company for mandamus prayed to be directed to the Superior Court of the State of California, in and for the County of Alameda, and Hon. Dudley Kinsell, Judge thereof. Writ granted.

John Ralph Wilson, of San Francisco, for petitioners.

Gilbert L. Jones and Nusbaumer & Bingaman, all of Oakland, for respondents.

NOURSE, J. This is an original proceeding in mandate to require the superior court to set aside its order dismissing petitioner's appeal from a judgment adverse to it rendered in the justice's court in an action entitled Rinke v. San Francisco-Oakland Terminal Railways, etc., and to direct the lower court to proceed with the trial of the action. The petition as first filed was designated as one in certiorari. A demurrer was interposed, upon the ground that mandamus, and not certiorari, was the proper remedy. This demurrer was sustained, on the authority of Golden Gate Tile Co. v. Superior Court, 159 Cal. 474, 114 Pac. 978, and Widrin v. Superior Court, 17 Cal. App. 93, 118 Pac. 550. An alternative writ of mandate was ordered issued, on the authority of the case first cited, and upon the return day respondent rested upon its general demurrer, which put in issue the question whether the superior court had properly dismissed the appeal, because the surety had not justified in the manner prescribed by law. The argument of respondent is that the provisions of section 1057a, Code of Civil Procedure, relating to the justification of corporate surety upon a bond on appeal from a judgment rendered in a justice's court are mandatory and exclusive.

The admitted facts alleged in the petition are: When the appeal was taken from the judgment rendered in the justice's court, appellant within due time filed a cost and stay bond, giving a foreign surety company as surety thereon. Exception was taken to the sufficiency of the surety, and in due time and after proper notice a hearing was had thereon before the justice of the peace. At the hearing the agent and attorney in fact of the surety company appeared personally before the justice of the peace and gave such testimony as to the financial standing of the company as to satisfy the justice that it was sufficient. He accordingly indorsed his approval of the bond as given. It does not appear that the competency of the agent to so justify was ever questioned, and no objection was or is now made to the sufficiency of the surety; but the sole ground upon which the superior court granted the motion to dismiss the appeal was that the provisions of section 1057a, Code of Civil Procedure, were not strictly complied with.

[1] Briefly, this section enumerates what may be accepted by the court as conclusive evidence of the sufficiency of the surety. One of the matters mentioned in the section as evidence to prove that fact is a financial statement of the assets and liabilities of the corporation sworn to by the president and attested by the secretary. It is admitted that such a statement was not presented to the justice in this case, but in lieu thereof a financial statement was offered, sworn to by the attorney in fact of the corporation, who testified that he was thoroughly familiar with the facts contained therein. The section of the Code expressly provides that, when its provisions are complied with, the court must accept the surety as sufficient. Its effect, therefore, is merely to make certain evidence conclusive upon the court for that purpose. It does not attempt to change the ordinary rules of evidence, and accordingly, if the surety does not elect to make proof of its sufficiency in the manner therein permitted, it may justify by any competent evidence proving that fact the same as other sureties may do.

[2] Furthermore, the justice of the peace having, in the exercise of his jurisdiction, approved the sufficiency of the sureties, the objection that he did so upon improper or insufficient evidence raises a question of error, and not of jurisdiction. The order approving the bond was final until set aside by some appropriate procedure. The superior court may dismiss an appeal, if the sureties do not justify before the justice or judge within the time prescribed, upon notice to the adverse party. Section 978a, Code Civ. Proc. But where, after due notice and hearing within the time prescribed, the justice finds as a matter of fact that the sureties are sufficient, and accordingly approves the bond, the superior court is without power to dismiss the appeal on motion based solely on the ground that the evidence heard by the justice was insufficient.

[3] The conclusion follows that the respondent was without jurisdiction to dismiss the appeal, and for the reasons heretofore given it is hereby ordered that a writ of mandate issue out of this court, commanding him

to set aside said order and proceed with the trial of the action.

We concur: LANGDON, P. J.; BRITTAIN, J.

48 Cal. App. 555

ROBBINS v. LAW. (Civ. 3331.)

(District Court of Appeal, First District, Division 1. California. July 17, 1920. Hearing Denied by Supreme Court Sept. 13, 1920.)

1. Limitation of actions ⟸13—Misrepresentations as to cause of action not estoppel to plead limitations.

Defendant's statements to plaintiff following his assault, that she had no cause of action against him, and that he had been so advised by his attorney, did not estop him in action for assault from pleading that action was barred by limitations under Code Civ. Proc. § 340, subdiv. 3; such statements being misrepresentations of law, and not of fact.

2. Estoppel ⟸84 — Misrepresentations of law not ground of estoppel.

Generally a misrepresentation of law will not work an estoppel.

3. Estoppel ⟸87—"Confidential relations," within exception to rule that misrepresentations of law will not work an estoppel, defined.

The term "confidential relations," within the exception to the rule that misrepresentations of law will not work an estoppel, is not confined to the strict fiduciary relationship existing between those having definite, well-recognized legal relations of trust and confidence, but extends to every possible case in which a fiduciary relation exists as a fact, though it may be a moral, social, domestic, or merely personal relation, and need not be a legal one.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Confidential Relation.]

4. Limitation of actions ⟸179(1)—Confidential relation as ground of estoppel must be pleaded.

Statement in complaint that plaintiff had unlimited confidence in and relied upon defendant *held* not sufficient to show confidential relationship so as to estop defendant on the ground of his misrepresentations of law to defendant from pleading the statute of limitations; it being necessary in such case to plead the facts from which the court can see that a confidential relation existed.

5. Pleading ⟸34(1)—Construed as a whole.

The complaint must be construed as a whole.

6. Limitation of actions ⟸179(1)—Complaint held insufficient to show confidential relationship.

In action for assault brought after expiration of period of limitations under Code Civ. Proc. § 340, subdiv. 3, in which it was claimed that defendant, after having assaulted and raped plaintiff, told her that she had no cause of action against him, and that defendant was therefore estopped from pleading the statute of limitations, complaint *held* not to show confidential relationship between the parties so as to bring case within the exception to rule that a misrepresentation of law does not work an estoppel, in that it showed that prior to misrepresentation defendant had wronged plaintiff and aroused her hostility towards him; hostility and personal violence being inconsistent with confidential relationship.

7. Estoppel ⟸87—Reliance on misrepresentations and exercise of diligence must be shown.

Where no confidential relation exists, it is the duty of one setting up estoppel to show, not only reliance upon the fraudulent misrepresentation, but also diligence in using the means at command to ascertain the truth.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Margaret Robbins against Herbert E. Law. Judgment of dismissal, and plaintiff appeals. Affirmed.

F. H. Dam, of San Francisco, for appellant.

Ira S. Lillick, of San Francisco, for respondent.

KOFORD, Judge pro tem. This is an appeal from a judgment of dismissal following an order of the superior court sustaining, without leave to amend, defendant's demurrer to plaintiff's second amended complaint. The cause of action alleged is assault or rape, alleged to have been committed by the defendant upon plaintiff on the 21st day of October, 1916.

The demurrer, which was sustained without leave to amend, pleaded the statute of limitations. The action was commenced April 2, 1919, and is barred by the provisions of section 340, subdivision 3, of the Code of Civil Procedure, unless there are sufficient allegations in the complaint to estop the defendant from raising this plea. The sufficiency of these allegations for this purpose is the sole question on appeal. The following excerpts from the complaint are all the essential allegations involved in the consideration of this appeal:

"(2) That heretofore, to wit, on or about the 21st day of October, 1916, * * * the defendant administered to plaintiff certain intoxicating and narcotic and anæsthetic substances; * * * that the same immediately brought a drowsiness and sleep over plaintiff, and then and there prevented plaintiff from resisting * * * the acts of defendant, * * * and rendered plaintiff unconscious of the nature thereof; and that * * * the defendant * * * willfully and feloniously committed a rape up-

on the plaintiff, * * * whereby plaintiff became pregnant and sick with child, and so remained and continued for the space of two months * * *

"(3) That, in consequence of said rape committed by the defendant upon the plaintiff, she became sick and sore and disordered and suffered greatly in her health and endured great pain, and was prevented from transacting her necessary business and affairs for many months thereafter, and has also suffered great shame and humiliation, and has been and still is greatly worried and vexed and nervous, and has been otherwise injured, to her damage $100,000.

"(4) Plaintiff further alleges, in view of the demurrer filed by defendant to the amended complaint herein, pleading the statute of limitations thereto, that defendant * * * is estopped to plead the statute of limitations to this complaint * * *:

"(a) That, at the time of the acts of defendant hereinabove described and set forth in paragraph 2 of this complaint, and thereafter until the month of December, 1918, a relation of trust and confidence existed between the plaintiff and the defendant, and in that behalf plaintiff alleges: That prior to the said acts of defendant set forth in paragraph 2 hereof defendant declared his love to plaintiff, * * * and asked plaintiff to place her entire confidence in him and to trust him in everything, and promised that he would always advise her of what was best for her to do; that plaintiff then and there accepted the defendant's said protestations of love as genuine and sincere, and for that reason the plaintiff permitted the defendant to, and defendant did, embrace and kiss and caress her in a proper and decorous manner; and thereupon plaintiff replied to the defendant that she would place her trust and confidence in him as so requested by defendant, and accordingly plaintiff thereupon did repose her trust and confidence in the defendant, and defendant thereby gained a great influence and control over plaintiff and in many ways dominated the plaintiff's thoughts.

"(b) That * * * plaintiff was and is a divorcee.

"(c) That when plaintiff awoke from the sleep hereinabove mentioned, and to wit, on or about the 22d day of October, 1916, the defendant was fondly caressing plaintiff, and within a few minutes thereafter and as soon as plaintiff realized what had happened, * * * the defendant represented and stated to the plaintiff, in a very serious and impressive manner, that defendant was prompted to his said acts, set forth in paragraph 2 hereof, by the strong attraction the plaintiff had for the defendant and by the great affection defendant had for the plaintiff, and defendant further represented and stated to plaintiff that plaintiff could do nothing whatever about or concerning such acts, and that the same were no offense because of the fact that plaintiff then and there was a divorcee and over 21 years of age, * * * and that defendant previously had been so advised by his attorney. That plaintiff then knew, of course, that the said acts of defendant were morally wrong or improper, but plaintiff had never read or heard of a case where a man was held liable for acts performed under such circumstances as those described in paragraph 2 hereof, and particularly plaintiff had never read or heard of a case where a man was held liable for such improper relations with a divorcee, and plaintiff feared that perhaps she was to blame for having partaken of the drink offered by defendant, as aforesaid, and, while plaintiff felt insulted and humiliated and shamed by said acts and conduct of defendant, plaintiff did not know that the same constitute a public offense in this state, or that plaintiff had a cause of action against defendant by reason thereof.

"(d) That defendant, * * * also urgently requested and advised plaintiff to do nothing and to say nothing to any one about or concerning the said acts of defendant, because such course, so defendant represented and stated, would only bring reproach upon both said parties, with no possible benefit to plaintiff. * * *

"(e) That a few days subsequent to the 21st day of October, 1916, the defendant promised plaintiff that if plaintiff would keep quiet * * * defendant would do many things for plaintiff, * * * and particularly promised plaintiff that if, at any time, plaintiff should need any money, she could call upon defendant for the same, and defendant would give it to her.

"(f) That defendant thereafter from time to time repeated the representations and statements and the request and advice and promises * * * to and including the month of December, 1918.

"(g) That, subsequent to the acts of defendant set forth in paragraph 2 hereof, to wit, from on or about the 22d day of October, 1916, down to the month of December, 1918, defendant made certain small presents, * * * and plaintiff accepted the same by reason of the trust and confidence she reposed in defendant; * * * that the relations between plaintiff and defendant at all times subsequent to said 21st day of October, 1916, have been decorous and proper.

"(h) That at all the times hereinabove stated the plaintiff has not stood on an equal footing with the defendant, and particularly in this: That on the 22d day of October, 1916, plaintiff was of the age of 23 years, and defendant was then of the age of 55 years, or thereabouts, was then a man of large means and of wide business experience, and had had frequent occasion to consult with attorneys, * * * while plaintiff was in humble circumstances, and had had but little business or legal experience.

"(i) That plaintiff never questioned, but, on the contrary, implicitly believed and relied and acted on each and all of the aforesaid representations and statements of the defendant, * * * and continued so to believe and act and rely on them until the 4th day of March, 1919, and that on said 4th day of March, 1919, the plaintiff learned and discovered and knew for the first time that such representations and statements, and the whole thereof, were false and fraudulent."

The remaining allegations of the complaint are general averments respecting the falsity of the representations, the fraudu-

lent intent with which they were made, and the efficiency of said representations, promises, and conduct to prevent plaintiff learning of her right to bring an action.

The allegations of the complaint fall naturally into two divisions: (1) the misrepresentations, and (2) the special relations existing between the plaintiff and defendant.

[1] Analyzing the foregoing allegations of misrepresentation which are relied upon as pleading matter sufficient to estop defendant from pleading the statute of limitations, it will be seen that the gist of the misrepresentation is that the defendant represented to plaintiff that she had no cause of action. He is not alleged to have concealed the facts constituting the cause of action, but with having positively declared that those facts, well known to both parties, did not give rise to an action at law. This is a misrepresentation of law, not of fact. The misrepresentation of defendant that he had been so advised by his attorney is not to be considered as a misrepresentation of fact, when distinguishing between representations of fact and law. It is the same as though he had fortified his misrepresentation by stating that he had read it in the Civil Code, which would only be restating the misrepresentation of law in another manner.

[2] The general rule is well established that misrepresentation of law is not actionable fraud, and will not work an estoppel. Bigelow on Estoppel, § 438, quoted in McKeen v. Naughton, 88 Cal. 467, 26 Pac. 354; Champion v. Woods, 79 Cal. 20, 21 Pac. 534, 12 Am. St. Rep. 126; Rheingans v. Smith, 161 Cal. 365, 119 Pac. 494, Ann. Cas. 1913B, 1140; Haviland v. Southern California Edison Co., 172 Cal. 608, 158 Pac. 328.

The exceptions to this rule are stated in the case of Champion v. Woods, supra, as follows:

"Generally speaking, deception as to matters of law affords no ground of redress or relief. There are exceptions—the rule does not apply to transactions between parties holding fiduciary or confidential relations, and where one who has had superior means of information possesses a knowledge of the law, and thereby obtains an unconscionable advantage of another who is ignorant, and has not been in a situation to become informed, the injured party is entitled to relief, as well as if the matters represented were matters of fact."

[3] Appellant insists, however, that the allegations of the complaint describing the relations between the plaintiff and defendant bring this case within both of the exceptions; that is to say: First, that the complaint shows a confidential relation between the parties, and, second, that the misrepresentations of law were made by one skilled in the law to one ignorant and uninformed and not in a situation to become informed. The term "confidential relations" is ordinarily understood to apply to the relations established by law between attorney and client, husband and wife, guardian and ward, and other legal relations of this character, but courts of equity have been careful not to fetter their own jurisdiction by defining the limits of this relationship. It is not confined to the strict fiduciary relationship existing between those having certain definite, well-recognized legal relations of trust and confidence, but is often said to extend to every possible case in which a fiduciary relation exists as a fact. The relation need not be legal; it may be moral, social, domestic, or merely personal. 2 Pom. Eq. Jur., §§ 956, 963; Story's Eq. Jur., § 370; Bacon v. Soule, 19 Cal. App. 434, 126 Pac. 384.

The various terms used in the authorities to describe the several classes of this relationship are often used synonymously, but, so far as is germane to the subject of estoppel by fraudulent misrepresentations, it is clear that this relationship in its broadest extent can mean nothing less than that the one setting up the estoppel had the right to rely upon the representations.

[4] The direct general allegations of the complaint, paragraph 4, subds (a), (h), and (i), faithfully copy some of the usual descriptive definitions, of confidential or fiduciary relations, or relations of trust and confidence. But the mere statement in the complaint that the plaintiff had unlimited confidence in and relied upon the defendant is not a sufficient statement of the facts to show a confidential relation. The facts must be alleged, from which the court can see that a confidential relation does in fact exist. Robins v. Hope, 57 Cal. 493.

[5-6] Furthermore, we must read the complaint as a whole. Considering the complaint as a whole, we are of the opinion that no confidential relation is shown to exist at any time subsequent to the date of the assault. The parties must be held to have been hostile. The most liberal definition of confidential relations could not include the relation between known enemies. The plaintiff knew that defendant had wronged her, committed violence upon her person, and, according to the complaint, caused her to feel sick, sore, disordered, vexed, ashamed, worried, insulted, and humiliated. Hostility and personal violence are poor bedfellows to lie down with confidential relations. They do not harmonize in the same complaint. The hostility of defendant known to plaintiff, as shown by the complaint, speaks louder than the general allegations of trustful reliance upon the ravisher. There is no confidential relation between hostile parties.

As hostility, both known and shown, destroys confidential relations, it is equally fatal to other exceptions to the general rule that a misrepresentation of law is not ac-

tionable fraud, and will not work an estoppel.

[7] Where no confidential relation exists, it is the duty of one setting up the estoppel to show, not only reliance upon the fraudulent misrepresentation, but also diligence in using the means at command to ascertain the truth, or by inquiry. In this connection it must appear that in relying upon it he acted as a reasonably prudent person would act, and was not guilty of negligence or carelessness. Thus it is held in Moore v. Boyd, 74 Cal. 167, 15 Pac. 670, that where the statute of limitations runs from the date of the discovery of the fraud the statute will commence to run from the date that the fraud should have been discovered by a man of ordinary prudence under the circumstances and with the means of knowledge readily available to him. See, also, 25 Cyc. 1216, 1213, and cases cited; 16 Cyc. 738, and cases cited.

We quote again from Champion v. Woods, supra:

"It is not sufficient under any circumstances that the party complaining was ignorant of the truth of the matter concerning which the representation was made, and that he believed it to be true. His situation may be such that he will be deemed in law to have knowledge of the facts, and barred from making complaint, though actually ignorant of the true state of facts. It is a general principle that if the means of knowledge be at hand, and equally available to both parties, and the subject-matter be open to inspection of both alike, and there be no fiduciary or confidential relation, and no warranty of the facts, the injured party must show that he has availed himself of the means of information existing at the time of the transaction before he will be heard to say that he was deceived by the misrepresentations of the other party. The fraud must have been practiced under such circumstances as to leave a reasonable inference that the injured party was deceived, and if the circumstances attending the transaction are such as to put a reasonable person upon inquiry, there can be no presumption of deceit. It seems quite incredible that the plaintiff, while engaged in a hostile action against her husband, could cherish such unbounded love and confidence in him as is set forth in the complaint."

Known hostility destroys the right to rely upon the representations without using the means available to any one to make inquiry and ascertain the law on a simple question. Nothing is shown in the complaint to indicate that plaintiff had any different means of ascertaining the truth on March 4, 1919, than at any time since the assault on October 21, 1916. If different circumstances existed at that time the complaint should allege what they were, so that the court could see whether the plaintiff had acted as a reasonably prudent person and with diligence in ascertaining her rights. Denike v. Santa Clara, etc., 9 Cal. App. 228, 98 Pac. 687.

The complaint, moreover, shows on its face negligence on the part of plaintiff in taking no action of any kind to redress her known wrong for a period of 2½ years after the assault, nor to make inquiry concerning the truth of the strange representation of law alleged to have been made by the defendant. The plaintiff was not justified in relying upon these representations, without making inquiry on her own account. It is so natural and usual for a complaint to follow an assault of this kind that it is recognized in our law in criminal actions for this offense, where the complaint made by the prosecutrix immediately after the assault is admissible on behalf of the prosecution, and the failure to make such complaint is admissible on behalf of the defendant.

Appellant learnedly discusses the psychology of the instant case. But the rules of law which are controlling upon us are applicable to all persons. It is quite clear that plaintiff's conduct was not that of a reasonably prudent person. We must hold, therefore, that the defendant is not estopped from pleading the statute of limitations, and that the demurrer was properly sustained.

The judgment is therefore affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

48 Cal. App. 568

THOS. D. CAMPBELL & CO. v. HOLEHAN et al. (Civ. 3432.)

(District Court of Appeal, First District, Division 1, California. July 19, 1920. Hearing Denied by Supreme Court Sept. 16, 1920.)

1. Evidence ⟸461(1) — Clause apparently stricken from contract cannot be considered, in absence of evidence as to intention.

Where a written contract provided that an exclusive agency thereby given should not defeat the right to commission for services already rendered as provided by the contract, but the commissions earned thereunder should be applied in payment of the former commission, a clause of the contract, which had apparently been stricken therefrom before execution, cannot be considered, nor the contract construed in conformity therewith to make the exclusive agency full payment of the previous commission, in the absence of any evidence as to the intent of the parties in striking the clause.

2. Assignments ⟸131—Complaint on partial assignment need not allege consent of debtor.

Since a partial assignment was valid in equity without the consent of the debtor,

though it was invalid at common law, a complaint under the Code, based on partial assignment, need not allege consent by the debtor to state a cause of action, as was required in a common-law declaration on such assignment.

3. Assignments ⟸129—Action by partial assignee not defective for want of parties when assignor was made defendant.

A complaint by the assignee of part of a debt is not demurrable for want of proper parties, where the assignor, who refused to join as plaintiff, was made a defendant.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Thos. D. Campbell & Co. against V. E. Holehan and the Charles A. Turner Company, which filed cross-complaint. Judgment for plaintiff and cross-complainant, and defendant Holehan appeals. Affirmed.

A. L. Abrahams and P. B. D'Orr, both of Los Angeles, for appellant.

Andrews, Toland & Andrews, of Los Angeles, for respondent Campbell Co.

Mulford & Dryer, of Los Angeles, for respondent Turner Co.

WASTE, P. J. Plaintiff brought this action to recover $5,000, alleged to be due (less a small credit) as commissions, from defendant Holehan, to Charles A. Turner Company, respondent, a 5/12 interest in which had been assigned to the plaintiff. Because of the declination of Charles A. Turner Company to join as plaintiff, it was made a defendant. It subsequently filed a cross-complaint, concurring in the allegations of plaintiff's complaint and joining in the prayer for relief against the defendant. Defendant denied the obligation and debt. Judgment was entered in favor of plaintiff, and the cross-complainant, for their respective shares of $4,500, from which defendant appeals.

The Charles A. Turner Company attached to its cross-complaint the agreement, out of which the alleged right to the commission arose. This contract, entered into between appellant Holehan and the respondent Charles A. Turner Company, recites that, in consideration of the consummation of an exchange of real estate, between Holehan and A. W. Longley, and confirming a verbal agreement theretofore made between the parties, it is agreed that the Charles A. Turner Company shall receive as commission for its services in connection with said exchange of properties between Holehan and A. W. Longley the sum of $5,000, payable as thereinafter specified. The contract then provides that as Holehan is the owner of an option to purchase from Longley certain real estate (fully describing it, and setting forth the option, which by its terms expired on the 14th day of April, 1917), it is agreed that the Turner Company shall be, and is appointed, and constituted exclusive sales agent of Holehan to sell, during the existence of the option, any and all of the real property covered thereby, and that Holehan will pay to the Turner Company a net commission of 5 per cent. on the selling price of all of the real estate so sold. Then follows a paragraph which appears to have been stricken out, and the contract concludes with the following provisions:

"It is further agreed that nothing herein contained shall be construed to cancel or invalidate the obligation of party of the first part hereto to pay to party of the second part the commission hereinbefore specified on the exchange of properties between party of the first part and A. W. Longley, and that the appointment of party of the second part as exclusive selling agent for the property herein described is provided as an alternative method of paying said commission to party of the second part; that should said option be found to be invalid, or be terminated for any cause, party of the first part immediately thereafter will pay to party of the second part in full of said commission on the said Longley-Holehan exchange the sum of five thousand dollars ($5,000.00) gold coin of the United States, after deducting from that amount such moneys as theretofore shall have been received by party of the second part on account of said commissions on the sale of said hereinbefore described real property as hereinbefore set forth."

The defendant did not deny the execution, or the existence of the contract, and in his answer merely denied that any commission was to be payable "except in accordance with" its terms. At the trial the fact that the exchange of properties between appellant and Longley had been consummated was admitted. It was alleged by the cross-complainant, Turner Company, that the option with Longley set out in the contract was never exercised by Holehan, and that it expired and terminated on the 14th day of April, 1917. This allegation was not denied. Upon this state of the record, and evidence as to nonpayment of the amount of the commission, except $500, the lower court awarded judgment against the defendant.

[1] In seeking a reversal of the judgment, appellant contends that the appointment by Holehan of the Charles A. Turner Company, as exclusive sales agent to sell the real property covered by the Longley option, and the agreement to pay a commission therefor, was in lieu of the payment of the commission of $5,000, agreed upon in connection with the consummation of the exchange of properties between Longley and himself, and that, as it is not shown that the commission was thus earned, the judgment should be set aside. In advancing his position he argues that the court should read into the contract the clause which appears to have been stricken out, and this without proof as to where, when or un-

der what circumstances the apparent correction was made. Both in the court below, and here, the appellant has disclaimed any intent to seek to reform the agreement, being content "to urge a construction of the contract as it stood, which would express the true meaning of its terms." We are not at liberty to disregard what, so far as the record discloses, was the solemn act of the parties at the time of the execution of the agreement. Furthermore, if the rejected clause were restored, the agreement is open to attack upon the ground that its provisions are repugnant and apparently nullify one another. Appellant's object, in thus seeking a restoration of the clause, is disclosed when he advances the argument that the contract, as signed by the parties, should give way before, and that it should be construed as though containing, the discarded stipulation, an interpretation different from that followed by the lower court. He relies upon Lassing v. James, 107 Cal. 348, 40 Pac. 534. In that case, however, parol evidence was admitted to clear ambiguity and uncertainty in the contract, and to enable the court to ascertain whether the provisions embodied in the sections of the Civil Code relating to interpretation of contracts were pertinent and applicable to the facts of the case. The weakness of appellant's position is that in the instant case no testimony was offered by him, or suggestion made, that there were any oral negotiations prior to the contract, or that the parties intended the contract to express anything else than was actually contained in the completed agreement. Appellant contends that the parties themselves placed a construction on the contract differing from that adopted by the court. There is no testimony to that effect.

[2] The final contention of appellant is that neither the complaint nor the cross-complaint contains a statement of facts sufficient to constitute a cause of action. His theory is that when the Turner Company assigned an undivided 5/12 interest in the contract to the Campbell Company, it split the demand, imposing an obligation upon appellant without his consent. While an assignment of part only of an entire demand is void, at law, unless done with the consent of the debtor, it is valid in equity. Under the practice at common law, a recovery upon such partial assignment could not be had without averring and proving that it was made with the consent of the defendant. Such an averment was immaterial in equity, and hence, under the Code of this state, the complaint is not demurrable for lack of facts, if it fails to contain such an allegation.

[3] Neither the complaint nor the cross-complaint, in the instant case, was demurrable for want of parties, for the plaintiff made its assignor a party defendant, and it has responded by filing a cross-complaint. Grain v. Aldrich, 38 Cal. 514, 520, 521, 99 Am. Dec. 423; Buckeye Refining Co. v. Kelly, 163 Cal. 9, 13, 124 Pac. 536, Ann. Cas. 1913E, 840.

The judgment is affirmed.

We concur: WELCH, Judge pro tem.; RICHARDS, J.

48 Cal. App. 566

PEOPLE v. GRAHAM. (Cr. 716.)

(District Court of Appeal, Second District, Division 2, California. July 19, 1920.)

Criminal law ⟸730(8)—Exception to argument held not sustainable, in view of court's instructions.

Argument by the prosecuting attorney, in a prosecution for larceny, that defendant was a member of a gang that was stealing hogs, which, he claimed, was an inference from the evidence, does not require reversal, on defendant's exceptions thereto, where the court instructed the jury to disregard the statement.

Appeal from Superior Court, Tulare County; M. L. Short, Judge.

Paul Graham was convicted of petit larceny, and he appeals. Affirmed.

D. E. Perkins and Dickson F. Maddox, both of Visalia, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and Thomas A. Wood, of Los Angeles, for the People.

THOMAS, J. This is an appeal from a judgment of conviction for petit larceny, on the ground of misconduct of the prosecuting officers. The information charged defendant and another with the crime of grand larceny—the stealing of two sows and five pigs, of the value of $75. Graham demanded and was granted a separate trial. From the record before us it appears that 4 days were consumed and 55 witnesses examined during the trial—the transcript covering nearly 500 pages. It is claimed by appellant that—

"During the arguments of the case to the jury the following remarks of the counsel for the prosecution were excepted to by the defendant:

"Mr. Ham, Deputy District Attorney: It is our theory that these men are a band of hog thieves; that they make their living by stealing hogs.

"Mr. Machetanz: I want our objection to go to that; that these men are a band of hog thieves.

"Mr. Ham: The court can instruct the jury.

"The Court: Very well. The jury are instructed to disregard that statement of the district attorney.

"Mr. Ham: It is our theory that those men were engaged in stealing hogs; it is our theory that that defendant went around there stealing hogs throughout that country.

"Mr. Perkins: We object to that as irrelevant, incompetent, and immaterial, and preju-

dicial to the substantial rights of the defendant.

"The Court: Go ahead with your argument.
* * *

"Mr. Scott, District Attorney: My theory is that there is a band of hog stealers down there, and that there is a combination in that country, down there in that neighborhood of Alpaugh, that has been stealing hogs. That is a proper inference to be drawn.

"Mr. Perkins: We except to the remarks of the district attorney that there is a band of hog stealers, and to the statement that there is a combination down there in the neighborhood of Alpaugh that has been stealing hogs.

"Mr. Scott: I say that is the inference which I draw.

"Mr. Perkins: I except to the inference, because it is not supported by any evidence in the case.

"The Court: It is just the statement of the district attorney; he is not contending that it is a fact, except as the evidence shows it.

"Mr. Perkins: We except to the remarks of the district attorney; that it is noticeable that that is a class of district down there where these acts prevail, as being unsupported by the evidence.

"The Court: Proceed; you have your exception."

The foregoing does not constitute ground for exception (People v. Willard, 150 Cal. 543, 89 Pac. 124), and, according to the positive and unqualified statement of appellant, is "the sole basis" of his appeal. We think that the mere statement of this claimed assignment of error is to answer it. There is positively no merit therein. With the court's instruction and admonition to the jury before us, in the absence of showing to the contrary, we are bound to presume that the jury obeyed and heeded the same. We consider the case so clear that argument or citation of authorities become unnecessary to support the conclusion reached.

Judgment affirmed.

We concur: FINLAYSON, P. J.; WELLER, J.

48 Cal. App. 576

SHRIVER et al. v. SUPERIOR COURT IN AND FOR SONOMA COUNTY et al.

(Civ. 2215.)

(District Court of Appeal, Third District, California. July 20, 1920. On Rehearing Aug. 19, 1920.)

1. Justices of the peace ⟸159(10)—Undertaking on appeal signed only as to affidavit of qualification, insufficient.

Where on appeal from a justice court the sureties have signed the affidavit of qualification attached to the form of undertaking, but have not signed the undertaking itself, the undertaking is insufficient to confer jurisdiction on the superior court.

2. Justices of the peace ⟸162(2)—Transmission of papers does not remove case where undertaking not signed.

Where an appeal is attempted to be taken from a justice of the peace, and the undertaking is unsigned, the appeal is a mere nullity, and does not remove the case from the justice's court, although the papers are improperly transmitted to the superior court.

3. Justices of the peace ⟸158(1, 2)—Fees paid on ineffectual appeal applied on second appeal.

Where an appeal was attempted to be taken from a justice's court, ineffectual because of a defective undertaking, and the fees were paid and the papers transmitted to the superior court, on a second appeal taken in time it was not necessary, under Code Civ. Proc. § 981, to pay the fees a second time, since it will be deemed that the fees paid to perfect the appeal remain in the hands of the justice until an appeal has been properly perfected.

4. Justices of the peace ⟸164(3)—Papers prematurely filed on imperfect appeal should be refiled.

Where on an attempted appeal from a justice court, the papers have been improperly transmitted to the superior court, because of a defective undertaking, and a second appeal has been taken in time, the papers transmitted on the first appeal should be refiled as accompanying the second appeal.

5. Prohibition ⟸10(2)—Writ lies to prevent trial of appeal where no judgment entered below.

A writ of prohibition will issue to prevent the superior court from trying a case appealed from a justice's court on the ground of lack of jurisdiction, where no judgment was ever entered in the justice's court from which an appeal could be taken.

6. Prohibition ⟸12—Where want of jurisdiction affirmatively appears, failure to direct court's attention thereto immaterial.

On an application for prohibition to prevent trial by the superior court, where no judgment had in fact been entered below, counsel's failure to call the court's attention thereto does not justify a refusal to enter the writ, where the record affirmatively shows want of jurisdiction.

On Rehearing.

7. Justices of the peace ⟸124(3)—Judgment not indicating in whose favor rendered, insufficient.

An entry on the docket of a justice of the peace after a finding of the jury, "Judgment entered for $74 and costs of suit," is insufficient to constitute a judgment as not indicating in whose favor it was rendered, in view of Code Civ. Proc. §§ 891, 893.

Application by F. R. Shriver and another for a writ of prohibition, prayed to be directed to the Superior Court in and for Sonoma County and Thomas C. Denny, Judge,

to prevent the trial of a certain action. Writ issued.

Vallandigham & Quackenbush, of Santa Rosa, for petitioners.

W. F. Cowan, of Santa Rosa, for respondents.

GLENN, Presiding Judge pro tem. The petitioners seek to prohibit the trial in the superior court of Sonoma county of a certain action, entitled F. R. Shriver and G. Schoff (a copartnership), Plaintiffs, v. Floyd Colvin and A. Beeman, Defendants, and which, prior to the filing of the petition in this court, had been set for trial by respondents. To the petition so filed, respondents have interposed a demurrer and answer. The demurrer was submitted without argument, and in view of the conclusions we have come to in a discussion of the facts as disclosed by the petition and answer, upon which this proceeding has been submitted, we believe the demurrer should be overruled, and it is so ordered.

It appears from the pleadings herein that the action above referred to was commenced in the justice's court of Santa Rosa township, county of Sonoma, and subsequently (according to the averments of the petition, upon the stipulation of the parties) was transferred to the justice's court of Russian River township, in said county. The action was tried on December 30, 1919, in said latter court, before the court and a jury, and on the same day a verdict was rendered and entered in favor of plaintiffs. It appears from the justice's docket that no judgment on the verdict was entered; but this matter will be discussed hereafter. However, a notice of appeal was filed, apparently on the assumption that a judgment had been made and entered on December 30, 1919, and the fees required to be paid upon the filing of the notice of appeal under the provisions of section 981 of the Code of Civil Procedure were duly paid and a purported undertaking filed. The sureties signed only the affidavit of qualification attached to the undertaking, but not the undertaking itself. The justice transmitted the papers on this notice of appeal to the clerk of the superior court, and they were there marked filed on January 10, 1920. On January 26, 1920, respondents therein, petitioners here, gave notice of motion to dismiss the appeal by reason of the insufficiency of the undertaking. The hearing was noticed for February 2, 1920. On January 28, 1920 (which was after the giving of the notice to dismiss, but before the hearing or the order granting the same, and which was within 30 days after the entry of judgment, assuming, for the present, that judgment was entered on December 30, 1919), the defendants and appellants in said action filed in the justice's court of Russian River township a new notice of appeal and also a new undertaking, but no fees accompanied the filing of these last-mentioned papers. They were nevertheless transmitted by the justice to the clerk of said superior court, and therein filed on January 28, 1920. These papers were filed in action No. 11532, and being the same action in which the papers under the first notice of appeal had been filed. (The date of the filing of the second notice of appeal and undertaking thereon appears from Exhibit D, attached to the petition.) The filing of these papers in the office of the clerk of the superior court was also prior to the hearing of the motion to dismiss the first appeal and the order granting the same. A copy of the second notice of appeal is attached to the petition, from which it appears that it was also taken from the purported judgment of December 30, 1919. Thereafter a motion was made by plaintiffs in said action, petitioners here, to dismiss the second appeal upon the grounds hereinafter discussed.

1. The first ground specified in the notice of motion is that the fees required by section 981 of the Code of Civil Procedure must accompany the filing of said notice of appeal, as the same is to be treated as a separate and independent appeal.

It will be noted that the second notice of appeal and the undertaking thereon were not only filed with the justice before the expiration of 30 days from December 30, 1919, the date of the purported judgment from which the appeal was taken, but were also transmitted to the clerk of the superior court and filed by him within said time and before the order dismissing the first appeal.

[1] It is important at the outset to determine whether or not the appeal first taken was perfected by the giving of a proper and sufficient undertaking. If it was, then there was no authority to file the second notice of appeal or undertaking, for upon the perfecting of an appeal the jurisdiction of the superior court immediately attaches. Farrisee v. Superior Court, 181 Pac. 73. If not perfected, then jurisdiction remained in the justice's court. The document filed as an undertaking was not signed by any sureties. According to the answer filed herein, two persons did sign the affidavit of qualification attached to the form of undertaking. We think this is clearly insufficient to constitute an undertaking, for parties who merely sign such an affidavit are not bound, nor do they become liable for the payment of any sum for costs on appeal, or otherwise.

An undertaking fatally defective is insufficient to confer jurisdiction upon an appellate court. Coker v. Superior Court, 58 Cal. 177; McCracken v. Superior Court, 86 Cal. 74, 24 Pac. 845. Of course, the rule is different where the undertaking is not fatally defective. Werner v. Superior Court, 161 Cal. 209, 118 Pac. 709.

[2] The undertaking is not only fatally defective, but, not having been signed is, in legal effect, no undertaking. The appeal was a mere nullity; hence the record was improperly transmitted to the superior court. Under such circumstances the case is to be deemed as in the justice's court. In the case of Tompkins v. Superior Court, 24 Cal. App. 656, 142 Pac. 96, notice of appeal from a judgment was given, but no undertaking was filed thereon. The papers were, however, transmitted to the superior court. Subsequently, and within the time allowed by law, a second notice of appeal and an undertaking were filed. The court say:

"Clearly the first appeal was, and is conceded to be, a nullity by reason of the fact that no sufficient undertaking was filed as required by section 978 of the Code of Civil Procedure. Hence the transmission of the record to the clerk, made at this time by the justice, was unwarranted, as the same is deemed to be in the office of the justice."

In the case of Johnson v. Superior Court, 28 Cal. App. 618, 153 Pac. 404, an appeal had been taken from a judgment of the justice's court, but the requisite fees under section 981 of the Code of Civil Procedure had not been paid. The appeal was ordered dismissed, and the court, after quoting the language above set forth from the Tompkins Case, says:

"So here, the transmission by the justice of the record on appeal to the clerk of the superior court was without legal warrant by reason of the fact that the fees referred to in section 981 were not paid to the justice at the time of the filing of the notice of appeal, and the papers and record are, as a matter of law, still in the office of the justice, or the same in legal effect as though the physical act of transmitting them to the county clerk had not been performed."

[3] The transferring of the papers under the first notice of appeal being unwarranted, it follows that the fees paid for the purpose of perfecting the appeal must be deemed to have remained in the hands of the justice until an appeal had been properly perfected. The sum so paid, under the provisions of sections 977 and 981 of said Code, is to be transmitted with the papers.

Petitioners cite Farrisee v. Superior Court, 181 Pac. 73, but that case is distinguishable from this, as an undertaking had been duly filed, but the sureties, upon exception being taken to their sufficiency, had failed to qualify. The court held upon notice of appeal being filed, together with a sufficient undertaking, the appeal became effectual and the jurisdiction of the superior court attached; that the failure of the sureties to justify did not ipso facto affect the appeal, but should be construed "as giving to the respondent the right, if he shall choose to avail himself thereof, to move for its dismissal upon the ground that since it was taken it has become ineffectual." Farrisee v. Superior Court, supra.

That an undertaking to pay costs on appeal must be first filed before jurisdiction is conferred, and if not so filed the appeal is ineffectual for any purpose, has been held in many cases, but particular attention is called to the cases of Stimpson, etc., Scale Co. v. Superior Court, 12 Cal. App. 536, 107 Pac. 1013; Thomas v. Hawkins, 12 Cal. App. 327, 107 Pac. 578; McCracken v. Superior Court, 86 Cal. 74, 24 Pac. 845.

The question as to the time of the payment of the fees under section 981 of the Code of Civil Procedure was involved in the case of Simmons v. Superior Court, 30 Cal. App. 252, 157 Pac. 817, and therein it is held that if the fees are paid within the 30 days allowed for taking an appeal, so as to enable the same to be transmitted with the record on appeal, although not paid at the time of filing the notice of appeal, it is sufficient. The court is careful to note that it does not intend to hold that the justice would be required to accept for filing any notice of appeal not accompanied with the payment of the fees. To the same effect is the case of Simmons v. Superior Court, 37 Cal. App. 676, 174 Pac. 670. The Simmons Case, 30 Cal. App. 252, 157 Pac. 817, is distinguished by the court therein from the case of Johnson v. Superior Court, supra, for the reason that in the Johnson Case the fees were not paid until after the expiration of 30 days, and hence the appeal had not been perfected within that time. Austin v. Strang, 30 Cal. App. 265, 157 Pac. 1002, cited by petitioner, is not in point, as that was mandate to compel the justice to enter a default without paying his fees therefor.

As no appeal had been perfected under the first notice of appeal by reason of the failure to file an undertaking thereon as required by law, jurisdiction of the action remained in the justice's court, and hence the papers and fees were prematurely transmitted. The second notice of appeal was taken within the time allowed by law (and after the time allowed by law for the filing of a new undertaking under the first notice) and a valid undertaking was filed. Hence this appeal became effectual (the fees for the transmission of the papers on appeal having been previously paid to the justice), and jurisdiction passed to the superior court. The record and fees having been previously (although prematurely) transmitted to the clerk of the superior court, all that remained for the justice to do was to transmit the additional papers, together with a complete copy of his docket, and it would be the duty of the clerk of the superior court to refile the papers received on the first appeal as accompanying the second appeal. Tompkins v. Superior Court, supra.

[4] 2. The second ground stated is that the papers were irregularly and improperly filed in said appeal. Apparently, from the points

and authorities of petitioners, the irregularity consisted in the clerk of the superior court having filed the papers on the second appeal among the papers on the first appeal. The answer to this is as stated above: The transmission of the record on the first appeal having been unwarranted, the papers thus transmitted should be refiled as accompanying the second appeal. Tompkins v. Superior Court, 24 Cal. App. 656, 658, 142 Pac. 96.

As the above points were the only ones argued by counsel, we have discussed the same at some length, for under the circumstances we did not desire to disregard them; however, in view of the conclusion to which we have come as to the third ground stated in the notice of motion, a discussion of those points might have been properly eliminated.

[5] 3. The third ground is that the court is without jurisdiction of said appeal. This is well taken, for no judgment has ever been made or entered by the justice's court in said action. It is true that counsel have not discussed this particular point, and doubtless did not call the same to the attention of respondents at the hearing of the notice of motion to dismiss. It has apparently been assumed by counsel that a judgment was entered on December 30, 1919, but that such is not the fact is disclosed by the record.

[6] While the notice of appeal (a copy of which is attached to the petition) recites that it is taken from the judgment made and entered on December 30, 1919, as a matter of fact, no such judgment was entered. The failure of counsel to call the court's attention to this matter would not, of course, justify a refusal to issue the writ, where the record, as it does here, affirmatively shows want of jurisdiction on the part of respondents to proceed further with the action.

The case was tried on December 30, 1919, before the court and a jury and the docket, a copy of which is attached to the petition, contains the following entry:

"December 30, 1919. All parties in court. Jury sworn to try the case. The jury, after hearing all evidence, returned a verdict in favor of plaintiffs.

"Verdict as follows:

Seven lambs at eight dollars..$50.00*
One ewe at ten dollars..... 10.00
Two ewes at four dollars.... 8.00

Total$74.00 and costs."

*The error in this item appears in the copy of the docket from which we have quoted.

At the end of the transcript of docket is the following:

"I hereby certify above is true copy of the docket kept by me. J. D. Cooper."

Nowhere in the docket is there mention of any judgment entered on the verdict of the jury. As no judgment has ever been entered, it follows that both attempted appeals were prematurely taken, and the superior court acquired no jurisdiction thereby. In the case of June v. Superior Court of Sonoma County, 16 Cal. App. 126, 116 Pac. 293, an appeal had been taken from the justice's court to the superior court after the entry of the verdict of the jury in the docket, but no judgment had been entered. The superior court made its order dismissing the appeal. It was sought by proceeding in mandate to compel the court to set aside its order dismissing the appeal. After reviewing the various decisions and sections of the Code applicable thereto, it was held that the appeal was prematurely taken, and that the superior court did not acquire jurisdiction thereby. The court say:

"We do not think that the justice must formulate a judgment with that particularity required of judgments required to be entered in the superior court, but that he should make some entry in his docket showing that he has rendered judgment on the verdict we do think is essential to a substantial compliance with the statute. His duty to enter judgment is in a sense ministerial, and its performance could probably be enforced by mandate, but, nevertheless, the statute requires this of him. Until such entry is made there is no judgment from which an appeal may be taken and, if the appeal is taken before the justice enters judgment on the verdict, it confers no jurisdiction on the superior court."

To the same effect also is the case of Thomson v. Superior Court, 161 Cal. 329, 119 Pac. 98, in which the court, in referring to the June Case, say:

"We see no escape from the conclusions reached in the above case."

From the foregoing it follows that a peremptory writ of prohibition should issue out of this court, directed to respondents, commanding them to refrain from all further proceedings in the action of F. R. Shriver and G. Schoof, a copartnership, v. Floyd Colvin and A. Beeman, except to enter an order dismissing the appeal attempted to be taken therein. Let the writ issue accordingly.

We concur: BURNETT, J.; HART, J.

On Rehearing.

PER CURIAM. [7] Respondents' petition for a rehearing. The writ was ordered issued by reason of the fact that the copy of the docket of the justice presented to this court showed that no judgment had ever been entered by the justice, and hence it was held that the attempted appeal was prematurely taken. Respondents assert, however, that the following entry was in fact made in the docket, but that they deemed it unnecessary to question its sufficiency, hence its omission, "Judgment entered for $74 and costs of suit."

In deciding the case, this court assumed, of course, that the record presented was correct. However, such an entry does not constitute a judgment. Section 891 of the Code of Civil Procedure provides that when a trial by jury has been had judgment must be entered by the justice at once "in conformity with the verdict." This means that it must be entered in favor of the party securing the verdict; otherwise the judgment is meaningless. The entry does not refer to the verdict, nor can it be ascertained therefrom in whose favor the justice intended to enter judgment. Section 893 of the Code of Civil Procedure provides that the judgment of the justice must be entered substantially in the form required by section 667, * * * "No judgment shall have effect for any purpose until so entered."

Respondents have referred us to no decision upholding a judgment which fails to indicate in whose favor it was rendered or entered; on the other hand, the authorities, which we have examined, hold that such a judgment is void for uncertainty. In 15 R. C. L. § 29, it is said:

"It is a fundamental rule that the form of a judgment should be such as will indicate with reasonable clearness the decision which the court has rendered, and a failure to comply with this requirement will render the judgment void for uncertainty. Thus a judgment which does not show for and against whom it is entered will be void for uncertainty, and if it does not show in what case it was rendered, it will in like manner be void"—citing the case of Ferrell v. Simmons, 63 W. Va. 45, 59 S. E. 752, 129 Am. St. Rep. 962.

"A judgment not designating in whose favor it is rendered is void for uncertainty." "The judgment must designate with certainty the party against whom it is rendered." 11 Ency. of Pl. & Pr. 949, 951.

In 1 Black on Judgments (2d Ed.) § 3, under the heading of "Essentials of a judgment," it is said:

"And the judgment must, of course, appear to be in favor of one party and against the other."

While it is doubtless true that a judgment of the justice's court need not be entered with all the formalities of one of the superior court, yet those things essential to constitute a judgment can no more be omitted from the one than from the other.

Section 900a of the Code of Civil Procedure seems to cover a situation such as presented by the entry referred to by providing:

"Said justice shall have power to set aside any void judgment upon motion of either party to the action after notice to the adverse party, and thereupon said action shall be treated as if no judgment had been entered."

Rehearing denied.

LAUMAN et al. v. CONCORDIA FIRE INS. CO. OF MILWAUKEE, WIS. (Civ. 3208.)*

(District Court of Appeal, Second District, Division 2, California. July 15, 1920.)

1. Insurance ⟸229(3)—Brokers held without authority to accept notice of cancellation.

Persons engaged by the insured to place insurance on his property, whose custom it was to give notice of any cancellation and to procure other insurance if possible, should be treated as mere brokers, and not authorized to accept notice of cancellation.

2. Insurance ⟸665(1)—Persons placing insurance held not agents to receive notice of cancellation.

In an action on a fire policy, where the insurer relied on notice of cancellation given to brokers employed by the insured to effect the insurance, evidence *held* wholly insufficient to show that they were ostensible agents within Civ. Code, § 2300, and as such entitled to accept notice of cancellation.

3. Insurance ⟸229(3)—Agents to procure insurance have no power to consent to cancellation.

An agent employed to procure insurance has no power to consent to a cancellation, or accept notice thereof; his authority terminating on delivery of the policy.

4. Insurance ⟸665(7) — Evidence, coupled with schedules, insufficient to show amount of loss.

In an action on a fire policy insuring a dry-cleaning establishment and garments therein, schedules, containing names of persons, lists of garments, and sums of money, in three columns, unsupported by any other testimony as to value, are insufficient to establish the value of the garments lost.

5. Appeal and error ⟸1122(2) — Appellate court must reverse erroneous judgment in lump sum, as it cannot make findings of fact.

Where the evidence as a whole did not show that the value of the property destroyed equaled the amount of the judgment, although there was evidence as to the value of some of the articles of a particular kind destroyed, a judgment for the insured in a lump sum for such articles must be reversed by the appellate court, as it has no authority to make findings.

6. Insurance ⟸662(1) — Preliminary proofs not admissible to prove loss.

Preliminary proofs of loss are never admissible at the trial as evidence of the fact of loss or the amount thereof.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Roy R. Lauman and another against the Concordia Fire Insurance Company of Milwaukee, Wis. From a judgment for plaintiffs, defendant appeals. Reversed.

*Superseded by opinion on rehearing. See 195 Pac. 951.

W. W. Hindman, of Santa Monica, for appellant.

Paul H. McPherrin and Chandler P. Ward, both of Los Angeles, for respondents.

THOMAS, J. This is an action to recover on a fire insurance policy. Plaintiff Lauman was at all times referred to in this action engaged in the cleaning and dyeing business in the city of Los Angeles. His "customers" were the owners of "routes," having their own wagons, etc., with which they solicited the patronage of their own patrons throughout various parts of the city. The articles so gathered such "customers" would take to Lauman's place of business for cleaning or dyeing, after which they would, by the latter's "customers," be delivered to their own patrons, the owners thereof. In other words, Lauman had no dealings with the individual owners of the clothing and other articles so delivered to him for cleaning or dyeing; all his business was with the owners of the various "routes." The court found in favor of plaintiff, and judgment was entered accordingly.

The policy upon which the action is based was issued to plaintiff by the defendant corporation through one C. P. Spinning, its duly and legally authorized agent. The policy covered three separate items, as follows:

(1) "One thousand dollars on office and other furniture and fixtures, machinery and equipment;" (2) "one thousand dollars on merchandise of every description, specifically including property left with plaintiff in trust or for repairs, or storage, or for which he should have assumed liability"; and (3) "five hundred dollars on one-story brick building, where the business was located, and as described in the policy of insurance."

As to the last item, there is attached to the policy a "mortgage clause," making the loss, if any, payable to the plaintiff H. R. Dodd.

The policy was issued on May 16, 1917. On the 5th of June following the property was damaged by fire. Thereafter, and within the time and in the manner required by such policy, Lauman notified the defendant company of the fire, and furnished and submitted to defendant company proof of loss in writing, later, at the request of defendant, submitting amendments thereto. In addition to this, and as late as September, 1917, in response to defendant's demand, Lauman personally submitted to an examination under oath in compliance with the terms of the policy.

Under date of July 11, 1917, the defendant corporation, through its special agent and adjuster, R. L. McCulloch, wrote Lauman a letter, which, omitting the formal parts, is in words and figures as follows:

"I am in receipt of a preliminary proof of loss under policy No. 30804 of the Concordia Fire Insurance Company of Milwaukee, Wisconsin, wherein you claim loss and damage by reason of a fire that occurred on the fifth day of June, 1917, at the premises No. 2190 East Eleventh street, Los Angeles, California. The Concordia Fire Insurance Company herewith disagrees with you as to the amount of loss claimed by you by reason of said fire under its policy No. 30804. The aforesaid Concordia Fire Insurance Company admits that the loss to the various articles covered under the first item of the form as attached to the policy is as set forth in the aforesaid proof of loss; and also that the loss to the building covered under the third item of the form as attached to the policy is as set forth in the aforesaid proof of loss. The aforesaid Concordia Fire Insurance Company disagrees with you as to the amount of the loss and damage claimed by you on any and all articles covered under the second item of the form as attached to the policy and described as 'merchandise,' and does not admit that you sustained any loss or damage under this item by reason of said fire, as you have failed to show that the goods destroyed or damaged were your property, or that you were liable by law for any loss or damage to said goods, or that at any time prior to the date of the fire you had specifically assumed liability therefor, nor do you furnish any evidence as to your liability to others in event said goods were held by you in trust at the time of the fire."

Accompanying the proof of loss filed by Lauman and constituting a part thereof, relating to item 2, was a schedule of garments lost, together with the owners' names and the amounts claimed by each. We do not consider it necessary to set out this schedule here. Further reference thereto will be made when we come to consider appellant's second point.

It appears that this class of insurance is exceedingly hazardous, and for that reason plaintiff had experienced considerable trouble in keeping his property insured, having had several policies issued to him by Horton & Son, an insurance firm with offices in Pasadena, as agent of various insurance companies. In our opinion no other reference to these "other" policies is necessary.

The policy under consideration contained the following provision:

"This policy may be canceled at any time, without tender of unearned portion of premium, by the company by giving five (5) days' written notice of cancellation *to the insured and to any mortgagee or other party to whom, with the written consent of the company, this policy is made payable*, in which case the company shall, upon surrender of the policy or relinquishment of liability thereunder, refund the excess of paid premium above the pro rata premium for the expired term." (Italics ours.)

On June 1, 1917, Horton & Son—not Spinning, the issuing agent—wrote Lauman as follows:

"Kindly return us Security policy No. 2064319 and the Concordia policy No. 30804, because

both of these companies have ordered their policies canceled. Kindly give this matter prompt attention, as we wish to return these two policies back to the companies at once. * * * In our letter of the 29th we mentioned the National as one of the companies which had canceled off, but this was an error. We should have stated the Security and the Concordia."

This letter was mailed in Pasadena at 6:30 p. m., June 1, 1917, and delivered to Lauman the next day. As we have already seen, the fire occurred on June 5, 1917.

On this appeal appellant contends: (1) That at the time of the fire the policy here involved had been canceled; and (2) that there was no proof of value as to the articles embraced in item 2 covered by the policy. To support the first contention, appellant argues that the firm of Horton & Son was the agent of plaintiff Lauman, "with power to receive notice of cancellation." If this be so, and such purported notice of cancellation was given within time, then on this phase of the case our decision must be for appellant. The question, therefore, resolves itself into two divisions: (1) Was Horton & Son the agent of plaintiff Lauman with power to receive notice of cancellation and to cancel the policy which is the basis of this suit; and (2) if so, was the purported notice given in time?

[1-3] It will be borne in mind that the agent issuing this particular policy of insurance was not Horton & Son, but C. P. Spinning. The record here shows that under date of May 25, 1917, a special agent of the defendant company—R. L. McCulloch—wrote to Spinning as follows:

"Kindly cancel Concordia policy No. 30804, Roy A. Lauman, assured, covering on cleaning and dyeing establishment at No. 2190 East Eleventh street, Los Angeles, California, and relieve the company of all liability thereunder within the time specified in the policy contract. I have already declined this risk four different times, and in order not to do the assured or your office an injustice I have made a reinspection to-day and find no change. I am sorry to disturb this line, and trust that it will cause you no inconvenience."

Upon receiving this letter, Spinning showed it to Mr. A. T. Horton, of the firm of Horton & Son. Thereupon Horton stamped across the page of the "daily" containing entries with respect to the policy in question, the word "Canceled." The "daily" referred to in this case is an abbreviation of the phrase "Daily Report," as used in the parlance of insurance agents. The "Daily Report" is a blank upon which the transactions, if any, that may have been had in connection with a given policy are entered. When a policy is written it is usually delivered to the assured, and a record thereof, together with all "riders" attached thereto, is kept by the agent in a book known as the "policy register." The "Daily Report" is a record of the same transaction, and theoretically, at least, is supposed to be mailed on the same day to the home office of the company. Such "daily" contains the report of that day for the one policy only, as issued, modified, or canceled, as the case may be. The "daily" in the transaction in question was not that of any company for which Horton's firm was acting as agent. Under these circumstances, by what authority did Horton perform this act? Other than the showing of the letter of May 25, 1917, to Horton, nothing was done by Spinning to bring notice of the cancellation of said policy to the plaintiff Lauman. The letter of June 1, 1917, was written and mailed by Horton & Son to, and received by, Lauman, as hereinbefore set forth. If we thought that Horton & Son had authority to receive notice of cancellation, and to cancel the policy, then we doubtless should hold that the letter of the special agent to Spinning, of date May 25, 1917, and by Spinning shown to Horton, was a sufficient notice of cancellation, regardless of Horton & Son's letter of June 1, 1917, to plaintiff, just referred to.

Appellant attempted to prove by the witness Spinning that, at the time Horton placed the word "Canceled" on the "daily," he (Spinning) "believed that Horton or Horton & Son, had the right to receive notices of cancellation," by asking him if "he thought and was of the opinion or belief that Horton & Son had the right to cancel the policy of insurance," and also if he "believed that Horton & Son, or the Mr. Horton that 'put that cancellation there,' had authority to cancel that policy"—to all of which questions objections were interposed and by the court sustained. Error is predicated upon each of such rulings.

The record shows that Spinning was employed as a bookkeeper by Horton & Son, and that he was conversant with the practice and custom of the firm in the matter of the cancellation of insurance policies—which was that in every case the assured was given notice of cancellation. Indeed, Mr. Horton himself corroborated Spinning in this regard, and goes somewhat further when he testifies:

"Our custom was first to protect the assured in some other company, and to notify him by either sending him a new policy or advising him that we could not replace it, and request the return of the other policy; and when the other policy came back, *or when the notice was duly given to him of the cancellation, then was the time that we stamped that 'Canceled.'*" (Italics ours.)

Horton further testified that he maintained the foregoing practice in every instance. Under these circumstances Horton & Son were mere brokers, and, being such, were without authority to accept notice of cancellation. Farnum v. Phœnix Ins. Co., 83 Cal.

246, 23 Pac. 869, 17 Am. St. Rep. 233. This record contains nothing which brings Horton & Son within the purview of section 2300 of the Civil Code. "The fact that an agent was employed to place insurance does not make him an agent to cancel the policy on behalf of the owner of the property." Cronenwett v. Iowa Underwriters, etc., 186 Pac. 824.

It is contended by appellant that—

"The facts proven conclusively show that Horton was the agent of plaintiff for the purpose of obtaining policies of insurance and to receive notices of and agree to cancellation of policies."

But with this we are not able to agree. When the plaintiff Lauman was being cross-examined by defendant's counsel he was asked the following questions, and made the following answers:

"Q. Did you tell him [Horton] to what amount to keep the insurance up? A. I asked him to place $1,000 in garment insurance. Q. You told him to keep it insured to the extent of $2,500, didn't you? A. $1,500 on building and equipment and $1,000 garment insurance. Q. And you told him to keep you insured to that extent? A. Most assuredly, if he could; they cannot always keep it. They do it to the best of their ability, I presume, but policies are sometimes canceled, and it is hard to place insurance."

Standing alone, this might support the broad assertion of appellant; but, viewed in the light of the whole testimony, we do not feel at liberty to disturb the finding of the learned trial court that—

"It is not true that on the 25th day of May, 1917, the defendant duly or regularly, or at all, notified the plaintiffs, or either of them, in writing, or at all, that all liability under said policy of insurance on behalf of the defendant to said plaintiffs would cease and determine within five days after the receipt of such notice," and "that it is not true that said, or any such, notice, was received by the plaintiffs, or either of them, on May 27, 1917, or at all."

The facts in the case of Ferrar v. Western Assurance Co., 30 Cal. App. 489, 159 Pac. 609, 611, to which our attention is called, were very different from those in the case at bar, in that in the case cited there was nothing to cause a conflict of ideas or opinion on the question of authority of the insurance agent to keep up the insurance, etc., and the court there found that both the evidence and the "course of dealing" supported the conclusion there reached. In the instant case the evidence, taken as a whole, amply supports the finding of the trial court, and there is no "course of dealing" established, except that which is in direct conflict to the position taken by defendant, as we shall presently see.

Under these conditions we fail to see any basis for the questions objected to. There is absolutely nothing upon which Spinning could base an opinion which would justify a conclusion on his part that Horton, or Horton & Son, had authority to receive notice of cancellation for plaintiff Lauman of any policy, except as provided by the terms of the policy and in accordance with the custom and practice of the office. Indeed, Horton's act in reference to the policy here involved was a departure from that custom; and certainly there is nothing in this record which can be construed as a "course of dealing" to authorize such. The letter of June 1, 1917, referred to above, we think speaks in stentorian tones in support of plaintiff's contention, and is a mute witness which, in our opinion, corroborates the evidence of both Horton and Spinning on this point. Especially does it point to the fact that on that date Horton & Son did not themselves believe that they had any authority to receive notice of cancellation or to cancel the policy, except by following the usual custom of the office and according to the terms of the policy. It must be obvious that had Horton & Son believed that the firm, or any member thereof, possessed such authority, there was no occasion whatever for the writing of that letter.

Another significant fact in this case is that defendant nowhere in this record makes any attempt to show an express or direct statement or action by plaintiff authorizing Horton, or Horton & Son, to accept notice of or to agree to a cancellation; and, as we have already seen, there is a complete absence of any evidence which would authorize the departure from the regular custom and practice of the office which was proven in this case. We think the court was correct on the rulings in question.

The record further shows that Spinning, as regards the Concordia agency, was an independent operator, and that the firm of Horton & Son was acting as broker for him. As such brokers, Horton & Son had no authority, as we have seen, to issue or cancel any Concordia policy. Under such conditions, the mere act of placing the impression of a rubber stamp "Canceled" upon Spinning's "daily" by Horton, as already referred to, was unavailing. As to both the Concordia company and plaintiff Lauman, Horton, in a legal sense, was a mere meddler or interloper. We have looked in vain for any evidence to prove the authority, ostensible or otherwise, of Horton & Son to receive notice of cancellation or to cancel any policy of insurance, particularly with respect to the policy in question. Admittedly, the only thing Spinning did was to show Horton the letter of May 25, 1917, to which we have already adverted.

If we assume that Horton & Son was in fact Lauman's agent, then we are confronted with the query: Was this letter which they mailed June 1, 1917, to Lauman a compliance with the terms of the policy as a notice of cancellation? Manifestly not. As we understand it, the rule is:

"That an agency to procure insurance is ended when the policy is procured and delivered to the principal, and the agent has no power after the policy is so delivered to consent to a cancellation, or to accept notice of an intended cancellation by the insurer, and evidence of a usage to give notice to a broker is inadmissible where the policy requires notice to the insured." 14 R. C. L. § 189; Farnum v. Phœnix Ins. Co., supra.

For these reasons it follows, we think, that Horton, or Horton & Son, were not the agents, or agents with authority, to receive notice of cancellation, and, no such notice having ever been given to plaintiff, that the policy was in full force and effect at the time of the fire.

It further occurs to us that the defense in this action—the claim that the policy was canceled, and hence void at the time of the fire—is clearly the result of an afterthought. In view of the recognition by the special agent of the company of the existence and vitality of the policy in question, admitting, as he did, the company's liability as to items 1 and 3 thereof, we cannot escape this conclusion. Had the company considered the policy canceled, then it doubtless would have taken the position that there was nothing to negotiate, and denied all liability. This it did not do.

[4] Appellant next urges that there was no testimony introduced as to the value, at the time of the fire, of the goods destroyed, and, as to a number of the claims presented to and paid or assumed by plaintiff, we think this is true. As to this the policy provides that—

"The company will not be liable beyond the actual cash value of the interest of the insured in the property at the time of the loss or damage; nor exceeding what it would then cost the insured to repair or replace the same with material of like kind and character."

Some of the claims are so supported by the evidence of witnesses as to the articles lost, and the value, etc., of such articles at the time of the fire, but others are not in evidence at all, unless it be conceded that the schedule to which we have already referred be evidence of that fact. It is not so conceded by us. We quote the evidence which was offered by plaintiff in support of his contention in one case, and which is fairly illustrative of a number of cases of claims allowed, paid or assumed by him:

"Q. I show you receipt for $85.00 signed R. L. Brown. Was he a customer of yours? A. Yes. Q. Did he make a claim on you? A. Yes. Q. Did you pay him $85? A. Yes."

It occurs to us that no discussion is necessary to convince any one that upon such showing the value of the articles referred to in the claims in question was not proven as of the time of the fire, or any other time. It is true the policy contains the following provision:

"* * * And (provided the insured shall be liable by law for loss or damage thereto or shall have specifically assumed liability therefor) this insurance shall also cover merchandise held in trust or on commission, or left for storage or repairs"

—but we do not think that by virtue of this alone, without any showing of value, and notwithstanding the good faith of the insured in paying certain of the claims so presented, and in assuming liability for the payment of others, the insured is entitled to recover under his policy in the absence of such proof. In our opinion, if it be conceded that, at the time the claims were presented by the various claimants to Lauman, the value of the various articles so claimed to have been destroyed in the fire was fixed, so far as plaintiffs are concerned, still such condition would not obviate the necessity of proving such value at the trial, otherwise the court would have no legal evidence to support its findings in that respect.

Respondent insists that—

"With very few exceptions Lauman did not pay any claim for the full amount thereof; the testimony shows that as a result of his investigations, negotiations, and dealings the several claims were settled for less than their original amounts. This necessarily implies and imports negotiations and inquiries and investigations as to the value of the articles lost, and consequently is evidence of value, if it does not absolutely establish the value of the several articles."

It is also contended by respondent that—

"In addition to the testimony which has been set out in the foregoing pages, proofs of loss were received in evidence, sworn to and verified by Lauman, as to the correctness of the values set opposite the various items. In addition, also, we have the uncontradicted testimony of Lauman that the data, and particularly the schedules of goods lost in the fire, were true and correct, and correctly showed the sound value and loss."

Upon examination of the transcript we find the schedule referred to offered by defendant and received in evidence over plaintiffs' objection. In the absence of evidence indicating otherwise, these "proofs" were offered by the defendant, and received by the court in support of defendant's defense, and not to support plaintiffs' case; defendants having stated that it was cross-examination as to the fact whether or not proof of loss was made. The schedule in question is "Defendant's Exhibit A." For illustrative purposes, we set forth the first line thereof only:

"1 Suit White Williams $15.00"

There are 28 other items designated in the same way. At the top of this sheet appears the following:

"The following amounts were paid by the Imperial Dye House—Roy R. Lauman, Prop., for clothing destroyed by fire on June 5, 1917."

As a part of the same exhibit was another schedule, at the top of which appeared the following:

"The following amounts were claimed from the Imperial Dye House, Roy R. Lauman, Prop., for clothing destroyed by fire June 5, 1917."

Below this are 27 items, the first of which is as follows:

"1 3 piece tailored suit
1 overcoat
1 lady's blue pleated dress—Mr. & Mrs. John H. Walsh.....$72.50"

On each of these schedules nothing appears to designate what the columns stand for, except as we may conjecture. Each of the schedules is sworn to by Lauman, but nothing is said in either of them as to value of any or all of the items referred to, at the time of the fire or at any other time. This we consider essential. Lion Fire Ins. Co. v. Starr, 71 Tex. 733, 12 S. W. 45; Home Ins. Co. v. Bank, 88 Tenn. 369, 12 S. W. 915. While the witness Lauman was on the stand he testified on the matter now under consideration as follows:

"Q. You have heretofore, and in response to the demands and requirements of the defendant company, furnished them certain data and information in the way of schedules, have you not? A. Yes. Q. In connection with your proofs of loss? A. Yes. Q. I will ask you if that information, that data, and those schedules and proofs of loss, were true at the time you furnished them, according to your best knowledge, information, and belief. A. At the time they were furnished to the best of my knowledge and belief as correct."

So far as we have been able to discover—and we have read practically all of the testimony, and not only alone that to which our attention has been called—there is not one word of evidence showing the value of any item to which we now refer. It is true there is evidence of value by the owners of some of the articles destroyed; but there is no evidence which will support the findings as to the full amount found by the court in favor of plaintiffs. Appellant cites, and correctly, too, we think, many items claimed which may have been included in the findings and judgment, in reference to which there was no legal evidence as to the value thereof, either at or about the time of the loss, or at any time. On the other hand, respondents, in answer to this contention, cited many items where the proof was sufficient with respect thereto. This latter condition, however, does not overcome the want of such proof as to the items referred to by appellant.

[5] The finding, in the case of item 2 of the policy is for a lump sum of $1,000, and we have no way of ascertaining what items went into its making, etc. The total amount of claims paid and assumed by Lauman is, as we have seen, $1,326.59; and items, the evidence in reference to which we have examined and fail to find any value proven, bring that total considerably below the amount found by the trial court to be due plaintiffs. This court, having no authority to make findings, can only reverse the judgment. Our attention is called by respondents to the following cases as supporting their contention that the proofs and schedules so introduced by defendant were proper evidence of value, viz.: Moore v. Protection Ins. Co., 29 Me. 97, 48 Am. Dec. 514; Cheever v. Scottish, etc. Ins. Co., 86 App. Div. 328, 83 N. Y. Supp. 730; Wooldridge v. Ins. Co., 69 Mo. App. 413; Bini v. Smith, 36 App. Div. 463, 55 N. Y. Supp. 842—but we consider none of these in point.

The case of Moore v. Protection Ins. Co., it is contended, holds that proofs and schedules there offered and received were offered to show the cost and value of the articles therein set forth, and, having been received, that they constituted legal evidence of such value. We do not understand this to be the holding of that case. There the question at issue was, not the value of the goods, etc., destroyed by fire, but whether the plaintiff was guilty of fraudulent conduct and false swearing. All books of account, invoices, etc., as well as the goods for which payment was sought under the policy, were destroyed by the fire. In his preliminary proofs the plaintiff there had estimated the value of the goods so destroyed at $2,800. After trial the jury found for plaintiff in the sum of $1,853. The defendant company in that case relied upon such verdict as proof of its contention of false swearing on the part of plaintiff therein. The court held, contrary to defendant's contention, that the estimate of the value of the goods in the store at the time of their destruction was only a matter of judgment on the part of plaintiff, and that his judgment of the value of the property lost—which, to all intents and purposes, was what the preliminary proofs and schedules amounted to—might properly be considered with all the other evidence upon the same question. It is true that this defense was urged by defendant here; but that is not the question which we are now considering.

In the case of Cheever v. Scottish, etc., Ins. Co. the lists referred to showed, among other things, the place of purchase, the purchase price and a statement of the time the articles had been used, as a basis for discounting the figures, and the witness in that case testified that she believed that 25 per cent. discount, on an average, would give the cash value of the articles at the time of the fire. Not even one of these elements is to be found in many of the items found in the proofs and schedules or the testimony of any of the witnesses who testified with regard to the claims now under discussion. According to the case under consideration, the holding was that the lists referred to "were not evidence that the things were in fact there, but when she testi-

fied that the lists were correct at the time she made them, and that the articles were actually in the hotel at the time, it was not error to admit the lists as having been testified to by her, and the facts given in connection with these lists formed the basis for the jury in estimating the value of the property destroyed."

In the case of Wooldridge v. Ins. Co., Mrs. Wooldridge was the only witness who testified as to the value of the property consumed by the fire. The court there says:

"She was unable to call to memory all of the articles or their value that were burned, but she constantly referred to the formal proofs of loss as containing a correct list and the true value of the articles lost by the fire. Those proofs were before the court and jury, and the defendant, under the circumstances, had the opportunity and the right to cross-examine her on these values, as shown by the proofs of loss, if it had so desired. We are not able to say that there was a lack of proof on this point."

In the case of Bini v. Smith, the court did not hold that the introduction of proofs of loss without other evidence was sufficient to prove value, but, on the contrary, said:

"They are not evidence for that purpose, and we do not understand that the appellant makes any such claim, or that the proofs of loss were introduced for that purpose."

There was in that case evidence that the building had cost more than $7,000, and that the household furniture had cost $639. What the court did hold there was that the cost of the property is some evidence of its value. The defense at the trial in that case was that the policy was issued without authority of the defendant, and without consideration—that is, payment of premium—and that about four months after its issue it was duly canceled in accordance with its terms. The policy required the assured, in case of fire, to furnish the underwriters, as part of the proofs of loss, a statement of the "quantity and cost of each article" and the "cash value of each item"; and there was evidence that the proofs of loss had been duly furnished, but were returned by the company *solely upon the ground that the premium had not been paid, and that the policy had been canceled for that reason.* Under these conditions the court held that "such specific objection waived all other objections to the proofs of loss." The recitals contained in the proofs of loss being supported by the testimony of the witness above referred to, as to the value of the building and household furniture, and in view of the further fact that the proofs of loss were received in evidence without objection, the court held that the proofs were competent, "*not to afford proof of cost or value, but to refresh the memory of the witness,* and the receipt in evidence of the proofs of loss was practically equivalent to an answer that the cost was the amount stated in them." (Italics ours.) There is nothing like this in the reference to the items now under consideration in the case at bar.

This being true, we are unable to agree with respondents in their said contention. These proofs of loss were therefore properly received as evidence, for the reason and purpose already stated, but for nothing else. They do not purport to show the value of any of the items now under consideration.

[6] We may also add that—

"The preliminary proofs of loss are never admissible at the trial as evidence of the fact of loss, or the amount thereof." Home Ins. Co. v. Bank, supra; Mutual Life Ins. Co. v. Stibbe, 46 Md. 302; Breckinridge v. Ins. Co., 87 Mo. 62; Hiles v. Ins. Co., 65 Wis. 585, 27 N. W. 348, 56 Am. Rep. 637.

What we have said, of course, does not apply to items 1 and 3 of the policy, for the reason, as we have already seen, that these were admitted by the company. Only for the insufficiency of the evidence to support the second item of the policy, the judgment would be sustained.

No other point urged need be considered.

Judgment reversed.

We concur: FINLAYSON, P. J.; WELLER, J.

48 Cal. App. 564

WALL v. SUPERIOR COURT IN AND FOR RIVERSIDE COUNTY et al.

(Civ. 3367.)

(District Court of Appeal, Second District, Division 2, California. July 19, 1920.)

1. Appearance ⟸19(4)—Nonresident submits himself to jurisdiction by filing demurrer.

Nonresident defendant, by filing demurrer to complaint on ground that court had no jurisdiction of his person, submitted his person to the jurisdiction of the court.

2. Certiorari ⟸5(1)—Will not lie to review order quashing service of summons and sustaining demurrer.

Certiorari will not lie to review order quashing service of summons and sustaining demurrer, in view of adequate remedy by appeal, since appealable judgment might have been entered upon demurrer.

Application for certiorari by Sarah J. Wall against the Superior Court of the State of California in and for Riverside County and Hon. J. W. Curtis, Acting Judge of said Court, to review an order of the court quashing demurrer. Writ discharged.

D. B. Chapin, of Riverside, and W. W. Little, of Salt Lake City, Utah, for petitioner.

A. Aird Adair, of Riverside, for respondents.

WELLER, J. By this proceeding petitioner seeks to review the action of the superior court of Riverside county. On August 19, 1919, a complaint was filed in that court, naming John J. Wall as a defendant. Summons was served on defendant Wall personally in Riverside county on April 28, 1920. On May 5, 1920, defendant Wall gave notice of his special appearance for the sole purpose of moving to quash the service of summons, and filed therewith notice of motion to set aside the service of summons on the ground that he was a nonresident of the state of California, and, at the time of the service of summons on him, was but temporarily in this state for the purpose of attending the trial of a civil action to which he was a party. The notice of motion was accompanied by an affidavit setting forth the circumstances of his visit to California, as above indicated. At the same time Wall served and filed a demurrer to the complaint on the ground that the court had no jurisdiction of his person, in that it appeared upon the face of the complaint that he was a resident of the state of Nevada. On May 18th the court, after argument, granted the motion to quash the service of summons and sustained the demurrer to the complaint.

[1, 2] That by filing the demurrer to the complaint defendant Wall submitted his person to the jurisdiction of the court there can be no doubt, and the court erred in its action. McDonald v. Agnew, 122 Cal. 448, 55 Pac. 125; Olcese v. Justice's Court, 156 Cal. 82, 103 Pac. 317; American Law Book Co. v. Superior Court, 164 Cal. 327, 128 Pac. 921. But petitioner cannot take advantage of this error by certiorari, for an adequate remedy exists aside from this proceeding. Judgment might have been entered on the demurrer, and an appeal would lie from such judgment.

Writ discharged.

We concur: FINLAYSON, P. J.; THOMAS, J.

48 Cal. App. 487

DE LA CUESTA v. ARMSTRONG HOLDINGS CO. (Civ. 3417.)

(District Court of Appeal, First District, Division 1, California. July 12, 1920.)

1. Brokers ⟸40—Contract in form of option held agreement to pay commission for procuring purchaser.

Contract giving plaintiff option to purchase defendant's ranch within specified period for a fixed cash price or on terms acceptable to defendant, and providing for payment to plaintiff of commission on purchase of ranch by plaintiff or plaintiff's assignee, *held* to entitle plaintiff to commission on sale of ranch to purchaser procured by plaintiff, the contract being not merely an option, but an agreement to pay plaintiff a commission for making a sale of the property, in view of Code Civ. Proc. §§ 1860, 1864, and Civ. Code, § 1654.

2. Contracts ⟸162—Intent determined from contract as a whole, where provisions inconsistent.

Where two provisions of a contract standing alone are inconsistent, the contract will be construed by determining the general intent of the parties from the contract as a whole.

3. Contracts ⟸170(1)—Admission considered in ascertaining whether contract imposed liability.

That party to contract admitted liability thereunder is a strong circumstance to be considered in determining whether contract imposed such liability.

4. Brokers ⟸57(2)—Entitled to commission, though owner thereafter negotiated with purchaser for more favorable terms.

Broker, who procured purchaser ready, willing, and able to purchase, by exchange, the principal's property on terms satisfactory to principal, was entitled to his commission, though principal, after acknowledging broker's services and recognizing his right to agreed compensation, negotiated with purchaser for more agreeable terms.

5. Brokers ⟸50—Entitled to commission for procuring purchaser within required period, though deal consummated thereafter.

Broker who, within required period, procured purchaser ready, able, and willing to purchase on terms satisfactory to owner, was entitled to commission, though deal was not fully consummated until after expiration of such period because of owner's negotiations for more favorable terms.

6. Brokers ⟸41—Owner dealing with purchaser procured liable for commission.

Owner, having made deal with purchaser procured by broker, and having assured broker that he would pay broker his commission, cannot refuse to pay commission on ground that his contract with broker was an option to broker providing for payment of commission only in the event of sale to broker himself or his assignee.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Edward De La Cuesta against the Armstrong Holdings Company. From judgment on order sustaining general demurrer to amended complaint without leave to amend, plaintiff appeals. Reversed and remanded, with instructions.

Sullivan & Sullivan and Theo. J. Roche, of San Francisco, and J. F. Frick, of Lompoc, for appellant.

Kuster & Salisbury and S. A. McNeil, all of Los Angeles, and Richards, Heaney & Price, of Santa Barbara, for respondent.

WASTE, P. J. This is an appeal by plaintiff from the judgment entered upon an order

sustaining a general demurrer to the amended complaint, without leave to amend, plaintiff conceding that no amendment could be made.

It is alleged in the amended complaint that the defendant, a corporation, was the owner of a 3,200-acre ranch in the county of Santa Barbara, together with the improvements, stock, and necessary equipment. Being desirous of securing the services of plaintiff to negotiate an exchange or sale of said property with a party known to plaintiff, but unknown to defendant, it employed plaintiff to negotiate the sale or exchange of the ranch property, at a valuation of $178,000, to be consummated upon terms acceptable to the defendant, promising to pay plaintiff a commission of 5 per cent. upon such valuation for procuring a person or party ready, willing, and able to take over the property. It promised, and did send to plaintiff from its office in Los Angeles, a memorandum of the terms of this employment, subscribed by it. By the terms of the writing the defendant purports to give to the plaintiff the exclusive right and option to purchase the property, together with all farm and ranch equipment, including stock on said premises, for the price of $178,000 cash, or upon terms acceptable to the board of directors of said company. Other terms of the sale were set out. It is further specified in the instrument that, in case plaintiff, or any one to whom he may assign the option, purchase the property within the period granted, the defendant will pay to plaintiff or to his order a commission of 5 per cent. of the aforesaid cash valuation of $178,000. No consideration was received by defendant for the option, except plaintiff's agreement to sell or exchange the property.

Within the time specified, plaintiff produced the party willing and able to purchase the ranch, who offered to transfer and convey to defendant real and personal property of the agreed value of $178,000, in exchange for the property of the defendant. This offer was satisfactory and acceptable to the defendant, and it so informed the plaintiff, at the same time stating to him that he had complied with the terms of the memorandum agreement, and had earned, and was entitled, upon the consummation of said exchange, to the compensation provided to be paid to plaintiff by the defendant, according to its terms. Defendant informed the plaintiff, however, that it desired to further negotiate with the intending purchaser for the purpose, if possible, of securing from him the transfer of additional personal property in the place and stead of certain portions of the real property offered in exchange for its property. The defendant delayed the closing of the transaction until after the time specified in the agreement, through no fault or neglect of plaintiff, and continued to negotiate with the party produced by plaintiff, and the exchange was finally consummated. The value of the real and personal property conveyed, and transferred, to the defendant was the sum of $178,000.

On these facts plaintiff claims to have earned and to be entitled to his commission, he having produced the person ready, willing, and able to, and who did, take the property on terms satisfactory, and agreed to, by the defendant. The respondent's theory is that the memorandum or agreement amounted only to an option granted to the plaintiff, and, being an instrument in writing, superseded any prior oral negotiations had between the parties, and that consequently the allegations of the complaint as to what preceded the execution of the writing must be disregarded; no fraud being claimed. It relies upon the well-known principle of law that parol evidence cannot be admitted to vary, or add to, the terms of a contract plain and unambiguous on its face. Its argument, in effect, is that the agreement is one merely for the sale of the property upon terms acceptable to the defendant, with a provision for a discount of 5 per cent. in the event of a sale to plaintiff or his assignee. Appellant's theory is that the agreement was both an option and an authorization to sell upon commission. His theory is supported by the authorities. Mitchel v. Gray, 8 Cal. App. 423, 429, 97 Pac. 160; Burt v. Stringfellow, 45 Utah, 207, 216, 143 Pac. 234.

[1] We are of the opinion that the plaintiff has stated a cause of action, and that the demurrer was improperly sustained. The memorandum of the agreement, entered into between the parties, is not so clear and unambiguous as to be readily understood without some explanation of the situation of the parties at the time it was entered into. The writing prepared and executed by the defendant (omitting descriptive matter and portions immaterial to this discussion) is as follows:

"For value received and for the time hereinafter stated, the Armstrong Holdings Company hereby gives to Edward de la Questa the exclusive right and option to purchase the property of said company located in the county of Santa Barbara * * * together with all farm and ranch equipment, including stock now on said premises, comprising approximately 3,200 acres, for the price of one hundred seventy-eight thousand dollars ($178,000) cash, or upon terms acceptable to the board of directors of said company. * * *

"In case Edward de la Questa, or any one to whom he may assign this option purchase said property within the time hereinafter specified, said Armstrong Holdings Company agrees to pay said Edward de la Questa, or to his order, a commission of five per cent. (5%) of the aforesaid cash consideration of one hundred seventy-eight thousand dollars ($178,000). This option to remain in full force and effect for the period of twenty (20) days from date and after that time to be void and of no force or effect."

The contract in this case was executed by the defendant in favor of the plaintiff. When different constructions of the provisions of an agreement are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made. Code Civ. Proc. § 1864. In cases of uncertainty the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. Civ. Code, § 1654. In the instant case the defendant prepared the agreement. We do not need to rely solely upon these technical rules of interpretation, however, in arriving at a conclusion in this matter. Other controlling principles applicable to the construction of contracts afforded a more satisfactory determination of the question.

[2] In the first instance, the agreement purports to give the plaintiff an option to purchase the ranch property of the defendant, within a definite period, for a fixed cash price, or upon terms the subject of future treaty, but acceptable to the defendant. By the following provisions, it is stipulated that upon the purchase by the plaintiff, or an assignee, the defendant will pay plaintiff a commission upon the cash valuation. A sale of property outright, at a fixed price, to one having an option to purchase is one thing. A payment of a commission to one authorized to make a sale is another proposition. Standing alone, the two provisions of the agreement are inconsistent. It remains, therefore, to determine the general intent of the parties, from the contract as a whole. Pacific Mutual Life Ins. Co. v. Pacific Surety Co. (Sup.) 189 Pac. 273. Read together, and in the light of the circumstances under which it is alleged the contract was made, and the situation of the parties to it (Code Civ. Proc. § 1860), they harmonize. To quote from the Utah decision, a case strongly in point:

"It seems to us that it was the intention the parties to the contract in question to grant the appellant a fixed time within which he had the * * * right either to purchase or sell the property at the price stipulated in the contract, and if he did either he was to receive 5 per cent. of the selling price as a commission." Burt v. Stringfellow, supra.

This construction, we are satisfied, coincides with the intention of the parties in the instant case.

[3] Respondent's present contention, that the appellant was merely granted an option to purchase the property, is destroyed by the averments of the amended complaint, admittedly true for the purpose of considering the demurrer, to the effect that when the plaintiff, within the time specified, produced the party, then and there ready, willing, and able to purchase the property, the defendant informed plaintiff that the property offered in exchange for its holdings was satisfactory and acceptable to it, at the same time informing plaintiff that he had complied with the terms of the agreement, and had earned and was entitled, upon the consummation of the exchange, to the compensation provided for in the agreement. Its own construction of its liability in the matter is a strong circumstance to be considered in arriving at a proper interpretation of the agreement. Union Oil Co. v. Stewart, 158 Cal. 149, 155, 110 Pac. 313, Ann. Cas. 1912A, 567; Dollar v. International Banking Co., 10 Cal. App. 83, 87, 101 Pac. 34.

[4, 5] The plaintiff, having, within the time limited, and under the terms of his employment, produced to the defendant a person ready, willing, and able to purchase, by exchange, the property of the defendant upon satisfactory terms, was entitled to his commission. Jauman v. McCusick, 166 Cal. 517, 521, 137 Pac. 254; Levy v. Dusenbery, 32 Cal. App. 411, 417, 163 Pac. 231. The fact that the defendant, after duly acknowledging the plaintiff's services in the matter, and recognizing his right to be paid the agreed compensation therefor, negotiated with the purchaser for more agreeable terms of the exchange, does not, in our opinion, change the situation of the parties. It still remains that the plaintiff was the procuring cause of the sale. Briggs v. Hall, 24 Cal. App. 586, 588, 141 Pac. 1067; Daniel v. Calkins, 31 Cal. App. 514, 518, 160 Pac. 1082. The delay in closing the sale, until after the time limited by the contract, was caused by the desire of the defendant to procure more satisfactory terms, and does not destroy plaintiff's right to his commission. Brown v. Mason, 155 Cal. 155, 159, 99 Pac. 867, 21 L. R. A. (N. S.) 328. The purchaser was found, and negotiations were begun within the time limit. It is immaterial that they were not fully consummated until afterwards. Ropes v. John Rosenfeld's Sons, 145 Cal. 671, 678, 79 Pac. 354.

[6] Respondent urges, in support of the judgment, that the plaintiff has not exercised his option either by purchasing, or offering to purchase, the property for himself, or assigning the option to another. As we have pointed out, the agreement is more than an option. It is also, and was intended by the parties to be, an agreement to pay the plaintiff a commission for making a sale of the property. He assumed that he had performed the agreement. The defendant acknowledged that he had done so, and gave him the assurance that he would be paid the agreed compensation. It gave countenance to the construction placed upon the contract by the plaintiff, acquiesced in its fulfillment accordingly, received and retained the benefits to be derived therefrom. Under such circumstances it must be held to have waived and abandoned its right to impeach the transaction for some technical omission, after the plaintiff's position has so materially changed. Scott v. Jackson, 89 Cal. 258, 262, 26 Pac. 898.

The judgment is reversed. The action is remanded to the lower court, with instruc-

tions to overrule defendant's demurrer to the amended complaint, permitting it to answer thereto within such time as may be proper.

We concur: WELCH, Judge pro tem.; RICHARDS, J.

48 Cal. App. 452

JOSEPH MUSTO SONS-KEENAN CO. v. PACIFIC STATES CORPORATION et al. (Civ. 3295.)

(District Court of Appeal, Second District, Division 1, California. July 9, 1920. Hearing Denied by Supreme Court Sept. 7, 1920.)

1. Contracts ⟸295(1)—Substantial performance of building contract is sufficient.

Where a building contractor has substantially performed all the essential parts of the contract in good faith, he can recover the contract price, less compensation to the owner for damage resulting from trivial defects and imperfections, due to inadvertence, especially when the owner has received the benefit of the work done.

2. Trial ⟸396(3)—Finding of substantial performance not inconsistent with allegation of performance.

A finding by the trial court that plaintiff had substantially performed in good faith the requirements of a building contract, but allowing defendant damages for trivial defects, is not inconsistent with the allegation of the complaint that plaintiff had fully performed the contract.

3. Trial ⟸398—Finding of full performance controls finding of unimportant defects in work.

If the probative findings that there were trivial defects in the performance of a building contract, for which damages were allowed to the owner, were inconsistent with the ultimate finding of completion of the contract, the latter finding would control.

4. Contracts ⟸322(4)—Evidence held to show substantial performance of marble work contract.

In an action to foreclose a mechanic's lien, evidence showing performance of a contract for the installation of marble work in a building in conformity with the contract, except as to trivial defects unavoidable in such work, and showing that all work objected to by the architect during its progress was replaced, *held* to support a finding of substantial performance of the contract.

5. Trial ⟸396(5)—Party not entitled to finding based on evidence later stricken by court.

Defendant cannot object to the refusal to allow damages sustained by uncontradicted testimony of its superintendent, where such testimony was later stricken by the trial court as hearsay.

6. Appeal and error ⟸1056(5)—Allowance of damages for trivial defects held to cure exclusion of evidence.

If it was error to exclude evidence of increased cost of maintaining a marble floor, because of the wide cracks therein, and of the difference in cost between a cement and marble tile floor, the allowance by the court of damages against the contractor for defects must be assumed to cover that item, so as to render the exclusion of the evidence immaterial.

7. Appeal and error ⟸1048(5)—Error held not prejudicial, in view of answers of witness.

Errors in permitting defendant's superintendent of construction to be asked whether he would have issued a certificate at the end of a job, where he permitted marble to be installed without objection at the time, and in permitting a question to be asked as to how many square feet of marble tile were sorted out, was harmless, where the answers to the questions could not have prejudiced defendant.

8. Damages ⟸123—Measure for immaterial defects in building contract is not cost of replacing work.

Where a building contractor substantially performed his contract to install the marble work in a building, the measure of damages for immaterial defects in the work is not the cost of removing and replacing all of the marble work in the building.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by the Joseph Musto Sons-Keenan Company against the Pacific States Corporation and others, in which the Pacific States Corporation filed a cross-complaint against the plaintiff. Judgment for plaintiff, and Pacific States Corporation appeals. Affirmed.

C. W. Pendleton, of Los Angeles (Anderson & Anderson, of Los Angeles, of counsel), for appellant.

Glen Behymer and Behymer & Craig, all of Los Angeles, for respondents.

SHAW, J. In this action plaintiff sought a decree foreclosing a mechanic's lien for material furnished and labor performed under and pursuant to a contract made with defendant Pacific States Corporation as owner of a structure known and designated as the Merritt Building. Judgment went for plaintiff, from which the defendant Pacific States Corporation appeals.

As appears from the contract attached to and made a part of the complaint, and upon which the claim of lien is based, plaintiff, for the consideration therein specified, undertook and agreed to furnish the material, fabricate, and install in accordance with the specifications therefor the marble work required in the construction of the building, including such extra material and work, which the owner, as provided, might demand, and for all of which said defendant agreed to pay in part as the work progressed, and the balance, 25 per cent. of the agreed price, at the expiration of 35 days after the final completion and acceptance of the work. The work performed under the contract comprised

various kinds, some of which was to be paid for upon a basis of cost of material and work of installation, plus a percentage, while other parts thereof were to be done at a fixed price specified in the contract. As alleged by plaintiff and in express terms found by the court, it furnished and installed all the materials called for under the terms of the contract, and performed all labor necessary in the installation thereof, all in accordance with and as required by said contract. As alleged, the total price of the work described in the first count of the complaint was the sum of $46,146.40, upon which said defendant paid the sum of $28,123.36, leaving a balance, after allowing defendant certain discounts of $24.77, of $17,998.27 unpaid, and for which judgment was asked.

While in its answer defendant denied that the work was done in conformity with the terms of the contract, and raised issues as to the amount of the work done in each of the several classes of work specified therein, defendant's chief contention, which is really the only one seriously urged on appeal, is that each of three classes of the work admittedly done, and which comprised nearly the whole of the work called for by the contract, namely: The installation of Colorado yule wainscoting, the tile floors, and verde antique bases were not only imperfect and defective as to material used, in that it was cracked, chipped, broken, and discolored, but also the work of installing the same was not in conformity to the contract, in that for various reasons it was done in an unworkmanlike manner. As to all of such issues the court found adversely to defendant, and, in addition to the finding that plaintiff, as required by the terms of said contract and in conformity therewith, furnished the materials for and performed the necessary labor in installing the same, further found specially upon said several issues as follows:

(1) "That said floor tile and border was installed in such a manner as to substantially conform to each and every of the requirements of the contract, plans, and specifications agreed upon between the Pacific States Corporation and the plaintiff, and the orders and modifications supplementary thereto; that there were some minor or trivial defects in the labor of installing the same, whereby a small portion of said floor tile and border was either chipped, cracked, slightly broken, or otherwise installed in an imperfect manner; that said defects were not pervasive, and did not occur through any bad faith on the part of the contractor, and said defects do not defeat or materially change the object of the contract between said parties, and that said contractor exercised good faith in the execution of said work, and endeavored at all times to comply with the requirements of his contract in that regard; that there was no willful departure by said contractor from the provisions of the contract, plans, and specifications agreed upon between the said contractor and the said Pacific States Corporation, and the said orders and modifications supplementary thereto, and that there was no omission of any of the essential or material parts required to be done and performed by said contract in regard to said floor and border, and that the said contractor has in good faith performed all of the substantive terms of the agreement existing between the said Pacific States Corporation and said contractor in reference to said floor tile and border; that, in discharging its contract relative to the same, plaintiff used exactly the kind and character of materials which were required by the specifications and employed the best labor, and that the imperfections in the said work performed are trivial and can be compensated for by a recoupment for damages, and that the defects in the workmanship of the installation of said floor tile and border arose through accident and inadvertence, and are not such as to defeat or materially change the design embodied in the agreement between the said parties in reference to the said floor tile and border; that the damage sustained by the defendant Pacific States Corporation by reason of the aforementioned defects is the sum of $231.33."

(2) "That said verde antique marble base and all thereof was installed in such a manner as to substantially conform to each and every requirement of the contract, plans, and specifications agreed upon between the Pacific States Corporation and the plaintiff herein, and the orders and modifications supplementary thereto; that there were some minor defects in the fabrication and installation thereof, whereby a portion of the verde antique marble base did not possess as high a polish as required by the agreements aforementioned or was scratched or otherwise imperfect; that said defects were not pervasive and did not occur through any bad faith on the part of the contractor, but that said contractor exercised good faith and endeavored at all times to comply with the requirements of its contract in this regard; that there was no willful departure by said contractor from the provisions of the contract, plans and specifications relative to said verde antique marble base as agreed upon between the said contractor and the said Pacific States Corporation and the orders and modifications supplementary thereto, and no omission of any of the material or essential parts required to be done and performed by said contract in regard to said verde antique marble base, and the said contractor has in good faith performed all the substantive terms of the agreement existing between said Pacific States Corporation and the said contractor in reference to the said verde antique marble base; that in discharging its contract relative to the same plaintiff used exactly the kind and character of materials which were required by the specifications and employed the best labor, and that the imperfections in the work performed are trivial and can be compensated for by recoupment for damages, the defects in the workmanship and fabrication of said verde antique marble base arising through accident or inadvertence and not being such as to defeat or materially change the design embodied in the agreement between the said parties;" and that the damages sustained by defendant due to said defects is the sum of $102.

(3) "That said Colorado yule marble wain-

scoting was installed in such a manner as to substantially conform to each and every of the requirements of the contract, plans, and specifications agreed upon between the Pacific States Corporation and the plaintiff and the orders and modifications supplementary thereto; that there were some minor or trivial defects in the labor of installing the same, whereby a small portion of said Colorado yule wainscoting was either chipped, cracked, slightly broken, or otherwise installed in an imperfect manner that said defects were not pervasive, and did not occur through any bad faith on the part of the contractor, and said defects do not defeat or materially change the object of the contract between said contractor and said owner relative to said marble wainscoting, but the said contractor exercised good faith in the execution of said work and endeavored at all times to comply with the requirements of his contract in that regard; that there was no willful departure by said contractor from the provisions of the contract, plans, and specifications agreed upon between the said contractor and the said Pacific States Corporation, and the orders and modifications aforementioned supplementary thereto, and that there was no omission of any of the material or essential parts required to be done and performed by said contract in regard to said marble wainscoting, and that the said contractor has in good faith performed all of the substantive terms of the agreement existing between said Pacific States Corporation and said contractor in reference to said marble wainscoting; that in discharging its contract relative to the same, plaintiff used exactly the kind and character of materials which were required by the specifications and employed the best labor, and that the imperfections in the work performed and imperfections in workmanship are of a minor character and can be compensated for by recoupment for damages, the defects in the workmanship of the installation of said marble wainscoting arising through accident or inadvertence and not being such as to defeat or materially change the design embodied in the agreement between the said parties"; and that the damages sustained by defendant as a result of such defects is the sum of $226.28.

[1] Appellant's first contention is that the findings which we have numbered 1, 2, and 3, since they show a substantial performance of the contract only, are inconsistent, not alone with full performance, as alleged in the contract, but likewise inconsistent with the ultimate finding that the work was done in accordance with the terms of the contract, and hence it contends the judgment should be reversed. There is no merit in this point. As to such character of contracts the law is well settled that a substantial performance of all the essential parts thereof, had in good faith, will entitle the contractor to recover the contract price, less compensation to the owner by way of recoupment for any damage resulting from trivial defects and imperfections due to inadvertence and not affecting substantive parts of the contract. This is especially true where, as in this case, the owner has received the benefit of what has been done and is enjoying the fruits of the work. Connell v. Higgins, 170 Cal. 556, 150 Pac. 769; Rischard v. Miller (Sup.) 188 Pac. 50; Collins v. Ramish (Sup.) 188 Pac. 550; Morris v. Hokosona, 26 Colo. App. 251, 143 Pac. 826; Omaha Water Co. v. City of Omaha, 156 Fed. 922, 85 C. C. A. 54.

[2, 3] Since a substantial performance is performance (Rowe v. Gerry, 112 App. Div. 358, 98 N. Y. Supp. 380), and all that is required to sustain an allegation of performance, and since the probative findings referred to show such performance, it follows that, instead of being inconsistent with the allegation of full performance, the findings to that effect are in full accord with and support the same. Even though the probative findings were inconsistent with the ultimate finding of completion in accordance with the contract, the latter would control. Perry v. Quackenbush, 105 Cal. 299, 38 Pac. 740.

[4] Appellant's chief contention is that the finding to the effect that plaintiff furnished the materials and performed all labor necessary in the installation thereof in accordance with and as required by the contract is not supported by the evidence. The question as to what constitutes substantial performance is one to be determined in each case, having regard to the circumstances and facts thereof. Collins v. Ramish, supra. In the instant case the building comprises several stories, each of which required tile flooring, marble base, and marble wainscoting. The aggregate of floor tiling was some 35,563 square feet, the contract price of which was $15,422; the marble base installed consisted of 7,312 linear feet, the contract price of which was $7,308; the marble wainscoting comprised 10,935 square feet, the contract price of which was $7,442—making a total for the work installed if done in strict accordance with the specifications, of upwards of $30,000. The installation of the work required the handling, setting, and joining of many thousands of pieces of material, and, as appears from the evidence, it would be impracticable, in view of the fact that the quality of the material was soft, spongy, and easily nicked, to secure a completed job of work where every piece would be absolutely perfect and as laid the width of every joint would be uniform when measured by a hair's breadth. That the arris or edge of some of the pieces where joined was snipped or nicked; that an uncleaned oil spot appeared on some pieces, or another was soiled; that the work was not all properly cleaned and washed down; that one piece did not take as high a polish as another, or did not exactly match it; and other alleged like defects, for all of which the court found that defendant was damaged in the total sum of $469, did not, in our opinion, affect plaintiff's right to recover.

Not only, as found by the court, were such imperfections not pervasive, but where such defects existed in the tiling, pieces of wain-

scoting, or base, and were so defective as to warrant so doing, they could be removed and new pieces substituted therefor, and where a piece was oil-stained or soiled it could be cleaned, and the allowance made by the court presumably covered the cost of such work. The performance of the work covered many months, during which time a representative of the architect was on the ground, and a superintendent was employed by defendant, whose duty it was to supervise the work as it progressed, and call plaintiff's attention to work which was not done to their satisfaction. Notwithstanding this fact, few complaints were made by either the architect or superintendent, and, where made, the pieces were taken out and others substituted therefor. Not only this, but during the progress of the work the president of defendant repeatedly expressed himself as being well satisfied therewith, and commended plaintiff for the character of work being done.

In our opinion, the question as to whether the contract was substantially performed should be determined upon a view of each class of work considered as a whole; and, so considered, it appears each class of work was done in strict accordance with the design therefor, and the material used was that called for in the specifications, and, save and except imperfections existing, but not pervasive, for which recoupment was allowed to defendant, it, as completed, constituted a substantial performance of the contract. In such a controversy witnesses will differ in taste as to whether one piece of marble matches another, or whether the joints between the pieces are too wide or too narrow, according to their respective tastes and opinions. However this may be, and conceding a conflict of testimony upon the question, it appears from evidence produced on the part of plaintiff that the work as completed was first-class in every particular. As one witness said:

"It is not possible, consistent with first-class workmanhsip in every respect, to avoid on occasion having a slight nick or broken edge in some of the slabs. We polished the slabs of wainscoting * * * to the point where the slabs had as high a polish as it is possible for them to receive, and we polished the verde antique base to the highest degree that that kind of marble could be polished. * * * There are no more flaws or defects in the job on the Merritt Building than there are in any first-class job."

Another witness testified:

"The workmanship and material throughout the Merritt Building, in so far as it related to the marble installed by the plaintiff, was without exception absolutely first-class. * * * I found it to be absolutely in a first-class condition in every respect of material and workmanship."

Other witnesses testified that at numerous times Mr. Merritt, president of defendant, expressed himself as well satisfied with the quality of material and workmanship, in the installation of the marble. Other witnesses, called as experts, gave like testimony to the effect that the installation of the work as completed, both as to material and workmanship, was first class, and could not be better. This testimony, and a great deal more to like effect, which fills the voluminous record, and which might be quoted, is sufficient, notwithstanding evidence to the contrary, to show that the work as completed and taken as a whole, was a first-class job of work, and done in substantial conformity to the specifications, even though it be conceded that some of the pieces of marble might not be in accordance with individual tastes, that some of the pieces of tiling were not so closely joined as to accord with individual ideas as to workmanship, or that, in some cases, small snips and nicks appeared in the edges of pieces of tile or marble.

Appellant cites the case of Oakes v. Barbre, 127 Ill. App. 208, where the work done was the construction of a monument to perpetuate the memory and mark the resting place of the dead, and, claiming that the Merritt Building was intended to be a work of art, insists that the rule applied to the construction of such monuments should be applied in this instance. In the case referred to, however, the court draws a distinction when it says:

"Unlike contracts for the construction of buildings, we are of the opinion the rule of substantial performance is not applicable" to such monuments.

We perceive no reason why a different rule should apply to contracts for work upon the Merritt Building than that applicable to other buildings of like character.

Appellant also cites the case of Perry v. Quackenbush, 105 Cal. 299, 38 Pac. 740, where it is said:

"The court cannot say that anything is immaterial which the parties have made material by their contract."

What was there said had reference to the facts of that case, from a reading of which it appears that the contractor willfully deviated from the specifications, in that he used material entirely different from that called for, and, as constructed, the building did not purport to even represent an effort on the part of the contractor, either in material or workmanship, to comply with the contract. In our opinion, the evidence is ample to sustain the findings of probative facts hereinbefore quoted, and, since the facts so found show a substantial compliance with the terms of the contract, it follows that no just ground of complaint exists as to the ultimate fact found that plaintiff furnished materials and installed the marble in accordance with the contract.

[5] Appellant directs our attention to a number of alleged minor errors the nature of which is such as to merit little notice. Among these are the following: Defendant alleged that it was damaged by reason of the fact that plaintiff poured grinding compound into the urinals and slop hoppers, which caused a stoppage of the plumbing, necessitating repairs which cost $250, as to which the court found adversely to the defendant. Appellant's contention that the court should have found in its favor upon this issue is based upon the testimony of defendant's superintendent, which it quotes in its brief, and which it claims was not contradicted by any evidence offered by plaintiff. The testimony of this witness, however, appearing later to be hearsay, was, as such, ordered stricken out by the court. The fact that one of plaintiff's employés was charged with the act constituted no evidence in support of the allegation.

[6] Defendant also complains of a ruling of the court in sustaining an objection to the question as to whether or not the condition of the tile floors, due to the joints being of varying width, would affect the expense of the upkeep of the building. Conceding such fact, if it existed, to be an element of damage, it must be deemed to have been covered by the allowance of damage made therefor by the court; and this answer is likewise a sufficient response to the contention that defendant should have been permitted to prove the difference in the cost of a cement floor and a Colorado yule tile floor, since, even conceding that a cement floor would be as serviceable as a tile floor, the less cost of the former could not affect plaintiff's right to recover for the character of floor contracted for by defendant, and which, as found by the court, was substantially performed.

[7] Nor did the court err in overruling defendant's objection to a question put to the witness Austin, where he was asked if he, as superintendent or architect, would have issued a certificate at the end of the job, where he had permitted marble to go in without objection made at the time, to which he replied: "I can't imagine such a condition." Even if this were error, the answer could not have prejudiced the defendant, for the reason that the contract provided that—

"The architects shall have the right to reject any defective material or workmanship, or, should they deem it advisable (owing to lack of time to replace, or other reasons) to accept such defective workmanship or material, a proper deduction is to be made therefor from the contract price."

Nor, conceding the question as to "how many square feet of such tile were sorted out" was immaterial, as it no doubt was, the answer was not prejudicial.

[8] Complaint also is made that the court erred in applying the proper rule for the measure of damages, in support of which it quotes the testimony of its witness John C. Austin, to the effect that, in order to make the work comply strictly with the specifications, it would be necessary to remove and reconstruct the whole work, which would cost $50,000. Not only was this evidence contradicted by testimony offered on the part of plaintiff, but, as will be seen from the authorities cited upon the subject of what constitutes substantial compliance with a contract, the law does not contemplate that the owner shall be compensated in damages for the removal and reconstruction of the work, where the work as completed constitutes a substantial compliance with the contract. As we have seen, the court upon sufficient evidence found that the contractor, in doing the work, acted in good faith and performed it substantially in conformity to the plans and specifications; that while there were some defects and imperfections, by reason of which the value of the work was diminished, they were not pervasive, and defendant could be recouped therefor by an allowance of damages.

An examination of the record discloses no other errors which we deem it necessary to consider.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

48 Cal. App. 551

PEOPLE v. FOSTER. (Cr. 506.)

(District Court of Appeal, Third District, California. July 17, 1920.)

1. Criminal law ⟸1129(3)—Assignments not specifying particular rulings complained of not reviewable.

Assignments, complaining of court's rulings as to certain evidence without specifying particular rulings or pointing out wherein any rulings were erroneous, cannot be reviewed.

2. Criminal law ⟸1129(3)—Court will not search record for errors.

It is not the duty of a reviewing court, upon its own initiative, to search the record to ascertain whether errors had been committed by the trial court.

3. Criminal law ⟸1163(1)—Appellant must show error to have been prejudicial.

It is appellant's duty, not only to point out the errors, but also to show that errors were of such magnitude as to have prejudiced his rights or prevented him from obtaining a fair and impartial trial.

4. Criminal law ⟸1129(3)—Assignments, not specifying misconduct complained of, not reviewable.

Assignment, complaining of misconduct of prosecuting attorney without specifying any particular misconduct, cannot be considered.

5. Criminal law ⇐665(2)—Exception of witness from order excluding other witnesses from courtroom held not error.

In prosecution for attempting to escape from state prison, refusal to exclude from the courtroom the captain of the guard at the prison at the time of the attempted escape, notwithstanding order excluding other witnesses during the trial pending their being called to testify, was not error, being proper for such captain of the guard, who had gathered the facts relating to attempted escape, to remain with district attorney in order to advise him as to the testimony.

6. Criminal law ⇐1159(3)—Verdict on conflicting testimony supported by evidence not disturbed.

Verdict on conflicting testimony supported by the evidence will not be disturbed.

7. Escape ⇐10—Evidence held to sustain conviction for attempting to escape from state prison.

In prosecution of prisoner confined in state prison under Pen. Code, § 106, for attempting to escape in which defendant denied having been one of the convicts who had made the attempt, evidence *held* to sustain conviction.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Jack Foster was convicted of attempting to escape from state prison and from judgment of conviction, and from order denying new trial he appeals. Judgment and order affirmed.

C. B. Harris, of Sacramento, for appellant.
U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was indicted by the grand jury of Sacramento county for the crime of attempting to escape from the state prison at Folsom, in said county, he then being a prisoner confined in said prison for a term less than for life. Pen. Code, § 106. His trial upon said indictment resulted in a verdict of guilty, and he prosecutes this appeal from the judgment of conviction and the order refusing to grant a motion made by him for a new trial.

It appears from the evidence that the locomotive engine which is used in hauling freight cars from the prison to the town of Folsom and there connecting with the Southern Pacific Company's road was, on the 29th day of June, 1919, in charge of a guard named Lucas, whose particular duties then were those of a locomotive engineer on said engine. The fireman of the engine at the time mentioned was a convict named Cody. On the afternoon of said day, while the engine was being used in the prison yard in switching freight cars, the defendant, together with two other convicts, St. Clair and Heath by name, jumped upon the engine and into the cab thereof, and St. Clair, holding a knife over and up against the body of Lucas in a threatening manner, said, "We are going to take a little ride with you, boys," at the same time ordering Lucas to "open up" the engine and start it towards the gate leading into the prison yards. The defendant also had a knife in his hand, and stood on the cab near St. Clair. Lucas opened the throttle and started the engine, but said to the prisoners that it could go no further than the gate because it (the gate) was locked. St. Clair replied: "Go on, anyway," and Lucas permitted the engine to move on, and it struck the gate, breaking it down, and the engine passed through it and about four car lengths beyond the gate, when the engine was stopped. Cody, the fireman, was taken off the engine by the defendant and his companions, and Lucas was ordered by them to alight, which he did, and thereupon with much haste started back to the prison yards in the direction of the gate through which the engine was forced. The prisoners, including the defendants, were promptly halted by the prison guards and confined in the prison.

The foregoing facts are taken from the testimony of the witness, Lucas, the engineer in charge of the engine at the time of the attempted escape. There was other evidence, circumstantial in character, introduced by the people, which was corroborative of the testimony given by Lucas. The cause was not orally argued before this court, but the defendant has filed a brief, which was evidently prepared by himself, although it seems to have the sanction of two lawyers, who immediately following the subscription of the defendant's signature to the document, appear to have subscribed theirs as "His Late Attorneys." The defendant, in his brief, complains in a general way of certain rulings of the court upon the evidence, and charges that errors prejudicial to his rights were thus committed, and also that the district attorney, in his presentation of the case to the jury, was guilty of misconduct which must necessarily have seriously prejudiced him and his case in the minds of the jury. It is further charged that, an order having been made by the court excluding all witnesses from the courtroom during the progress of the trial pending their being called to testify, the court erred in overruling his objection to the order exempting the witness, Capt. Cochrane, an officer of the prison, from the operation of the rule of exclusion.

[1-4] As stated the assignments charging alleged errors in the court's rulings respecting certain evidence are in general language. It is not specifically pointed out what particular rulings are thus objected to or wherein any rulings were erroneous. It is obvious that points so made on appeal cannot be reviewed. It is not the duty of a reviewing court upon its own initiative to search the

record of a case to ascertain whether errors had been committed by the trial court in the trial of a case. If there were errors committed in the trial of this case it was the duty of the defendant not only to point out such errors but also to show that the errors so pointed out were of such magnitude as to have prejudiced his rights or prevented him from obtaining a fair and impartial trial. Nor does the defendant in his brief show wherein the district attorney was guilty of misconduct in his trial of the case. He merely states generally that the prosecuting officer was guilty of misconduct which resulted in injury to him and his case. If such was the fact the alleged misconduct should have been specifically referred to or brought to the attention of this court by the defendant. As above stated as to the complaint against the court's rulings an assignment of misconduct in such a form cannot be reviewed or, at least, will not be reviewed. In this connection, however, it may be well to state that, notwithstanding that the defendant has failed to specify the particular errors and misconduct of which he has attempted to complain, we have nevertheless given the record careful examination, and that from such examination we have been persuaded to the conviction that his objections as to those matters are groundless.

[5] There is no merit in the complaint that the court abused its discretion in allowing over objection by defendant, Capt. Cochrane to remain in the courtroom during the progress of the trial. The record shows that Cochrane held the position of captain of the guard at the prison at the time of the attempted escape, and the court in overruling defendant's objection to the presence of the captain in the courtroom properly observed that the district attorney was entitled to have by his side for the purpose of consulting about the case as it progressed, any officer of the prison or other person who might be of aid to him in the matter of the marshaling of the proofs. Presumably from his position the duty of a captain of the prison guard on occasions such as the one responsible for this prosecution is to gather the facts and circumstances characterizing the episode, and it was not only proper, but perhaps necessary, that the captain should remain with the district attorney and advise with that official as to what testimony was available to the people.

[6, 7] Following the points above adverted to, the defendant, in his brief, enters upon an extended analysis of the testimony in an effort to show that the verdict was not justified. The argument thus advanced by the defendant would be appropriate before the jury but can have no force before a reviewing court, where the evidence is, upon its face, in sharp conflict, and that produced by the people clearly appears to be sufficient to support the conclusion reached by the jury. There is no inherent weakness or improbability in the testimony presented by the people in support of the charge alleged in the indictment, and if accepted by the jury, as obviously it was, it is fully sufficient, not only to uphold the verdict but to have justified it, notwithstanding the asseveration of the accused under oath and the testimony of other witnesses he presented in purported corroboration thereof, that he was not one of the convicts who jumped into the cab of the engine, and that he did not attempt to make his escape on the occasion referred to in the indictment, but that he only, with a large number of other convicts, upon hearing the commotion in the lower yard of the prison where the engine is used, ran down to the point where the disturbance was going on to gratify his curiosity as to what the cause of the trouble or commotion was.

We conclude that the defendant has failed to shake or disturb the foundation upon which the judgment and the order are planted, and that therefore both the judgment and the order should be affirmed. It is so ordered.

We concur: NICOL, Presiding Judge pro tem.; BURNETT, J.

(48 Cal. App. 524)

SIMONS v. INYO CERRO GORDO MINING & POWER CO. et al. (Civ. 3197.)

(District Court of Appeal, Second District, Division 2, California. July 14, 1920. Opinion of Supreme Court In Bank Denying Hearing, Sept. 10, 1920.)

1. Evidence ⟸324(3)—Statute held not to modify common-law rule that title cannot be shown by common repute.

Code Civ. Proc. § 1963, subd. 12, does not modify the common-law rule that evidence of common reputation is inadmissible to establish title to real estate, where private rights only are affected, and such subdivision is to be read together with section 1870, subd. 11, which declares when and in what cases evidence of common reputation is admissible.

2. Evidence ⟸324(3) — Common reputation held admissible to prove right to take water from spring.

A claim made to any part of the public domain, or a claim to a right to take water from a stream or a spring that is situated wholly on the public domain, necessarily affects the public and the public interest, and common reputation of ownership is admissible in an action between private parties claiming ownership, under Code Civ. Proc. § 1870, subd. 11, and section 1963, subd. 12.

3. Evidence ⊂324(3)—Common reputation as to ownership must be of past generation or 30 years old.

Whenever common reputation of ownership is admissible on the ground that it establishes a claim that tends to disparage a public right, the only reputation that is admissible under the common law is that of a past generation; and under Code Civ. Proc. § 1870, subd. 11, and section 1963, subd. 12, the reputation must respect facts of a public or general interest more than 30 years old.

4. Waters and water courses ⊂2—No private right to corpus of stream or spring on public land.

There can no more be private ownership in springs located on public lands of the United States than there can be private ownership in the corpus of a stream of running water; there being but a usufructuary right, to be acquired by an appropriation made in the manner provided by law.

5. Waters and water courses ⊂12—There must be appropriation as well as discovery of springs on public lands to give right to divert water.

Mere discovery of springs on public lands could not give a right to divert or use any of the water, nor could mere development of the water, unaccompanied by any actual diversion for beneficial use, give any right; it being necessary that there be an intent to apply it to some existing or contemplated beneficial use, an actual diversion from the natural channel by some mode sufficient for the purpose, and an application of the water within a reasonable time to some beneficial use, under Rev. St. U. S. §§ 2339, 2340, 14 Stat. 253, 16 Stat. 216 (U. S. Comp. St. §§ 4647, 4648).

6. Waters and water courses ⊂14—Manner of diversion of waters to beneficial use immaterial.

Diversion as an element of a valid appropriation of waters on public lands must be an actual diversion, but the mode of diversion is immaterial, and in appropriating waters of a spring only such acts are necessary, and such indications and evidences of appropriation required, as the nature of the case and the face of the country will admit, and which under the existing conditions and circumstances are practicable to accomplish the appropriator's purpose in making a beneficial use of the water.

7. Waters and water courses ⊂19—Appropriation completed as against later appropriators prior to actual application to beneficial use, where reasonable diligence is exercised.

If diversion of waters on public land is actually made with intent to use the water for beneficial purposes, the appropriation is then complete, in the sense that the rights of the appropriator cannot be defeated by acts done or appropriation attempted to be made by others after such diversion, and while he is proceeding with reasonable diligence to apply the water appropriated to the purpose contemplated.

8. Waters and water courses ⊂24—Appropriation without notice provided by Code could not exceed water actually taken.

Where appropriation of water from springs on public lands was not by the statutory mode provided in the Civil Code, in that no notice of appropriation was posted, the appropriator's right could not exceed the greatest amount of water ever actually taken by him and applied to a beneficial use or uses prior to the time when others appropriated waters from the springs.

9. Evidence ⊂324(3)—Question as to common reputation as to ownership of water rights misleading.

Where evidence as to ancient common reputation as to the ownership of water rights was admissible, the most that could be shown by a witness was that there was an ancient common reputation in the community relative to the diversion and use of water for some beneficial purpose, stating what that reputation was, and to ask the witness to state who was reputed to be the owner of "springs" could only mislead, since there can only be ownership of a right to take and use water, and not of the corpus of the water.

10. Evidence ⊂324(3)—Common reputation as to ownership of right of little probative force.

Evidence of a common reputation as to the ownership of a right to take water from a spring on public land can have little, if any, probative force, since the nature and extent of a right to divert water depends on a nice application of facts to legal principles with which the average layman has no acquaintance.

11. Evidence ⊂472(6)—Questions as to ancient common reputation objectionable, as leaving it to witness to interpret reputation.

In an action involving water rights, where ownership was sought to be shown by common reputation, the question, "According to that common reputation, who was the owner of those springs?" was objectionable, in that it left it to the witness, instead of the jury, to interpret the reputation that existed in the community, thus requiring the witness to usurp the functions of the jury.

12. Mines and minerals ⊂104—General manager of mining company must be shown to have had authority to dispose of real property.

A claim of title to real property under an agreement with the general manager of a mining company must be supported by evidence that he had authority to dispose of the same.

13. Waters and water courses ⊂26—One constructing pipe line on public lands entitled to protection.

One who enters on public land and constructs a pipe line thereon under claim of ownership of a water right is entitled to the protection afforded by Rev. St. U. S. § 2339 (14 Stat. 253, § 9 [U. S. Comp. St. § 4647]); a right of way for such pipe line being given by the government.

14. Frauds, statute of ⊂72(1)—Right of way on public land to convey water is real property, and sale must be evidenced by writing.

A right of way given for a pipe line by the government under Rev. St. U. S. § 2339 (14 Stat. 253, § 9 [U. S. Comp. St. § 4647]), to one having ownership of a water right upon public lands, is real property, and a sale thereof must be evidenced by a written instrument.

15. Waters and water courses ⊂27—Owner of water rights not entitled to pumps and diversion system constructed by trespasser.

An appropriator of water flowing from springs on public lands is not entitled to pipe lines, pumps, etc., constructed by another to take water from such springs, even though the latter was a trespasser as against the federal government.

16. Waters and water courses ⊂19—Surplus not appropriated subject to appropriation.

Where a certain amount of water is appropriated from a spring on public lands, any surplus which would run to waste, if not put to some beneficial use, is subject to appropriation by other persons availing themselves of the privilege granted by Act Cong. July 26, 1866, by appropriating such surplus in a manner recognized and acknowledged by the local customs, laws, and decisions of the courts.

On Hearing in Supreme Court.

17. Waters and water courses ⊂109—Owner of land owns water of spring having no natural outlet.

A spring may have no natural outlet, in which case the owner of the land in which it lies, under ordinary circumstances, owns the water as completely as he does the soil.

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by S. C. Simons against the Inyo Cerro Gordo Mining & Power Company, the Cerro Gordo Mines Company, and Louis D. Gordon. Judgment for plaintiff, and defendants appeal. Reversed in District Court of Appeal, and hearing denied in Supreme Court.

A. H. Swallow, of Bishop, F. J. Hambly, of San Jose, and S. E. Vermilyea and S. L. Carpenter, both of Los Angeles, for appellants.

Richard S. Miner and P. W. Forbes, both of Independence (Louis Oneal and J. P. Sex, both of San Jose, and W. A. Lamar, of Independence, of counsel), for respondent.

FINLAYSON, P. J. Defendants appeal from a decree adjudging plaintiff to be the owner of three springs of flowing and living waters, situated on vacant public lands of the United States in Inyo county, known collectively as the "Chris Crohn Springs," and located about 4 miles northeasterly from the town of Cerro Gordo—formerly a prosperous mining camp. The decree adjudges that plaintiff is the owner of each of the three springs, and of the right to divert all the waters thereof for domestic, culinary, household, drinking, mining, and milling purposes, and all other useful and beneficial purposes; that she is the owner of all the pipes, flumes, tanks, pumps, and other apparatus used to divert and conduct the waters of the springs to the town of Cerro Gordo; that none of the defendants has any right to any of the waters of any of the springs, or to the pipes, flumes, tanks, or pumps; that defendants be enjoined from hindering plaintiff from taking the waters of the springs at the outlets thereof, or from the pipes; and that plaintiff recover of and from defendants the sum of $4,000, found by the court to be the amount of damages sustained by plaintiff by reason of the fact that, since October 17, 1916, defendants have prevented her from taking or using any water from the springs through or by means of the pipe line that, by the decree, is declared to be her property. It is alleged in the answer that the defendant Cerro Gordo Mines Company is the owner of the right to divert and use all of the waters of the springs, and that it is the owner of the entire diversion system—the pipe lines, pumps, tanks, etc.

Plaintiff claims title to the springs, and the right to divert and use all the waters thereof, as the successor in interest of one Chris Crohn, an old miner and prospector, who died about a year and a half before the trial. It appears from the evidence that in the early '70's Chris Crohn, upon whose acts plaintiff's asserted rights depend, conveyed water in kegs on muleback from one of the three springs, the middle spring, to the mining camp at Cerro Gordo, and there sold it by the gallon. There is no evidence that Crohn ever posted any notice of appropriation. There is no satisfactory evidence that he ever took any water from the most southerly of the three springs. At rare intervals, once in every 30 of 60 days, during a certain period of time, he took some water from the most northerly spring, the waters of which were not well adapted to domestic uses. This business of packing and selling water was continued by Crohn until the year 1882, when he and his wife left the district and moved to Mendocino county, in the nothern part of the state, where they remained for about 8 years. During this period Crohn left a person in charge of his properties and business at the Cerro Gordo camp, and he himself made occasional trips to the camp for the purpose of looking after his interests there. There is some evidence that prior to 1878 a small pipe was laid from the middle spring to a mine that subsequently was located by Crohn as the Augusta mine. It is not clear whether this old pipe was laid by Crohn to divert water from the middle spring, or whether it was installed by some one else. In fact, the evidence of the existence of this old pipe is not of the most satisfactory character.

In 1889 the Union Company, under whom defendant Cerro Gordo Mines Company claims, purchased the Cerro Gordo mine, and shortly thereafter purchased from three or four persons the rights which they claimed to have initiated by reason of certain appropriation notices theretofore posted by them at or near the springs. The Union Company never purchased from Crohn any right which he asserted in or to the springs. Immediately after purchasing the claims of these three or four persons, the Union Company, at a cost of about $8,000, built and installed a diversion system—pipe lines, pumps, tanks, etc.—whereby it diverted water from the springs to Cerro Gordo. This is the diversion system that the lower court, in its decree, adjudged to be plaintiff's property. From its installation, in the fall of 1889, to the date of the trial, the diversion system so installed by the Union Company was used by it, and later by its successor, the Cerro Gordo Mines Company, to divert water from the springs to the town of Cerro Gordo. To sustain her claim to these pipes, pumps, tanks, etc., plaintiff relied upon the evidence of Chris Crohn's widow to the effect that in 1890, and shortly after the installation of these pipes, pumps, tanks, etc., by the Union Company, she overheard a conversation between that company's general manager and her husband, in the course of which the former told her husband that his company would pay her husband rent for such water as the company might divert from the springs, and, if it did not and the company should quit working, Crohn could have the pipe lines, pumps, tanks, etc., for the rent of the water. Needless to say, it was only over the vigorous objections of defendants' counsel that this evidence was admitted.

At all times subsequent to the installation of the system constructed by the Union Company, until enjoined by the lower court, that company, and its successor, the Cerro Gordo Mines Company, diverted and used water from these springs and devoted it to beneficial purposes. Defendants rely upon this diversion and use to establish the right of the Cerro Gordo Mines Company to take and use all the waters of the springs. Plaintiff, on the other hand, maintains that such diversion and use were with the consent of, and in subordination to, the title of herself and her predecessor, Chris Crohn.

To sustain her contention that her predecessor and grantor, Chris Crohn, was the owner of a right to take and use all the waters of these springs, plaintiff, over defendants' objection, was permitted by the court below to introduce the testimony of numerous witnesses that Crohn was the reputed owner of the springs. The questions propounded to each of these witnesses were all very much alike. Those propounded to the witness Pearl Castle will suffice for an example. After testifying that she first heard of the springs in June, 1908, when, for the first time, she visited the Cerro Gordo mining camp, the following questions and answers were propounded and given:

"Q. Did there exist in that community at that time a common reputation as to the ownership of those springs? A. Yes, sir. Q. According to that common reputation, who was the owner of those springs? A. Chris Crohn."

It will be noticed that this witness, who testified that when she first visited the springs there was a common reputation as to the ownership, was not asked what that common reputation was, but, instead, was asked who, according to that common reputation, was the owner of the springs—thus permitting the witness, instead of the jury, to place her interpretation upon the common reputation existing in the community regarding the ownership. We agree with appellants that these questions clearly were improper, and that in overruling defendants' objections thereto the lower court committed prejudicial error.

Under the common-law rules of evidence—rules founded on reason and the experience of ages—evidence of common reputation was confined to cases of pedigree, prescription, custom, boundary, and matters of general and public interest. Evidence of common reputation respecting private ownership or possession was inadmissible at common law, save where such ownership or possession favored or disparaged the existence of some public property right in which the whole community was interested, such as the public right in bridges, ferries, highways, public lands, profits à pendre, free warrens, and the like, and not even then unless the reputation was that of a past generation. Sexton v. Hollis, 26 S. C. 231, 1 S. E. 893; Locklear v. Paul, 163 N. C. 338, 79 S. E. 617; Goodson v. Brothers, 111 Ala. 589, 20 South. 443; South School District v. Blakeslee, 13 Conn. 228; Dawson v. Town of Orange, 78 Conn. 96, 61 Atl. 101; Twining v. Goodwin, 83 Conn. 500, 77 Atl. 953, Ann. Cas. 1912A, 845; Russell v. Stocking, 8 Conn. 236; Arthur v. Humble, 140 Ky. 56, 130 S. W. 958; Johnson v. Turner (Md.) 22 Atl. 1103; Green v. Chelsea, 24 Pick. (Mass.) 71; Howland v. Crocker, 7 Allen (Mass.) 153; Wendell v. Abbott, 45 N. H. 349; Canfield v. Hard, 58 Vt. 217, 2 Atl. 136; Spicer v. Spicer, 249 Mo. 582, 155 S. W. 832, Ann. Cas. 1914D, 238, and notes on page 244; 2 Wigmore on Evidence, § 1580 et seq.; Jones on Evidence, § 305; 16 Cyc. 1210. See, also, Berniaud v. Beecher, 76 Cal. 394, 18 Pac. 598. In Sexton v. Hollis, supra, the general rule and its exceptions are thus stated:

"Common repute is nothing more than the prevailing belief in a certain community, and to allow that to be adduced as evidence upon an issue of title would be to substitute the belief or opinion of the community for that of the jury called on to pass upon such issue. The question is, What do the jury believe? and not,

What is the generally received opinion in the neighborhood? and the belief of the jury must be formed from the legal and competent testimony adduced in the case. This class of testimony falls under the head of hearsay evidence, which, as a general rule, is clearly incompetent. It is true that there are certain well-recognized exceptions to this rule, which in several of the cases are said to be as old as the rule itself; but we do not think that this case comes within any of these exceptions, which are confined to cases of pedigree, of prescription, of custom, and in some cases of boundary, and also matters of general and public history."

For reasons presently to be stated, we think that the instant case falls within one of the uniformly recognized exceptions to the general rule; that is, we think that Crohn's reputed ownership presented a matter of general and public interest.

[1] We do not agree with respondent's claim that subdivision 12 of section 1963 of the Code of Civil Procedure has modified the common-law rule that evidence of common reputation is inadmissible to establish title to real estate where private rights only are affected. By that Code section it is expressly declared that, among the prima facie or disputable presumptions enumerated therein, is this:

"That a person is the owner of property from exercising acts of ownership over it, or from common reputation of his ownership."

The only provisions of our Code of Procedure that have any bearing upon the question of proving title by common reputation are the Code provision already quoted (subdivision 12 of section 1963), and subdivision 11 of section 1870, which reads:

"In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: * * * 11. Common reputation existing previous to the controversy, respecting facts of a public or general interest more than thirty years old, and in cases of pedigree or boundary."

These two Code provisions should be read together. What was said in Estate of Heaton, 135 Cal. 386, 67 Pac. 321, and Estate of Mills, 137 Cal. 302, 70 Pac. 91, 92 Am. St. Rep. 175, about reading together subdivision 11 of section 1870 and section 1852, is equally applicable here. When subdivision 12 of section 1963 and subdivision 11 of section 1870 are read together, as they should be, it is clear, we think, that the former contemplates but a restatement of the common-law rule. One of these two Code provisions (subdivision 11, section 1870) declares when and in what cases evidence of common reputation is admissible; the other (subdivision 12, section 1963) declares what is the effect of such evidence when properly admitted. By subdivision 12 of section 1963 the Legislature did not intend to declare that evidence of common reputation of ownership is admissible as prima facie evidence of title in any and every case where title to property is an issue. It does not pretend to say when evidence of common reputation may be admitted. It only declares the effect of its admission. All it does, in effect, is to declare that when, under other Code provisions, common reputation is admissible, the effect of its admission is to raise a prima facie presumption of ownership.

To illustrate: It always has been the rule that, when title to real estate is only collaterally involved, parol evidence, such, for instance, as common reputation of ownership, is admissible (Shanks v. Robertson, 101 Kan. 463, 168 Pac. 316, 1 A. L. R. 1140, and notes on page 1143); and of course, if, in such a case, such evidence of common reputation is received, its effect is as declared in subdivision 12 of section 1963—i. e., it raises a prima facie presumption of ownership. But to hold that, where title is a direct issue, and is of such a character that a claim thereto can in no wise affect the public or its interests, evidence of common reputation of ownership is admissible, would countenance a rule that easily could be turned to the accomplishment of great wrong and injustice, and titles would be won and lost as neighborhood gossip veered with the ever-changing feelings of friendliness or hostility toward the rightful claimant. Berniaud v. Beecher, supra, seems to be the only case in this state that touches the question. Though the question did not receive much discussion there, it clearly appears from the briefs filed on the petition for a rehearing that the point was directly raised, and was decided in accordance with the foregoing views.

But, though the general rule is that evidence of common reputation of ownership is inadmissible, under the Code, as at common law, where private property rights only are affected and matters of general or public interest are not involved, nevertheless such evidence may properly be received where the title sought to be established affects public property rights in such a way as to be a matter of public or general interest, and the reputation is ancient. A distinction has long been recognized between public and private rights, and the admissibility of hearsay evidence with respect thereto. The interest which the members of a community possess in their common rights is so great that judicial administration has assumed that it is sufficient to insure such general discussion and mutual correction as to give some probative value to a common reputation that affects such rights. 4 Chamberlayne on Evidence, § 2741. Accordingly, where a foundation is laid, by acts of ownership, reputation becomes admissible where the claim tends to abridge the public right, and the reputation is ancient; i. e., is that of a past generation, or, as said by our Code (subdivision 11, section 1870), respects

facts of a public or general interest "more than 30 years old." Russell v. Stocking, supra; Dawson v. Town of Orange, supra; Morse v. Whitcomb, 54 Or. 412, 102 Pac. 788, 103 Pac. 775, 135 Am. St. Rep. 832; Chamberlayne on Evidence, § 2743; Wigmore on Evidence, §§ 1582, 1586. Speaking of proof of title by common reputation in cases where the public interest necessarily is affected by the claim of private ownership, the Connecticut court, in Russell v. Stocking, supra, said:

"A foundation being laid, by acts of ownership, reputation becomes admissible, particularly where the claim tends to abridge a public right. 'For all mankind,' says Lord Kenyon, 'being interested, it is natural to suppose that they would be conversant with the subject, and discourse about it, having all the same means of information.'"

[2] A claim made to any part of the public domain, or a claim to a right to take water from a stream or other source of water supply that is situated wholly on the public domain, necessarily affects the public and the public interest. For that reason we are inclined to the view that the rule that common reputation of ownership is admissible where the claim tends to abridge a public right is applicable to private claims to public lands and to private water rights in or to waters that are situated wholly on or flow wholly over public lands. One of the chief concerns of those early adventurers who sought to exploit the wealth of our wild lands was to make themselves acquainted with the rights and claims of those around them. Frequently such claims were not only the familiar topic of their conversations, but the all-absorbing topic. We are inclined to the view, therefore, that the reason for the admission of evidence as to the common reputation of ownership of bridges, highways, and the like applies with equal force to claims to public lands and to water on such lands. This view seems to have received the sanction of our Supreme Court in Vernon I. Co. v. Los Angeles, 106 Cal. 237, on page 254, 39 Pac. 762, on page 768, where the court said that it was proper to show that it was a matter of common reputation, more than 30 years old, that the city of Los Angeles claimed the water and had control over it. In this connection the court said:

"It was proposed to show that the city had used the water under a claim of right. It was proper to show this, and as it was a matter of general interest, and as to a portion of the time of ancient date, and the declarants dead, it could be established by proof of the prevailing current of assertion. Greenleaf on Evidence, § 128."

It would also seem that this view of the law meets with the approval of Mr. Chamberlayne, who, in a paragraph devoted to the admissibility of evidence of common reputation when the public interest is affected, says:

"Whether certain lands are public or owned by private individuals may properly be a subject of general concern to the members of a community." 4 Chamberlayne on the Modern Law of Evidence, § 2803, citing Dawson v. Town of Orange, supra.

What is said in Harriman v. Brown, 8 Leigh (Va.) 708, and McKinnon v. Bliss, 21 N. Y. 218, also lends support to this view, though those cases presented questions of boundary only.

We have deemed it our duty to give this question this somewhat exhaustive consideration, not only because of its intrinsic importance, but also because of the admissibility of common reputation respecting the ownership of a right in and to waters of these springs will, without doubt, arise on the retrial, and it is our duty to determine all questions of law necessary to a final determination. Though we believe and hold that, for the reasons we have stated, it is proper to admit evidence of common reputation, respecting the existence of a right to divert and use waters that are wholly situated on the government's vacant public lands, still, for reasons about to be stated, we are constrained to hold that the questions as propounded by respondent's counsel to establish Crohn's title by common reputation were fatally defective in form. The questions, in the form in which they were cast by plaintiff's counsel, were objectionable in at least three particulars:

[3] 1. In the first place, whenever common reputation of ownership is admissible upon the ground that it establishes a claim that tends to disparage a public right, the only reputation that is admissible under the common law rule is that of a past generation (Dawson v. Town of Orange, supra; 2 Wigmore on Evidence, § 1582); or, as our Code provides, the reputation must respect facts of a public or general interest "more than thirty years old." Not only was the reputation as testified to by many of the witnesses in the court below a recent reputation—a reputation based upon the statements of living, not deceased, persons—but the reputed ownership itself was of recent date; that is, it was not shown to have been a reputed ownership existing more than 30 years before the trial. The questions, as framed, called neither for an ancient reputation nor for a reputed ownership more than 30 years old. Thus, for example, the witness Pearl Castle, who visited the Cerro Gordo mining camp and first heard of the springs about 9 years prior to the trial, was asked, over appellants' objection, whether there did not exist in the community "at that time"—9 years before the trial—a common reputation as to the ownership of the springs.

[4] 2. By many of the questions the witnesses were asked, not what was the common reputation as to the ownership of a right to take and use water from the springs, but

what was the common reputation as to the ownership of the springs themselves. And many, if not all of the witnesses, in reply to such questions, said that Chris Crohn was commonly reputed to be the owner of the springs—not that he was commonly reputed to be the owner of a right, viz. the right to take water from the springs. Such evidence could not possibly throw any light upon the real question presented by the case, which was this: Is this plaintiff, as successor of Chris Crohn, the owner of a water right; i. e., a right to take and use water from the springs? And, if she is, then what is its extent? Has she the right to take all, or only part, of the waters of the springs? There no more could be private ownership in the springs themselves than there could be private ownership in the corpus of a stream of running water. There could be but a usufructuary right. And that right could be acquired only by an "appropriation" made in the manner provided by law; that is, by reducing the water to actual possession for a beneficial use.

[5-8] The vice of the questions, in the form in which they were cast by examining counsel, will clearly appear if we pause to consider some of the elementary rules governing the acquisition of water rights on the public domain. Counsel for respondent seem to think that Chris Crohn could and did acquire title to the springs by right of discovery, and, also by developing the water of the springs. It seems that Crohn, or some one, ran a short tunnel into the hillside, where the waters from one or more of the springs bubble up from the earth, and also constructed a sump near one of the springs, into which the waters collected. Mere discovery of the springs could not give a right to divert or use any of the water. Nor could mere development of the water, unaccompanied by any actual diversion for beneficial use, give any right. It is only by some species of "appropriation"—i. e., reducing the water to actual possession, made as provided by the act of 1866 (Rev. Stat. § 2339 [U. S. Comp. St. § 4647])—that one can acquire title to a right in or to waters situated or flowing wholly on public lands. The federal government, as proprietor of the public domain, early recognized the necessity of permitting persons in these arid regions to acquire an interest in water sources on public lands distinct from the lands themselves; and in 1866 (14 Stat. 253; Rev. Stat. § 2339) Congress passed an act which provides, among other things, as follows:

"Whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same."

By the act of July 9, 1870 (16 Stat. 218; Rev. Stat. § 2340 [U. S. Comp. St. § 4648]), it was further provided:

"All patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section."

It will be noticed that the language of the act of 1866 is:

"Whenever by priority of possession, rights to the use of water * * * have vested," etc.

The right is the right to the "use," and it can be acquired only by "priority of possession"; i. e., by actual diversion with a bona fide intent to use the water for a beneficial purpose. In Kelly v. Natoma Water Co., 6 Cal. 105, it was said that—

"Possession or actual appropriation, must be the test of priority in all claims to the use of water, whenever such claims are not dependent upon the ownership of the land through which the water flows."

To constitute a valid appropriation of water, three elements must always exist: (1) An intent to apply it to some existing or contemplated beneficial use; (2) an actual diversion from the natural channel by some mode sufficient for the purpose; and (3) an application of the water within a reasonable time to some beneficial use. Low v. Rizor, 25 Or. 551, 37 Pac. 82; Nevada Ditch Co. v. Bennett, 30 Or. 59, 45 Pac. 472, 60 Am. St. Rep. 777, and notes on page 799 et seq.

As to the second element of a valid appropriation, namely, that there must be an actual diversion, it is the fact of diversion, and not its mode, that is material. Ordinarily a diversion is accomplished by a ditch, canal, pipe line, and the like; but any mode may be resorted to which, under the circumstances, proves effective. 60 Am. St. Rep. 806. In appropriating the waters of a spring located on public lands, only such acts are necessary, and such indications and evidences of appropriation required, as the nature of the case and the face of the country will admit, and which, under the existing conditions and circumstances, are practicable to accomplish the appropriator's purpose in making a beneficial use of the water.

The third, and perhaps the most essential, element to the legal appropriation of water is its application within a reasonable time to some useful purpose or industry. It is, perhaps, not strictly true that this application is essential to the appropriation; for, if diversion is actually made with intent to use the water for such purposes, the appropriation is then complete in the sense that the rights of the appropriator cannot be defeated by acts done or appropriations attempted to be made by others after such diversion and while he is proceeding with reasonable dili-

gence to apply the water appropriated by him to the purpose contemplated. Water in excess of such amount as is reasonably necessary for the contemplated use, though actually diverted and carried away, is not, in the legal sense, "appropriated," and still remains subject to appropriation and use by others. Crohn's appropriation was not by the statutory mode provided in the Civil Code; that is, he did not post any notice of appropriation. His water right, therefore, if any he ever had, could not exceed the greatest amount of water ever actually taken by him and applied to a beneficial use or uses prior to the time when others appropriated waters from the springs. Smith v. O'Hara, 43 Cal. 371; Southside Imp. Co. v. Burson, 147 Cal. 401, 81 Pac. 1107; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198. Actual diversion (the taking of possession) creates the right; actual use (the amount in possession) measures the right. As said by Judge Hawley in Union Min. Co. v. Dangberg (C. C.) 81 Fed. 73:

"In the appropriation of water there cannot be any 'dog in manger' business by either party."

[9, 10] If, now, we apply to this case the foregoing elementary principles relative to the acquisition of water rights by "appropriation," it will readily appear why it was improper to permit respondent to ask her witnesses if, according to common reputation, her predecessor in interest, Chris Crohn, was the owner of the springs themselves. It appears from the evidence that at no time did any of the uses to which Crohn put the waters reasonably require all the water flowing from the three springs. Years ago, when the camp had its greatest population, 1,500 to 2,000 inhabitants—it since has dwindled almost to the proportions of a deserted camp—Crohn used no more than about 300 gallons a day, packed on muleback into the town of Cerro Gordo. The total flow from the springs is about 3 miner's inches, or considerably more than ever was reasonably necessary to satisfy the beneficial uses to which Crohn at any time devoted the water that flows from the springs. If, therefore, he ever acquired a water right, it was the right to use an amount much less than the total flow from the three springs. It follows, therefore, that if, as we hold, common reputation is admissible to establish title to a water right, such reputation should be confined to the right itself, whatever it may be, and not be extended to the corpus of the water to which the incorporeal right may attach; that is, the most that can be shown by the witnesses is, in substance, that there is an ancient common reputation in the community relative to the diversion and use of the water for some beneficial purpose, stating what that reputation is. To ask the witnesses to state who was reputed to be the owner of the springs, as was done by counsel for the plaintiff in this case, could only mislead. There can be no ownership of the springs; there can only be ownership of a right to take and use water from the springs. In taking leave of this particular aspect of the general subject of proof of title by common reputation, we cannot refrain from expressing the belief that, in the very nature of things, the establishment of a water right by evidence of common reputation never can prove satisfactory. At best, evidence of a common reputation as to the ownership of such a right can have little, if any, probative force. This is so because the exact nature and extent of a right to divert and use water from a source of supply on public land frequently depends, not only upon a multiplicity of facts, but upon a nice application of those facts to legal principles with which the average layman has no acquaintance.

[11] 3. The questions propounded to respondent's witnesses were objectionable upon the further ground that they left it to the witnesses, instead of the jury, to interpret the reputation that existed in the community. The questions were not confined to asking the witnesses to tell what was the common reputation about which they were called to testify. They, or some of them at least, were asked who, according to the reputation as to ownership, was the owner. As framed by the examining counsel, the questions in effect, required the witnesses to usurp the functions of the jury. As said in Wilson v. Maddock, 5 Or. 482:

"The proper fact to be proven was merely the common reputation. Of this alone the witness was competent to testify. The inference or presumption to be drawn from that fact was matter for the jury."

For these reasons we are satisfied that the lower court erred in overruling appellants' objections to the questions whereby respondent sought to prove ownership of the springs by common reputation, and that such error was clearly prejudicial.

[12] The lower court erred, also, in finding and adjudging that respondent is the owner of the pumps, pipe lines, tanks, etc., installed in the fall of 1889 by the Union Company, the predecessor of the Cerro Gordo Mines Company. Not only does the complaint fail to allege that plaintiff owns the pumps, pipe lines, tanks, etc., but there is no competent evidence to sustain the finding that they are owned by plaintiff. As already stated, Chris Crohn, in 1882, left the mining camp for Mendocino county, where he resided, until his return to Cerro Gordo in 1889, or about the time when the Union Company installed its diversion system. It was not until 1890 that Mrs. Crohn returned to Cerro Gordo from their home in Mendocino county. The lower court, over the objection of defendants, permitted Crohn's widow to testify that, on her return to Cerro Gordo in 1890, she overheard a conversation between her husband and the

general manager of the Union Company to the effect that the company would pay Crohn 1¼ cents per gallon for all water it might take from the springs through its diversion system, and that, if the company should quit working without thus paying for the water, Crohn might have the pipe lines, pumps and tanks. This, conceded by respondent to be the sole evidence upon which to base a finding that plaintiff is the owner of the pumps, pipe lines and tanks, was wholly insufficient for that purpose. In the first place, there is no evidence that the Union Company's general manager had any authority thus to dispose of his company's real property. In the next place, the pipe lines and the right of way therefor were realty, title to which could not pass by parol. There is no allegation or evidence of any equitable estoppel; and if plaintiff, as Crohn's successor, is entitled to the pipe lines, etc., installed by the Union Company in 1889, and the right of way therefor, it is only by reason of what, according to Crohn's widow, was said to her husband by the general manager of that company in 1890 in the course of the conversation to which we have just adverted. But title cannot be so established.

[13-16] One who enters on public land and constructs a pipe line thereon, under a claim of ownership of a water right, is entitled to the protection afforded by the act of 1866 to the constructors of ditches and canals; that is, a right of way for such pipe line is given by the government. San Jose L. & W. Co. v. San Jose Ranch Co., 189 U. S. 177, 23 Sup. Ct. 487, 47 L. Ed. 765. Such right of way is real property; and one who enters into possession thereof under a verbal sale does not succeed to the legal title. The sale must be evidenced by a written instrument. Smith v. O'Hara, supra. To this the only reply vouchsafed by respondent is that the Cerro Gordo Mines Company is, and its predecessor, the Union Company, was, a trespasser. In the first place, even if the Union Company never acquired any water right, and even if, as against the federal government, the laying of the pipe lines through, and the construction of the tanks and pumps upon, the vacant public lands was a trespass, still, as between plaintiff and defendants, the former would not, for that reason, be entitled to the pipe lines, pumps, etc. But, as a matter of fact, neither the Union Company nor the Cerro Gordo Mines Company was a trespasser, either at the springs or in those parts of the vacant government lands wherein and whereon its diversion system was installed. This is so for the reason that, even if Crohn did acquire a water right, it was not a right to take all the waters of the springs. According to plaintiff's own showing, Crohn never used more than a part of all the spring waters. The surplus, therefore, which would run to waste, if not put to some beneficial use, was subject to appropriation by the Union Company, or by any one who chose to initiate a right thereto by availing himself of the privilege granted by the act of Congress of July 26, 1886, namely, by appropriating such surplus in a manner "recognized and acknowledged by the local customs, laws, and the decisions of the courts."

For these reasons, the judgment must be reversed, and the cause remanded for retrial. As it is unlikely that the many other assignments of error pressed upon our attention by appellants will arise at the second trial, they do not require detailed consideration.

Judgment reversed.

We concur: THOMAS, J.; WELLER, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition for rehearing is denied.

We withhold our approval from the statement in the opinion of the District Court to the effect that evidence of common reputation is admissible to prove ownership of a private claim to take water flowing upon public lands. We consider it extremely doubtful if the rule stated in subdivision 11, section 1870, Code of Civil Procedure, allowing such evidence "respecting facts of a public or general interest more than thirty years old," extends to such private claims to a part of the lands of the United States, and we prefer to leave the question open for further consideration.

[17] We also refuse to approve the broad statement that there cannot be a private ownership in springs of water. The case is not parallel to the question of the ownership of the water of a stream. A spring may have no natural outlet, in which case the owner of the land in which it lies, under ordinary circumstances, owns the water as completely as he does the soil.

48 Cal. App. 509

EMPIRE SECURITIES CO. v. LEVY.
(Civ. 3340.)

(District Court of Appeal, First District, Division 1, California. July 14, 1920. Rehearing Denied Aug. 12, 1920. Hearing Denied by Supreme Court Sept. 10, 1920.)

1. Municipal corporations ⊂=459—Installment assessments may exceed 50 per cent. of assessed value.

San Francisco street improvement ordinance of September 4, 1913, and San Francisco charter, pursuant to which the ordinance was passed (article 6, c. 2, § 33, as amended by St. 1913, p. 1602), in expressly removing from installment assessments the limitation of assessments to 50 per cent. of the assessed value of property provided for in subdivision 3 of section 8, did not forbid any one assessment in excess of the 50 per cent. limit, in absence of an express provision to this effect, and so does not prevent an installment assessment from exceeding such limit.

2. Statutes ⊂=190 — Unambiguous statute needs no interpretation.

A statute free from ambiguity and uncertainty will not be interpreted; the statute itself being conclusive, notwithstanding contention that the result is unjust or against policy.

3. Municipal corporations ⊂=445—Inclusion in street contractor's bid of sums for printing, engineering, and inspection did not render assessment void.

That street contractor's bid for street improvement work under San Francisco Street Improvement Act of 1913 included sums for printing, engineering, and inspection did not render assessment void.

4. Municipal corporations ⊂=488, 489(7)—Objection to contractor's bid should be made before board of supervisors.

Objection to street contractor's bid for contract, under San Francisco Street Improvement Act of 1913 should have been made before the board of supervisors, and not in a suit to foreclose a lien for an assessment.

5. Pleading ⊂=403(2) — Complaint cured by statement of necessary facts in answer.

Any defect in complaint for failure to state fact is cured by the statement of such facts in defendant's answer.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by the Empire Securities Company against Louis Levy. Judgment for plaintiff, and defendant appeals. Affirmed.

Hankins & Hankins, of San Francisco, for appellant.

Randolph V. Whiting, of San Francisco, for respondent.

KOFORD, Presiding Judge pro tem. This is an appeal by defendant from a judgment in favor of plaintiff foreclosing a lien against defendant's lot for a street work assessment. The street work was done and the assessment was levied under authority of the San Francisco Street Improvement Act of 1913, enacted pursuant to the provisions of the city charter. The lot involved was assessed for general taxation purposes for the fiscal year 1915–16 at $160. The street assessment foreclosed against it amounted to $571.48. The lot has a frontage upon the street improved of 78 feet 5 inches, and a depth of only 25 feet ¾ inch, and appears to have had an assessed value proportionately lower than neighboring lots. The assessment was made payable in 6 annual installments, so it results that not only the assessment, but also each annual installment, amounts to more than 50 per cent. of the assessed value of the lot. It is this fact upon which appellant bases his contentions for a reversal of the judgment. The Improvement Act and the charter expressly forbid an assessment of over 50 per cent. of the assessed value of the lot, and provide that, in case it does exceed this limit, the assessment shall be divided into annual installments, not exceeding 10 in number.

[1] It is the contention of appellant that the act in question should be given an interpretation forbidding any one installment in excess of the 50 per cent. limit, even though there is no express provision to this effect. The charter of the city and county of San Francisco (subdivision 3, section 8, article 6, chapter 2, Stats. 1899, p. 297), contains the following provision:

"No assessment shall be levied upon any property, which, together with all assessments for street improvements that may have been levied upon the same property during the year next preceding, will amount to a sum greater than fifty per cent. of the value at which said property was assessed upon the last preceding assessment book of the city and county."

In 1913, article 6, chapter 2, section 33, of the charter was amended (December 10, 1912, approved by Legislature March 28, 1913—Stats. 1913, p. 1602), providing for the passage of an improvement ordinance, for the payment of installments, and also provided:

"In any proceeding for the improvement of streets wherein provision is made for the payment of any assessment in annual installments, the amount of such assessment shall not be limited by the provisions contained in subdivision 3 of section 8 of this chapter."

Under the authority of the above amendment to the charter, the street improvement ordinance of 1913 (approved September 4, 1913) was passed by the board of supervisors. The street work in controversy was done under this ordinance, which provided:

"No assessment shall be levied upon any property, which together with all assessments for street improvement that may have been levied

upon the same property during the next year preceding, will amount to a sum greater than fifty per centum of the value at which said property was assessed, exclusive of improvements thereon, upon the assessment book of the city and county current at the date of the passage of the resolution of intention, except, however, as in this ordinance hereinafter provided."

The exception referred to in the improvement ordinance is set forth in section 28, part 2, of the act:

"Any assessment imposed under the provisions of this ordinance may be paid in annual installments, not exceeding ten in number, whenever the board of public works shall so determine and declare in the resolution of intention or whenever the board of supervisors shall so determine and declare in the ordinance ordering the work, and it shall be mandatory for the board of public works to so determine and declare in every case when the amount of the assessment imposed will exceed one-half of the assessed value of the lot or parcel of land against which such assessment is imposed."

[2] Appellant contends for the application of the rule of statutory interpretation that a statute must be given a reasonable interpretation; that it is unreasonable to forbid an assessment exceeding the 50 per cent. limit and nevertheless allow each of the several installments of an installment assessment to exceed the same limit. He contends that the only common-sense reason of removing the 50 per cent. limitation in the case of an installment assessment is to make each installment less than 50 per cent. His argument is quite persuasive, but would be more properly addressed to the law-making power than to the judicial branch of government. We think the rule of statutory interpretation which is applicable here is as stated in Davis v. Hart, 123 Cal. 384, 387, 55 Pac. 1060, 1061, as follows:

"A cardinal rule of interpretation is that a statute free from ambiguity and uncertainty needs no interpretation. This must be so, for all interpretation and construction is for the purpose of ascertaining the legislative will. When this is clear, interpretation is not allowable. In such case, it cannot be argued that the result is unjust or against policy. The statute is itself conclusive upon these subjects."

To the same effect see Merkley v. Williams, 3 Cal. App. 268, 84 Pac. 1015.

The charter and the Improvement Act both expressly remove the 50 per cent. limitation in the case of an installment assessment. There is no ambiguity or uncertainty about the language. The most that can be said about these provisions is that they do not give the property owner as complete protection as he is led to expect by the first and original limitation. But as was said in Warren v. Postel, 99 Cal. 294, 33 Pac. 930:

"Absolute protection against the city council is not obtainable under any such scheme. The Legislature is the proper place to go for improvement in this matter."

The case last cited holds that the provisions of the Street Law of 1885, placing a limitation of one-half of the assessed value of the property on any one work, did not prohibit two public works under two separate street proceedings being done during the same year, even though the aggregate of the assessments exceeded the one-half limit. We think that decision is analogous to the facts of this case.

Appellant probably does not realize the lengths he would have this court go in "reading into the statute." In the first place, the limitation in the statute is, not that the assessment must not exceed 50 per cent. of the assessed value, but that the assessment "together with all assessments for street improvements that may have been levied upon the same property during the year next preceding" shall not exceed 50 per cent. If we should hold installments to be the same as "assessments levied," and therefore make the provision applicable to installments, the installments would automatically be cut down to 25 per cent., because we should have to take account of the installment assessment of the "year next preceding." Also, with regard to the first installment, we should have to take into account any other assessment levied during the year next preceding the year of the first installment, which in many cases would make the first installment different in amount from subsequent ones. Again, the installments are limited to 10 in number, and if these are each limited in amount the total assessment would be limited in amount. Perhaps appellant would welcome all this, but these things are not in the statute. These considerations only serve to demonstrate the maze we fall into when we try to read a meaning into a statute which is not ambiguous nor uncertain.

[3, 4] Appellant briefly states that the assessment is void because the contractor's bid includes certain sums for printing, engineering, and inspection; that the only proper items are for labor and material. He does not cite any authority, and appears not to have raised the point in the court below. His special demurrer called attention to the items, but the demurrer was not well taken, and it was properly overruled. The place to make on objection of this kind is, moreover, before the board of supervisors. Ahlman v. Barber Asphalt Pav. Co., 181 Pac. 238; Hutchinson Co. v. Coughlin, 184 Pac. 435.

[5] The complaint does not show on its face that the assessment was divided into installments, neither does it show that the assessment exceeded the 50 per cent. limitation. We do no think the complaint is defective on this account. But at any rate the full facts on this point are set out at length in defendant's answer, which cures the de-

fect, if any, in the complaint. Girvin v. Simon, 116 Cal. 604, 48 Pac. 720; Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 Pac. 370; Nolan v. Fidelity & Deposit Co., 2 Cal. App. 1, 82 Pac. 1119; Merryman v. Kirkby, 13 Cal. App. 344, 109 Pac. 635; Daggett v. Gray, 110 Cal. 169, 42 Pac. 568; Savings Bank v. Barrett, 126 Cal. 413, 58 Pac. 914.

This disposes of all the points raised by appellant.

The judgment appealed from is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

48 Cal. App. 514

MORAN et al. v. FREEMAN. (Civ. 2130.)

(District Court of Appeal, Third District, California. July 14, 1920.)

1. Animals ⊜49—Fence laws held repealed and common-law rule restored.

The Estray Act (St. 1915, p. 636) *held* to repeal all fence laws, except in six specified counties, and to restore the rule of the common law, allowing owner of land, though not inclosed, to recover damages for trespassing by stock.

2. Animals ⊜100(1)—Remedy against owners for trespass not taken away by statute stock law.

Remedy by action for damages against owners of trespassing stock *held* not taken away by St. 1876, p. 210, merely providing a special remedy by proceeding against trespassing stock.

Appeal from Superior Court, Yuba County; E. P. McDaniel, Judge.

Action by T. W. Moran and others against William Freeman. Judgment for plaintiffs, and defendant appeals. Affirmed.

Chas. A. Wetmore, Jr., of Marysville, for appellant.

W. H. Carlin, of Marysville, for respondents.

BURNETT, J. The action was for damages caused by trespassing sheep, and the judgment was for plaintiffs in the sum of $408. Appellant states that the only point raised by him is that the court erred in overruling his demurrer to the complaint, and his contention is:

"That the complaint does not state a cause of action, because nowhere in said complaint is it alleged that the land upon which crops of the respondents were growing was, at the time of the alleged trespass, inclosed by a fence."

In that respect the averment of the complaint is:

"On or about the 12th day of February, 1919, plaintiffs were the owners of a growing crop of peas; * * * and on or about said date aforesaid, and while plaintiffs were such owners of said pea crop aforesaid, defendant did willfully and wrongfully suffer and permit his band of sheep, consisting of many hundreds in number, to trespass and feed upon said crop of peas, and did thereby tramp down, eat, and otherwise destroy said crop, to plaintiffs' damage in the sum of $600."

[1] It is the claim of appellant that the rule of the common law, allowing the owner of real property to recover damages for trespassing of stock, although said real property may not be inclosed, was abrogated by the Legislature of this state in 1850, and has never been re-enacted, at least as far as Yuba county is concerned. He claims, further, that the only statute in reference to the matter which applies to said county is found in the Statutes of 1876, page 210. He proceeds to argue that this statute does not restore the common law, but provides only a special remedy, giving the owner of the land a right to take up and impound the trespassing stock, and in such case only has he the right to commence an action against the stock or the owner for damages. Appellant is in error in the claim that the rule of the common law is not applicable to said county. Whatever may have been the situation prior to that date, since August 8, 1915, the said rule of the common law has been in force in this state in all the counties except 6 thereof, not including Yuba county. This is by virtue of the statute passed by the Legislature May 20, 1915, and taking effect on said August 8, 1915, and found in the Statutes of 1915, page 636. That this statute is operative to restore the common-law rule has been distinctly decided by the Supreme Court in Montezuma Improvement Co. v. Simmerly, 189 Pac. 100. Therein the Supreme Court said:

"In answer to both of these arguments we are constrained to hold that the statute of 1915 which we have been considering does, by the very force of its terms, in view of the cited authorities, repeal all 'fence laws' in the counties of this state, * * * except in the 6 counties specified."

[2] Moreover, if we concede that said statute of 1876 is still in force in Yuba county, appellant is equally at fault in his claim that this action will not lie. It is to be observed that the right vouchsafed by said statute to the owner or occupant of any land finding stock doing or having done damage to such land applies, "whether said land be inclosed by a lawful fence or not so inclosed." It is to be observed, further, that it provides a special remedy by action against property in rem, and it does not purport to exclude the right of the owner of the land to proceed by personal action against the owner of the stock. In other words, in such cases the stock may be distrained damage feasant, or

the ordinary action for the actual damage suffered by the owner of the land may be brought. The very point was decided in Triscony v. Bandenstein, 66 Cal. 514, 6 Pac. 384. Therein the court had under consideration a special trespass law applicable to Monterey county. Stats. 1873–74, p. 50. In that case, as in this, it was contended that the plaintiff had the right "to take up" cattle trespassing upon his land and hold them subject to the provisions of that law, and that his only remedy was to institute proceedings under that law against the cattle themselves and their owners. The Supreme Court said:

"But the fact of taking the cattle damage feasant was not alleged in the complaint, nor did it otherwise appear there. The complaint was not framed with reference to the statute, nor was the action founded upon it; therefore defendants could not, by a demurrer to what appears on the face of the complaint, invoke the statute against the complaint. Besides, the statute, which gives a remedy by process in rem against the cattle themselves, does not take away the remedy to recover damages from their owner for wrongs done by them, where they were not distrained damage feasant. And if there be anything which that statute bound the plaintiff to do in connection with his lands, upon which the alleged trespasses were committed, and he left it undone, it might be that the defendants could avail themselves of it as a defense to the action."

We think there is no merit in the appeal, and that the demurrer was properly overruled.

The judgment is therefore affirmed.

We concur: NICOL, Presiding Judge pro tem.; HART, J.

48 Cal. App. 474

Ex parte MARINCOVICH. (Cr. 728.)

(District Court of Appeal, Second District, Division 2, California. July 10, 1920.)

1. Criminal law ⊜304(4)—That Santa Catalina is ordinarily called Catalina matter of common knowledge.

As against claim of one charged with violating the fishing laws in fish and game district No. 20 (described by St. 1917, p. 1061, § 47, as consisting of Catalina Island and certain waters), that there is no island along the coast so known, the court will notice that it is matter of common knowledge that Santa Catalina Island is ordinarily referred to simply as Catalina Island.

2. States ⊜12(3)—Unless granted to United States, state has jurisdiction over three-mile water limit.

The rule of international usage that a nation has exclusive jurisdiction over the waters adjacent to its shores for a width of three miles is applicable to a state, save only as control may have been granted to the United States.

3. Fish ⊜8—State's jurisdiction over three-mile water belt extends to fisheries.

The jurisdiction of the state over the three-mile belt of waters adjacent to its shores extends to control over fisheries.

4. States ⊜12(3)—Unless excluded by Constitution, state has jurisdiction over three-mile belt around its islands.

Unless excluded by its Constitution, the state's jurisdiction extends to the waters for a width of three miles around each of the islands along and adjacent to its shores.

5. Constitutional law ⊜26—State's Constitution to be construed against divesting it of its prerogatives.

A state's Constitution is to be construed strictly in its favor, and as not divesting it of any of its prerogatives, unless intention so to do is clearly expressed.

6. States ⊜12(3)—Constitution does not exclude from state's boundaries and jurisdiction waters for three miles around its islands.

Const. art. 21, is not to be construed as excluding from the state's boundaries, and so from its jurisdiction, the three-mile belt of water around each of its offshore islands, merely because, after giving its boundaries as extending three miles into the ocean, it adds merely, "also including all the islands, harbors, and bays along and adjacent to the coast," without saying anything as to the waters around the islands.

7. Fish ⊜9—No uncertainty in boundaries of fish and game district No. 20; "state waters."

There is no uncertainty in the definition by St. 1917, p. 1061, § 47, of fish and game district No. 20, as including Catalina Island and the portions of the state waters within certain lines, "state waters" meaning the three-mile zone around such island, especially in view of section 48, defining district No. 20A as consisting of the portion of the state waters around that island not included in district No. 20.

8. Fish ⊜8 — Amendment of Constitution leaves power in state to regulate deep-sea fishing.

Const. art. 1, § 25, added by amendment of 1910, and providing that the people shall have the right to fish on public state lands, and that no such lands shall be transferred without reservation of such right, provided that the Legislature may regulate time and conditions of fishing, adds nothing to the rights of the people as to deep-sea fishing, and in no way detracts from the power of the Legislature to regulate it.

9. Fish ⊜8—Legislature may regulate fishing, so long as there is no discrimination.

Within the limitations of the Constitution against discrimination, the Legislature, for the protection of fish, may pass such laws as it deems wise.

10. Statutes ⊂⊃110½(2)—Act as to fishing embraces but one subject, expressed in the title.

St. 1919, p. 420, entitled "An act to amend" Pen. Code, § 636, "relating to the protection of fish and game," complies with Const. art. 4, § 24, by embracing but one subject, expressed in the title.

11. Statutes ⊂⊃77(3)—Fishing regulation for single district not local or special legislation.

Pen. Code, § 636, as amended by St. 1919, p. 420, regulating fishing in a single district, is not local or special legislation, which is violative of Const. art. 4, § 25, in view of section 25½, added in 1902, authorizing the division of the state into fish and game districts, and the enactment of such laws for the protection of fish and game therein as may be deemed appropriate to the respective districts.

Original application by Tony Marincovich for writ of habeas corpus. Writ discharged, and petitioner remanded.

C. W. Pendleton and Henry E. Carter, both of Los Angeles, for petitioner.

Thos. Lee Woolwine, Dist. Atty., and W. J. Clark, both of Los Angeles, for respondent.

FINLAYSON, P. J. Petitioner was arrested for a violation of section 636 of the Penal Code. He is charged with having had in his possession, in fish and game district No. 20, a net measuring more than 6 feet in its greatest breadth and which was not a dip net for taking fish to be used as bait only. He attacks the constitutionality of this Code section, particularly in so far as it relates to fish and game district No. 20, claiming that California has no jurisdiction over the waters referred to as "state waters" in the statutory definition of fish and game district No. 20 (Stats. 1917, p. 1061); that the statutory description of that district is fatally indefinite and uncertain; and that section 636 violates section 25 of article 1 and section 24 and subdivision 2 of section 25 of article 4 of the state Constitution. We think that none of these contentions is tenable.

Section 636 provides that it shall be unlawful for any person to have in his possession, in fish and game district No. 20, any net other than a dip net for taking fish to be used as bait, and that such dip net for catching bait shall not measure more than 6 feet in its greatest breadth. Section 636, Penal Code, as amended July 22, 1919 (Stats. 1919, pp. 422, 423). By the act of July 27, 1917, whereby the state is divided into fish and game districts, districts 20 and 20A are described as follows:

"Sec. 47. Fish and game district twenty shall consist of and include Catalina Island and that portion of the state waters lying between a line extending south from the southeasterly shore in line with and intersecting South East rock; thence around the east end to the north side of a line extending west from the extreme west end of said island.

"Sec. 48. Fish and game district twenty 'A' shall consist of and include that portion of the state waters around Catalina Island not included in fish and game district twenty."

Stats. 1917, p. 1061.

[1] There is no merit in petitioner's claim that there is no island along or adjacent to our coast known as Catalina Island. It doubtless is true, as petitioner says, that the correct name of this island is its old and original Spanish name, "Santa Catalina Island"; but we may not close our eyes and ears to facts of common knowledge, and this court cannot affect to be ignorant of the fact that probably as many as 9 out of every 10 persons met with on the street, when speaking of this island, refer to it simply as "Catalina Island," and seldom, if ever, give the full, original Spanish name. It is due to petitioner to say that he does not urge his hypercriticism with any great degree of strenuousness. His principal contention, as we understand it, is that there are no "state waters" around this island over which the state has jurisdiction to regulate fishing.

[2-4] Unless the people of the state, in their definition of the state's boundary as contained in article 21 of the Constitution, have decreed otherwise, the sovereignty and jurisdiction of California extends over a belt of water, 3 miles wide, circling the island, and the waters of such belt are territorial waters of the state; they are the "state waters" referred to in the statutory definition of fish and game district 20. If the extent of California's jurisdiction is to be determined according to the general rule, based upon usage uniformly recognized by the law of nations, there can be no doubt that it includes a zone of water, 3 miles wide, around Catalina Island. All the writers upon public law agree that every nation has exclusive jurisdiction over the waters adjacent to its shores to a distance of 3 miles from shore, or, as it is frequently expressed, "the distance of a cannon shot from shore." The distance of 3 geographical miles was fixed at a time when no gun could force a ball farther. This rule of international usage is applicable to California just as though it were an independent, sovereign nation, save only that its right of exclusive control over such waters is limited in so far as control may have been granted to the United States. Manchester v. Massachusetts, 139 U. S. 234, 11 Sup. Ct. 559, 35 L. Ed. 159; Humboldt L. M. Ass'n v. Christopherson, 73 Fed. 239, 19 C. C. A. 481, 46 L. R. A. 264. In Wheaton, International Law (8th Ed.) § 177, the maritime territorial jurisdiction of an independent nation is defined as follows:

"The maritime territory of every state extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea inclosed

by headlands belonging to the same state. The general usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or so far as a cannon shot will reach from the shore along the coasts of the state. Within these limits its right of property and territorial jurisdiction are absolute, and exclude those of every other nation."

The dominion of the state or nation over the seas adjoining its shores is for the purpose of protecting its coast from the effects of hostilities between other nations which may be at war, the protection of its revenue, and the preservation of order by its police. Included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish, or fish attached to or embedded in the soil. Massachusetts v. Manchester, 152 Mass. 230, 25 N. E. 113, 9 L. R. A. 236, 23 Am. St. Rep. 820; Manchester v. Massachusetts, supra; Dunham v. Lamphere, 3 Gray (Mass.) 268; Humboldt L. M. Ass'n v. Christopherson, supra; notes to State v. Shaw, 67 Ohio St. 157, 65 N. E. 875, 60 L. R. A. 481 et seq.; 16 Am. & Eng. Enc. of L. (2d Ed.) 1132; 33 Cyc. 830.

There is just as much reason for the extension of state sovereignty over a 3-mile belt around Catalina Island as there is for the extension of sovereignty over a 3-mile zone along and off the shore of the mainland. In the one case, as in the other, such jurisdiction is necessary to an adequate exercise of the state's police powers and to protect the coast from the effects of hostilities by other nations at war. That a state's sovereignty extends over a 3-mile belt around islands that lie along and adjacent to its shores was evidently the opinion of Secretary Bayard, who, in 1886, wrote to Mr. Manning, the then Secretary of the Treasury, as follows:

"We may therefore regard it as settled * * * that, so far as concerns the eastern coast of North America, the position of this department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond 3 miles from low-water mark, and that the seaward boundaries of this zone of territorial waters follows the coast of the mainland, *extending where there are islands so as to place around such islands the same belt.*" (Italics ours.)

See 1 Wharton's Dig. Int. Law, § 32.

We conclude, therefore, that, unless the people of the state, in their definition of the state's boundary as set forth in article 21 of the Constitution, have deliberately excluded such waters from the territory over which the state's sovereignty extends, the state has jurisdiction over a belt of water, three miles wide, around each of the islands that lie along and adjacent to our shores.

[5, 6] We have no fault to find with petitioner's contention that the sovereignty and jurisdiction of this state extend only to such places as are within its boundaries as established by the Constitution. Pol. Code, § 33. But we do not think that the boundary of California, as defined in the Constitution, necessarily precludes the idea that the state has sovereignty and jurisdiction over a 3-mile belt of waters around each of the islands along and adjacent to the coast. Article 21, of the Constitution, in its definition of California's boundary, after tracing it to a line between the United States and Mexico, proceeds as follows:

"Thence running west and along said boundary line to the Pacific Ocean, and extending therein three English miles; thence running in a northwesterly direction and following the direction of the Pacific Coast to the forty-second degree of north latitude; thence on the line of said forty-second degree of north latitude to the place of beginning; also, including all the islands, harbors, and bays along and adjacent to the coast."

Because this language of the state's organic law expressly extends the boundary of the mainland 3 miles into the ocean, and does not similarly and expressly extend the seaward boundary of the islands that are along and adjacent to the coast, it is argued that it was not intended that the boundary of any of these offshore islands should include any surrounding zone or belt of ocean waters.

It is a universally recognized canon of construction that laws in derogation of sovereignty shall be construed strictly in favor of the state, and should not be permitted to divest the state or its government of any of its prerogatives, unless the intention to effect that object is clearly expressed. As we already have pointed out, California, according to the decisions of the federal Supreme Court and the opinions of writers on international law, acquired, on her admission to the Union, the sovereignty of an independent nation over a zone of waters 3 miles wide extending along the mainland, and also over similar zones or belts around the islands along and adjacent to her coast, unless, by her own definition of her boundary, the state has deliberately excluded such waters from her territory and jurisdiction. In defining its boundary in its organic law, the state has not expressly said that it shall not include any zones or belts of waters around the islands that lie along and adjacent to the coast. Nor has the state, in its definition of her boundary, clearly and unequivocally expressed an intention to reject that sovereignty which, unless clearly renounced by her, she rightfully has over a belt of water, 3 miles wide, girdling each of such islands. We are satisfied, therefore, that under the canon of construction to which we have adverted it must be held that the state's sovereignty extends over a belt of water, 3 miles wide, around each of such islands, and that such waters are the "state waters" referred to in the statutory definition of fish and game district 20. The same conclusion was reached by division one of the District

Court of Appeal for this district in the recently decided case of Suttori v. Peckham, 191 Pac. 960.

[7] There is no uncertainty in the statutory definition of fish and game district 20. Santa Catalina Island, or, as it is popularly known, Catalina Island, is an island in the Pacific Ocean situated about 7 leagues off the mainland of Southern California, and separated therefrom by the Santa Barbara Channel. It is a part of Los Angeles county. The island extends in a northwesterly and southeasterly direction; its longitudinal course, in a general way, paralleling the shore line of the mainland. As will be recalled, the act whereby the state is divided into fish and game districts defines, in section 47, district 20 as consisting of the island and "that portion of the state waters lying between a line extending south from the southeasterly shore in line with and intersecting South East rock; thence around the east end to the north side of a line extending west from the extreme west end of said island." There is no ambiguity or uncertainty here. For reasons already stated, the "state waters" referred to by the act consist of a zone of waters, 3 miles wide, surrounding the island. That, by the words "that portion of the state waters," as that phrase is used in section 47 of the act, the Legislature intended to refer to a portion of the 3-mile belt or girdle of ocean waters that encompasses the island of Catalina, and not some other island or place, is made manifest by the fact that in the next section—section 48—it is said that fish and game district 20A shall consist of "that portion of the state waters around Catalina Island not included in fish and game district 20." The "portion of the state waters" that comprises fish and game district 20 consists, therefore, of that segment of the 3-mile belt around the island which lies between a line extended due south from the rock known as South East rock and a line extended due west from the most westerly extremity, or northwesterly end, of the island. A glance at any map will show that the "state waters" between these two lines are those "state waters"—that is, zone of waters 3 miles wide—that extend along and seaward from the southwesterly, or windward, side of the island, and face the mid-Pacific Ocean. The remaining portion of the "state waters" that comprise the 3-mile belt around the island is in fish and game district 20A.

[8, 9] There is no conflict between section 636 of the Penal Code and section 25, article 1, of the Constitution—added by the amendment of 1910. By this amendment to the organic law the people were given no right, with respect to deep-sea fishing, not previously possessed by them. Paladini v. Superior Court, 178 Cal. 369, 173 Pac. 588. Wild game (included within which is fish—People v. Truckee Lumber Co., 116 Cal. 397, 48 Pac. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183) always has belonged to all the people of the state. It is evident, therefore, that what the people of the state own they can alienate on such terms as they choose to impose, and that the Legislature, as the law-making representative of all the people, may dispose of the fish in the state's deep-sea waters on such terms as to it may seem best, subject only to the constitutional limitations against discrimination. Within those limitations, the Legislature, for the protection of fish, may pass such laws as to it may seem most wise. The measures best adapted to that end are for the Legislature to determine, and the courts cannot review its discretion. Ex parte Kenneke, 136 Cal. 527, 69 Pac. 261, 89 Am. St. Rep. 177; In re Phoedovius, 177 Cal. 238, 242, 170 Pac. 412.

"The ownership being in the people of the state, the repository of the sovereign authority, and no individual having any property rights to be affected, it necessarily results that the Legislature, as the representative of the people of the state, may withhold or grant to individuals the right to hunt and kill game, or qualify or restrict, as in the opinions of its members will best subserve the public welfare." Geer v. Connecticut, 161 U. S. 519, 533, 16 Sup. Ct. 600, 606 (40 L. Ed. 793).

It has been held that a statute making it unlawful to fish in the waters of the state, with intent to sell or trade the fish after they are caught, is not unconstitutional, even though the act benefits none but wealthy sportsmen. State v. Dow, 70 N. H. 286, 47 Atl. 734, 53 L. R. A. 314. In this New Hampshire case the court, holding that the act was not discriminatory, employed this language:

"It is not apparent in what way the defendant is denied any right granted to others. If they [the wealthy sportsmen] may fish, so may he [the defendant]; and the prohibition of his fishing with intent to sell the fish to them equally enjoins them from fishing with intent to sell their fish to him. 'The statute makes no discrimination. * * * Everybody is prohibited.' True it is that the prohibition affects some more than others. 'Such is necessarily the effect of all restrictive laws. * * * The equality of the Constitution is the equality of persons, and not of places; the equality of right, and not of enjoyment. A law that confers equal rights on all citizens of the state, or subjects them to equal burdens, and inflicts equal penalties on every person who violates it, is an equal law.'"

These principles were not changed by the addition of section 25 to article 1 of the Constitution. The principal purpose of that amendment was to preserve to the people the right to fish upon the public lands of the state, and to require that grants of land by the state should not be made "without reserving to the people the absolute right to fish thereon." The proviso of the section authorizing the Legislature to fix "the season when and the conditions under which the

different species of fish may be taken" was intended to leave the matter exactly as it was before the section was added, except as it restricted the power to alienate the public land without such reservation or to create private fisheries thereon. Paladini v. Superior Court, supra.

[10, 11] The title to the act whereby section 636 was last amended does not violate the requirement of section 24, article 4, of the Constitution, that every act shall embrace but one subject, which subject shall be expressed in the title. The title of the act whereby the section was last amended reads: "An act to amend section six hundred and thirty-six of the Penal Code, relating to the protection of fish and game." Stats. 1919, p. 420. The act relates wholly to the "protection of fish and game," and nothing else. It comprises but one subject, and that subject the protection of fish and game, is expressed in its title. Nor is the section amenable to the objection that it is local or special legislation, and therefore violative of subdivision 2 of section 25 of article 4. Section 25½ of article 4 of the Constitution, added in 1902, reads:

"The Legislature may provide for the division of the state into fish and game districts, and may enact such laws for the protection of fish and game therein as it may deem appropriate to the respective districts."

The purpose of this section is to remove certain of the restrictions, imposed by the preceding section, against local and special legislation, by specifically authorizing local legislation for the protection of fish and game. Paladini v. Superior Court, supra.

We see no ground upon which the legislation that is made the object of petitioner's attack may be held invalid.

Petitioner is remanded, and the writ discharged.

We concur: THOMAS, J.; WELLER, J.

48 Cal. App. 796

Ex parte DRAGICH. (Cr. 729.)

(District Court of Appeal, Second District, Division 2, California. July 10, 1920.)

Original application by Peter Dragich for writ of habeas corpus. Writ discharged, and petitioner remanded.

C. W. Pendleton, of Los Angeles, John J. Monahan, of San Pedro, and Henry E. Carter, of Los Angeles, for petitioner.

Thos. Lee Woolwine, Dist. Atty., and W. J. Clark, both of Los Angeles, for respondent.

PER CURIAM. The facts in this proceeding are in all material aspects the same as in the Matter of Marincovich (Crim. No. 728) 192 Pac. 156, this day decided.

For the reasons there given, petitioner is remanded, and the writ discharged.

48 Cal. App. 654

PEOPLE v. LEJKOJES. (Cr. 890.)

(District Court of Appeal, First District, Division 2, California. July 26, 1920.)

1. Criminal law ⟸935(1)—Trial judge should set aside conviction, unless satisfied it was sustained by the evidence.

The trial judge, who presided at both trials of defendant, and who set aside the verdict of conviction in the first trial because not sustained by evidence, should have set aside the second verdict also, unless he was satisfied that it was sustained by the evidence.

2. Criminal law ⟸1144(18)—Refusal to set aside conviction presumed proper.

The discretion vested in the trial court to grant or refuse a new trial is presumed to have been lawfully exercised, and, despite the leniency which courts habitually show to those charged with crime, every intendment is in favor of the regularity of the trial court's action in denying a new trial after conviction, the same as it would be in favor of his action in granting a new trial.

3. Arson ⟸37(1)—May be established by circumstantial evidence.

Arson, like other crimes, may, and must frequently, be proved by circumstantial evidence.

4. Criminal law ⟸552(3)—Circumstantial evidence need not be absolutely incompatible with innocence.

Circumstantial evidence, to be sufficient to sustain a conviction, need not be absolutely incompatible with the innocence of accused, and incapable of explanation on any other reasonable hypothesis; the true rule being that the facts shall not only be consistent with the guilt of accused, but inconsistent with any other rational conclusion.

5. Arson ⟸37(1) — Circumstantial evidence held sufficient to sustain conviction.

Circumstantial evidence *held* sufficient to sustain the conviction of defendant for burning the house in which he was staying, notwithstanding facts in evidence claimed to show the guilt of others.

Appeal from Superior Court, City and County of San Francisco; Franklin Griffin, Judge.

Max Lejkojes was convicted of arson, and he appeals from the judgment and the order denying his motion for a new trial. Affirmed.

Martin Stevens, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

BRITTAIN, J. The appellant, who was convicted of arson, appeals from the judgment and from the order denying his motion for a new trial. It is conceded that the fire was of incendiary origin and that the appellant had an opportunity to commit the crime.

Because of the circumstantial character of the evidence, the appellant contends the verdict should have been set aside on the ground that the possibility of the crime having been committed by another was not excluded.

[1] The entire record has been examined with painstaking care, and the conclusion has been reached that this court ought not set aside the verdict. It was disclosed on the part of the appellant that the case had been tried before, and that the verdict of guilty on the first trial had been set aside on motion for a new trial. The same judge presided at the second trial. Like the jurors, he heard and saw the witnesses. Unless he was satisfied that it was sustained by the evidence, it was his duty to set aside the second verdict, as he did the first. People v. Knutte, 111 Cal. 453, 44 Pac. 166; People v. Chew Wing Gow, 120 Cal. 298, 52 Pac. 657.

[2] The discretion vested in the trial court to grant a new trial is presumed to have been lawfully exercised. People v. Hotz, 73 Cal. 241, 14 Pac. 856; People v. Brooks, 90 Cal. 174, 27 Pac. 72. In criminal cases these rules are more frequently invoked in favor of the accused than on the part of the state, but despite the leniency which courts habitually show to those charged with crime, after a jury has reached a verdict of guilty, on appeal every intendment is in favor of the regularity and propriety of the action of the trial court in denying, as in granting, a motion for a new trial.

[3, 4] Arson, like other crimes, may and frequently must be proved by circumstantial evidence. People v. Scott, 13 Cal. App. 301, 109 Pac. 498; People v. Urquidas, 96 Cal. 239, 31 Pac. 52; People v. Morrow, 60 Cal. 142. The law does not require, in order to justify the inference of legal guilt in cases of circumstantial evidence, that the existence of inculpatory facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt. The true rule is that the facts shall not only be consistent with the guilt of the accused, but inconsistent with any other rational conclusion. People v. Murray, 41 Cal. 66; People v. Davis, 64 Cal. 440, 1 Pac. 889; People v. Bellamy, 109 Cal. 610, 42 Pac. 236.

[5] In applying these rules to the facts shown by the evidence, it is not necessary to recite every circumstance disclosed in a trial in which the taking of evidence occupied five days. While all the circumstances must be considered, where the accused and the people rely upon different and unrelated trains of circumstances to reach opposed conclusions, the outstanding facts in each train may be best understood if stated separately.

The property where the fire occurred was owned by a Mrs. Larson, aged 52. For many years she had been a widow. She had one child, a daughter, aged 26, at the time of the fire. The property had been purchased under an installment contract in 1914, and the final payment was not made until some time in 1918. Title was then transferred to Mrs. Larson, who assumed a mortgage of $2,000 on the property. At that time the insurance policy for $3,000 held by the mortgagee was assigned to Mrs. Larson. At the time of the fire the mortgage debt had been reduced to about $1,800. The building was an old one, and on the adjustment of the fire loss its value was established at $3,500. The insurance adjustment covered the loss from three fires, which occurred, respectively, on April 1, April 29, and June 8, 1919. The present accusation relates only to the fire of April 1.

Before moving to the house which was burned, on California street, near Tenth avenue, in San Francisco, in 1914, Mrs. Larson, with her daughter, lived in a larger house on Folsom street. In 1907 the accused became a member of her family, or at least rented a room in her house, with the privilege of cooking his own meals in its basement; but sometimes he was invited to eat his meals with Mrs. Larson and her daughter. He was a vegetarian, and preferred to cook his own meals. He moved with the Larsons to the California street house, and continued to live there until the fire of April 1, 1919. In November, 1918, Mrs. Larson rented another house on Clay street, to which she moved with her daughter; the appellant remaining in the California street house. The Clay street house was about the same size as the Folsom street house, but the Larsons did not move their belongings at once. At intervals between November and the time of the fire, four months later, they moved many small loads of furniture and boxes. In March, 1919, while still occupying the Clay street house, Mrs. Larson rented, but neither she nor her daughter moved to, another house on Pine street, to which some of the things from the California street house were moved. During the four months the Larsons were moving they were frequently at the California street house, and Miss Larson was there with the appellant on Wednesday and Thursday preceding the fire, which occurred about 2 o'clock in the morning of Tuesday, April 1, 1919.

On the evening of March 31 a Mrs. Harrington, living next door to the Larson house, had a visitor, who called attention to noises in the Larson house, in the room close to that in which they were sitting. The son of Mrs. Harrington, who had been twice married, was the witness Schaeffer, a member of the fire department, and the first person to enter the house after the fire was discovered. About 2 o'clock in the morning the witness Cowing, a letter carrier, who was returning from his work to his home adjoining the Harrington house, saw smoke coming from the upper windows of the Larson house. His wife was sick. He first aroused her, and then rang the Harrington bell, believing the occupants of those houses to be in danger. After hurriedly tell-

ing them there was a fire next door, he ran to the fire alarm box in the next block, where he turned in the alarm, returning at once to the scene of the fire.

When Cowing returned, the appellant was at the bottom of the front steps, apparently fully dressed, and wearing his hat. He deposited on the sidewalk a large bundle, which was later found to contain bedding. The appellant walked to a side door leading to the basement. Cowing got to the door about the same time. There was heavy smoke issuing from the door. Cowing then heard the appellant say, not in a loud tone, "Fire! Fire!" A moment later Schaeffer, who had partly dressed, entered the basement at the side door, but was compelled to withdraw by reason of the smoke and pungent fumes. While inside he saw two distinct fires burning, and it was later discovered there were three such fires in the basement alone.

After the arrival of the chemical engine, the basement fires and others on the first and second floors were extinguished. While the firemen were still in the house, where they had been joined by the acting fire marshal, a policeman saw the appellant approaching the house, and at first stopped him; but, on being told that the appellant lived there, he accompanied him into the house. The appellant was taken to the fire marshal, and his answers to questions then asked him were such that the marshal directed the policeman to arrest him on the charge of arson.

The whole house was littered with tin cans, bottles, and paper. At various places were what the marshal called "plants," meaning easily fired materials piled together, with the appearance of having been placed for the purpose of incendiarism. Sliding doors had been pulled out, and the space behind them stuffed with papers and rags. At other places, old wooden inside blinds had been chopped to pieces and piled around similar kindlings of paper. There were a number of these so-called plants, some of which had been ignited, while some were unburned. There was a strong odor of alcohol, and uncorked bottles of alcohol, filled or partly filled, were found placed close to the plants, or some of them. One of the plants, in which there was a partly burned candle, was at the door of the bathroom, adjoining the room occupied by the appellant. A section of flooring, making a hole about 32 inches by 3 feet, had been removed from a closet under the stairway, making a draft from the basement to the first floor.

The appellant testified in his own behalf, and his story did not differ greatly from that he told to the fire marshal and the policeman. He said he went to the house early in the evening before the fire, and, the hall being dark, he went at once to his room. He did not enter the bathroom. He was cold, and, on removing his other clothing, he retained his undershirt, putting his pajama shirt on other that. He was suffering from chilblains, and, after removing his stockings, he anointed his feet and put on others. This statement is important, because the fact that he had had time to put on his socks after discovering the fire was commented on by the fire marshal, and the socks he said he had removed were neither in the bundle he carried out, nor were they discovered in a subsequent search of his room, which was untouched by the fire. If they had been discovered, they would no doubt have been produced, as were other things discovered in his room by his counsel. He further stated that he had had trouble with his ears, and before going to bed he had put some medicament in them, and had then closed them with absorbent cotton. He was awakened, and perceived the odor of smoke. He did not know from whence it came; but, as it became stronger, he arose, pulled on his trousers and shoes, and in the dark gathered together such clothing and bedding as he could in a bundle made of a part of the bedding, put on his hat, and unlocked the door of his room. On going into the hall he discovered the fire was in the house from which he was fleeing with his bundle. He went downstairs to the front door, but did not immediately open it. He stopped at the door in the dark to put on his coat and vest. He then unlocked the front door and went out. He saw Cowing, the letter man, and stated that he at once called "Fire! Fire!" He took his bundle down the front steps, and then went around to the side door. Some time before, the lock to this door having been broken, he had braced the door, so that it could not be opened from the outside; but he went there, in his excitement, and pushed it open, only to be driven back by the smoke. When he told his story, the fire marshal commented on his stockings. He was taken to his room, but did not make the explanation concerning the chilblains, nor point out the socks he had removed. When the fire marshal spoke of his shoes being laced, he said he had laced them while he was on the sidewalk. In regard to the hole in the flooring, he said he was building a stairway, and, when the marshal said no one had ever seen a stairway opening of that size, the appellant replied that he was building it on the installment plan. Notwithstanding the fact that the appellant's employer and one of his coemployés testified that, for the 11 years he had been in the employ of one concern as a cabinet maker, his duties had been faithfully performed, and that his reputation for veracity was good, the circumstances detailed were at least consistent with the guilt of the appellant. To sustain the conviction, however, the evidence must also have been inconsistent with any other rational hypothesis.

Under the facts of the case, the only other hypotheses suggested are that the appellant was insane, but this is denied by him; that the fire was the work of boys or other van-

dals, not actuated by motives of malice, but the careful preparation for the fire, which the marshal testified would have taken a man at least a full day, removes this theory from the realm of rationalism; that the fire was started by or at the instance of the owner, for the purpose of collecting the insurance, without the knowledge of the appellant, but it is inconceivable that after 12 years' intimate acquaintance with him, these multiple fires would have been started in the lower part of a house in which he was known to be sleeping. The only rational conclusion, based upon any assumption of a purpose of collecting insurance, is that the appellant must have been a party to the crime. But one other hypothesis is advanced. It is that the fire was started by those designated in the evidence of Mrs. Larson as I. W. W.'s, or pro-Germans, and it is upon this that the appellant places his strongest plea for reversal.

After the Larsons moved, or started to move, to the Clay street house, they had as roomers a Mrs. Parsons and her son. Mrs. Larson testified they told her the son was a fugitive from justice, who had been arrested in Chicago as a slacker from military service. About two weeks before the fire, she testified, she reported the son to the officers of the government, and he was arrested. On the same day the mother left the house. The son was discharged from custody, and the whereabouts of the Parsonses were unknown at the time of the trial. On March 27, which was the day Miss Larson last visited the house with the appellant, there was mailed in San Francisco an anonymous typewritten note, addressed to Mrs. Larson, reading as follows:

"You are stuck on the federals aint you—we will fix you so cutey that you never know what happened to you, report the slackers will you do it again and the Irish."

There were three other typewritten anonymous letters produced at the trial. There was a suggestion that Parsons had used the typewriter owned by Miss Larson, and which both she and her mother used; but these letters could not have been written before his arrest on the charge of Mrs. Larson, and he had no access to the machine afterwards. The language of the first note is unusual in its reference to "the federals." In her testimony Mrs. Larson, in response to a question by the attorney for the appellant about Parsons, said:

"He was a slacker, and was a fugitive from the federal—from Chicago—and was in hiding."

Again:

"His mother said they were hiding, and were very much afraid the federals would catch them."

Again:

"He was later indicted by the federals of—what do you call it—slacker?"

The insurance policy was not canceled immediately after the first fire. The appellant was released on bonds, and took up his abode in the Pine street house alone; Mrs. Parsons and her daughter remaining in the Clay street house. On April 10 another anonymous letter was mailed. It referred to the collection, presumably of insurance money. A third letter, with an indistinct post date, probably mailed before the one of April 10, spoke of "this last one" as an April fool joke. On April 29 strangers in the city, who were desirous of seeing Chinatown, went with Mrs. Larson, Miss Larson, and the appellant, to Oakland, to see a moving picture of Chinatown instead. They returned to the Clay street house about midnight, and were then informed that the California street house had again been set on fire. They had refreshments, and the next afternoon Miss Larson went to the California street house to ascertain the character of the injury. There was no direct evidence concerning the Oakland trip, other than their own. On May 19 the last of the anonymous letters was mailed. It referred to things happening to Germans who came to Mrs. Larson four years before, and said that two of them had committed suicide "rather than be giving evidence against the peoples." There were references to Lenine and Trotzsky, and to burning. The last fire occurred on June 8. The insurance was then canceled, and thereafter there were neither any more fires at the California street house nor any more anonymous letters.

There was no offer of evidence that anything had happened to any Germans, or that Mrs. Larson had any communication with the federals, as she called the government agents, except in connection with the arrest of Parsons, who was released. The appellant, though he had been for many years a resident of the United States, was born in East Prussia, and was registered as an alien enemy, yet he was not only left in charge of the property of Mrs. Larson, but after the first trial she employed as her own counsel the gentleman who was substituted as the attorney for the appellant.

There are certain other circumstances which the jury had the right to and no doubt did consider, in connection with the claim of pro-German or I. W. W. activities. When the Larsons moved from California street to Clay street, the gas was turned off from the house; but the electric service was continued. All the light bulbs but one were then removed. It was left in a fixture in the second story hall just outside of the room occupied by the appellant. The appellant moved his cooking utensils then from the basement to a room adjoining his sleeping room. He had a stove or range burning oil or gasoline. In his bedroom were various articles of furniture for his comfort. There were curtains both at the window and across an alcove to form a closet for his clothing. There were

cheap pictures on the walls, and rugs on the floor, so that, but for the fact of his being alone, he was in a very comfortable nest. There was, perhaps, a reason for his locking the door of his sleeping room on the night of the fire. The back basement door could not be locked, and any stroller might have entered the basement, and by way of the hole in the floor have gained the first floor, from which he would have had the run of the house.

The moving, having been carried on for four months or more, had been about completed, and on the Wednesday before the fire Miss Larson removed all the furniture, except his cot, from the appellant's rooms. She took away his oil stove and cooking utensils and all his personal belongings, except an alarm clock and an old discarded coat. She took the curtains, rugs, even the cheap pictures from the walls; but she left, as they had been left during the four months when no one was in the house during the day, in the front room, locked with a common lock, in the basement that any stroller might enter, a number of boxes, a Circassian walnut bedstead worth $350, and several large paintings by famous artists, which she valued at $800. These things she testified were there on Wednesday and on Thursday, when she went back to get a jardiniére or two, and carried away the last remaining light bulb. On the morning of the fire, when she visited the place with her mother, the boxes, the bedstead, and the paintings were gone, and in their place were the dead branches of an acacia tree which had grown in the yard. There was no insurance on these valuable things, but shortly before the fire there was a 10 days' covering note on the contents of the house, for $1,000. It was allowed to lapse, because most of the furniture had been removed to the California street house, notwithstanding the boxes in the basement and the bedstead and pictures. Miss Larson testified further that, after the $3,000 policy was assigned, she learned that there was a mistake in the rate of insurance, and she visited the insurance office, and had the rate corrected. At that time, she further testified, the man told her that, of the $3,000 insurance, $1,000 was on the household furniture of the persons from whom her mother bought, and that she had that $1,000 canceled, reducing the policy to $2,000. Because her mother had expended $700 in improvements in the house, she had had the policy increased to $3,000. The policy was introduced in evidence. It was for the term of three years from April 2, 1918. It was for $3,000 on the improvements, with nothing on any furniture. It was never reduced to $2,000, and never reraised to $3,000. It would be a work of supererogation to go further with the analysis of the evidence. That introduced on behalf of the appellant was full of contradictions and palpable misstatements, of fantastic explanation and improbable stories. The jury simply did not believe the stories on which the theory of the I. W. W. or pro-German intervention was based.

The appellant claims he is the victim of a made case by the acting fire marshal and the arresting policeman, and bases this charge upon the facts that after both the first and second fires the marshal, in endeavoring to surprise a confession, made admittedly false statements to both the appellant and to Mrs. Larson. Regardless of the evil of such statements, which are far too common with those charged with the duty of investigating crimes, the particular statements do not in any way bear on this case, except as to the credit which the jury gave the evidence of the marshal and the policeman. The jury saw them and heard them, and was the judge of their credibility as witnesses under oath.

In view of the entire record, the circumstances submitted to the jury meet every requirement of the law to support the verdict. In such a case this court cannot reverse the judgment, nor declare as a matter of law that the trial judge was guilty of any abuse of discretion in refusing to grant a new trial. The various matters in which it is claimed that the court erred in the admission and exclusion of evidence have been examined, although neither argument nor citation of authority is made to support the claims. The contentions have been fully answered in the brief of the Attorney General. They are entirely devoid of merit, and do not warrant serious discussion.

The judgment and order denying a new trial are both affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

48 Cal. App. 710

PEOPLE v. COSGROVE. (Cr. 902.)

(District Court of Appeal, First District, Division 2, California. July 28, 1920. Rehearing Denied Aug. 24, 1920. Hearing Denied by Supreme Court Sept. 23, 1920.)

1. Criminal law ⟸274, 1149—Withdrawal of plea of guilty rests in discretion of court.

The granting of an application to withdraw a plea of guilty to a charge of murder, under Pen. Code, § 1018, rests in the discretion of the trial court, which can be reviewed only for abuse of discretion, accused having no absolute right to withdraw his plea.

2. Criminal law ⟸980(2) — After vacating judgment on plea of guilty, court need not again determine degree.

Where the court granted defendant's motion to vacate a judgment sentencing him for murder in the first degree after his plea of guilty had been entered, but refused permission to substitute a plea of not guilty, it need not again determine the degree of guilt from evidence then introduced, before passing a new judgment and sentence upon defendant.

3. Criminal law ⟸980(2)—In determining degree of guilt on plea of guilty, court can disregard defendant's testimony showing provocation.

In determining the degree of the offense, after defendant pleaded guilty to a charge of murder, the court could accept testimony of witnesses which showed that deceased was shot in the back by defendant without provocation, and find him guilty of first degree murder, disregarding his testimony, which tended to show a provocation, which he claimed reduced the offense to manslaughter.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

James Cosgrove was convicted of murder in the first degree, and he appeals. Affirmed.

Geo. D. Collins, Jr., of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

LANGDON, P. J. This is an appeal from a judgment of conviction and sentence to life imprisonment by the superior court for the county of Fresno on a plea of guilty upon a charge of murder. The information was filed March 27, 1917. On April 9, 1917, the defendant was arraigned on the charge and pleaded "not guilty." On May 3, 1917, "the defendant by his counsel asks and is granted leave to withdraw his plea heretofore entered herein. Defendant now waives time and orally pleads that he is guilty as charged in the information." On the same day the superior court rendered judgment on the plea of guilty, finding and specifying in the judgment that the crime was murder in the first degree. The evidence before the court upon this finding consisted of the transcript of the preliminary examination in this case and the inquisition of the coroner's jury. The district attorney made a statement of the facts to the court in substantial conformity to the testimony upon these two hearings, and the attorney for the defendant stipulated as to the correctness of the facts so stated by the district attorney.

Upon December 6, 1919, more than 2½ years after the judgment was rendered, the defendant made a motion to vacate and set aside said judgment upon the grounds: (1) That defendant was never arraigned for judgment, nor arraigned on the information. (2) That before passing sentence the court did not determine from evidence, nor from the facts, the degree of the crime. (3) That the judgment erroneously states an arraignment, and also erroneously states that defendant was sworn and testified to the degree of the crime. The motion to correct the minute entry of the judgment was made for the purpose of striking out the recitals and statement of an arraignment, for judgment, and also the statement that defendant was sworn and testified as to the degree of the crime. This motion was granted. The motion to vacate the judgment was also granted. The motion to withdraw the plea of guilty and substitute a plea of not guilty was based upon the ground that in pleading guilty the defendant did so solely upon the misrepresentation made to him by his counsel that the Governor of the state would grant a pardon to him in 18 months. The trial court denied the motion to withdraw the plea of guilty and substitute the plea of not guilty.

Upon the judgment being vacated, the defendant made application for probation, and the same was referred to the probation officer, who later filed his report, recommending that the application be denied. The court adopted this report, and, after arraigning the defendant and stating that the degree of the crime (murder in the first degree) had been determined upon evidence before the rendition of the prior judgment, pronounced a new judgment on January 17, 1920, and sentenced the defendant to life imprisonment in the state prison at San Quentin.

[1] The appellant argues, first, that under section 1018 of the Penal Code the right to withdraw a plea of guilty is conferred upon a defendant, and the application to withdraw such a plea must be granted as a matter of course. It is further argued that, though this be not true, and though discretion be vested in the trial court, nevertheless there was an abuse of discretion in the present case. It has been held that this is a matter entirely within the discretion of the trial court, and its ruling thereon will not be disturbed, in the absence of a clear abuse of discretion. People v. Brown, 38 Cal. App. 46,

175 Pac. 85, and cases cited therein. We find no evidence of an abuse of discretion under the facts in evidence in the present case.

[2] The point made by the appellant that the court erred in not determining anew the degree of the crime, prior to pronouncing the second judgment, is without merit. It appears from the record, and indeed it is conceded, that the court took evidence and inquired into the degree of the crime prior to the pronouncement of the first sentence. The matter having once been determined, there was no occasion for a second examination into the facts.

[3] Appellant also takes the position that, assuming the trial court acted within the law in taking as a basis of the new sentence its prior determination of May 3, 1917, that the crime was murder in the first degree, nevertheless the evidence upon which the court made such determination utterly fails to show that the crime committed was murder in the first degree. In support of this last argument, appellant sums up the portion of the testimony before the coroner's jury and at the preliminary examination which is most favorable to his position, but fails to state the contradictory portions of the record, which evidently were more convincing to the trial court. The record shows that the defendant and his wife were separated, and she had obtained an interlocutory decree of divorce from him. She was living with her mother in a two-room apartment, and both mother and daughter desired that the defendant should not come to their home. The mother had left the house for a few moments to make some purchases of groceries. During her absence, the defendant rang the bell; his former wife opened the door. She testified she had been ill for some time, and was then very ill, and was afraid of the defendant. His presence so frightened her that she began to cough violently, and went into the bathroom and closed the door, which locked with a spring lock. The defendant followed her to the door of the bathroom and tried to turn the knob of the door. At about this time the mother entered the apartment and defendant said to her: "Marie is having a coughing spell." The wife testified that she did not hear her mother make any reply, and does not think another word was said before the defendant fired the fatal shot. The mother was shot in the back when she turned, probably to put down her packages. The testimony of the grandchild of the deceased, who was the only eyewitness to the shooting, is also to the effect that his grandmother said nothing whatever to the defendant before he fired the shot.

The record shows that the defendant had been drinking intoxicating liquors earlier in the day upon which the shooting occurred, and there is also testimony that the defendant had been addicted to the excessive use of alcoholic liquors for several years. The deceased was shot with a revolver which the defendant had brought with him loaded to the apartment. The court was justified in believing the version of the occurrence contained in the testimony of the former wife of defendant and her child, at the preliminary examination and at the coroner's inquest. It was not bound to ignore this testimony, and accept the defendant's statement, upon which he relies upon appeal, to the effect that when the defendant greeted deceased with the statement, "Marie is having another coughing spell," deceased replied to him, "You here again; I am going to fix you." The appellant's position is that the court should have believed the deceased used this language, and that it so enraged the defendant, who had become abnormal from the use of alcohol, that he became insanely angry, and while in this condition fired the fatal shot. Appellant relies upon such an interpretation of the facts to make the offense manslaughter, instead of murder in the first degree.

We are of the opinion that the record contains evidence amply justifying the trial court in finding facts constituting murder in the first degree. There are no other matters urged by appellant which we consider merit discussion.

The judgment is affirmed.

I concur: BRITTAIN, J.

48 Cal. App. 572

FIDELITY & CASUALTY CO. OF NEW YORK et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 3303.)

(District Court of Appeal, Second District, Division 1, California. July 19, 1920.)

Master and servant ⊂⊃375(2)—Compensation claimant's injury while on way to work, held not one "growing out of and incidental to employment."

An employé's injury was not received when "performing service growing out of and incident to his employment and acting within the course of his employment," as required by Workmen's Compensation, Insurance and Safety Act; he for his own convenience having left his place of employment at a garage during his regular hours of employment, and having been injured while returning there after such hours to attend to some unfinished duties, ordinarily performed when on duty, though in addition to his fixed hours of employment he was subject to emergency calls.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

Award of compensation was made by the Industrial Accident Commission of California to Arthur H. Johnson, injured employé of the Pure Milk Dairy Company, and the Fidelity & Casualty Company of New York, insurance carrier, and the employer bring writ of review. Award annulled.

Jennings & Belcher, for petitioners.

A. E. Graupner, of San Francisco, for respondents.

CONREY, P. J. Writ of review to determine the validity of an award, made by the Industrial Accident Commission in favor of one Arthur H. Johnson and against the Pure Milk Dairy Company, a corporation, and its insurance carrier.

The dairy company, as a distributor of milk in the city of San Diego, operated five automobile delivery wagons and maintained a garage for their care and repair. Johnson was employed as foreman of the garage, and was furnished with a Ford automobile to be used in connection with his employment. He was permitted to use the automobile incidentally for his personal convenience, and kept the automobile at his home during the time when he was at home. Johnson's regular hours of employment were from 7 a. m. until 6 p. m. He was also expected to respond to emergency calls at any time, and the company maintained a telephone at Johnson's home, in order that he might be called at any time when required out of the regular hours by the emergencies of the business.

On the 19th day of April, 1919, having in view some affairs relating solely to his personal convenience and pleasure, Johnson left the garage at about 5 o'clock in the evening and drove the Ford car to his home and to several other places in the performance of his personal errands. After attending to these matters he went to his home, took off his working clothes, and dressed for the purpose of keeping a social engagement of the evening. He then started from his home to the garage for the purpose of attending to some unfinished duties there prior to keeping said social engagement. On his way to the garage, in suddenly turning his car to avoid collision with a motorcycle, the car was overturned, and Johnson received the injuries for which he sought to obtain compensation, and on account of which an award was made by the Industrial Accident Commission.

The question for decision is tersely stated by counsel for petitioners as follows:

"Should compensation be awarded to an employé who, purely for his own purposes, leaves his place of employment before his day's work is finished and, several hours later, is injured upon the public streets when returning to his place of work?"

This question (except only that the applicant had not left his employer's place of business at an unusual time) was presented to this court in Zbinden v. Industrial Accident Commission, No. 1902. Compensation having been denied by the Industrial Accident Commission, the applicant applied for a writ of review. The petition was denied without written decision; this court being then of the opinion that, as determined by the commission, an accident occurring under the circumstances stated did not arise out of or happen in the course of the applicant's employment. The accident in that case consisted in a collision between an electric railway car and an automobile, in which the applicant was riding while on the way from his home to the place of employment. We think that that case was correctly determined, and it is directly in point in this case.

"In the very broadest sense, of course, it is true that an injury which happens to a man who is on his way to his place of employment is an injury 'growing out of and incidental to his employment,' since a necessary part of the employment is that the employé shall go to and return from his place of labor. But it is to be noted that the right to an award is not founded upon the fact that the injury grows out of and is incidental to his employment. It is founded upon the fact that the service he is rendering at the time of the injury grows out of and is incidental to the employment. Therefore an employé going to and from his place of employment is not rendering any service, and begins to render such service only when, as has been said, arriving at the place of his employment, he proceeds to use some instrumentality provided, by means of which he immediately places himself in a position to perform his tasks." Ocean Accident, etc., Co. v. Industrial Accident Commission, 173 Cal. 313, 322, 159 Pac. 1041, 1044 (L. R. A. 1917B, 336).

Under the provisions of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831), the employé is entitled to compensation for injuries received by him only where, at the time of the injury, the employé is "performing service growing out of and incidental to his employment and is acting within the course of his employment." In order to establish his right to compensation, the employé must affirmatively prove that at the time of the injury the condition existed which is thus described in the statute.

Respondents have endeavored to sustain the award made herein by suggesting that through the necessities of business there are two well-defined classes of employés, between whom there rests a sharp line of distinction; the first class consisting of men whose hours of labor are fixed, and who have little or no authority or responsibility, and the second class, consisting of "those individuals who are vested with both authority and responsibility, whose hours of labor are not sharply defined, and whose responsibility may call them to go upon their employers' business at any and all hours of the day or night." It is contended that Johnson belonged to the second class, and that he was "on duty 24 hours of

the day, whenever the service of the company required, or when he was ordered, or when in his judgment something was required to be done for the company's welfare"; that therefore, since in his judgment it was necessary for him to go to the garage on the evening in question to see that certain things had been done, he should be regarded as having been occupied in his employer's service while on his way back to the garage.

We think that this contention results in a broad and indefinite description of Johnson's duties, not warranted by the evidence. The evidence shows without conflict that his hours of employment were fixed, although in addition thereto he was subject to call for duty at other hours when the work called for was such as could not be performed in the ordinary course of his daily duties at the garage. This is far from being an employment which kept him in the service of the company at all times and places. When he left the garage for his own convenience and pleasure, he was not engaged in the service of his employer, and would not be so engaged until his actual return to the place of employment, unless, possibly, in some exceptional instances, such as when he might be notified to repair or otherwise care for a milk wagon, which had broken down somewhere on the road. But there is no evidence that any such emergency had arisen. The sole claimed purpose of his intended return to the garage was for the performance of duties at that place, which were such duties as were ordinarily performed by him when on duty at the garage. The conclusion necessarily follows that the employé's injuries were not received at a time when he was performing service for his employer or acting within the course of his employment.

The award is annulled.

We concur: SHAW, J.; JAMES, J.

48 Cal. App. 609

MANOOGIAN v. SUPERIOR COURT IN AND FOR IMPERIAL COUNTY.

(Civ. 3282.)

(District Court of Appeal, Second District, Division 2, California. July 22, 1920.)

1. Certiorari ⟸31—Will not lie to review orders which have been fully executed by special administrator.

Certiorari will not issue to review orders directing a special administrator to make certain payments, even though those orders were void, where the payments have already been made and the special administrator was not a party to certiorari so that judgment against him for the payments could not be rendered.

2. Certiorari ⟸5(1)—Appeal from account by special administrator adequate remedy for void order authorizing payments.

If an order of the superior court authorizing a special administrator to make certain payments was void, it would not authorize him to credit himself with those payments on his account, so that a remedy by appeal from an order approving the account, if entered, would be adequate to protect those interested in the estate, and therefore certiorari will not issue to review the orders for payment.

3. Appeal and error ⟸843(2) — Appellate court will not decide question for benefit of lower court which affects person not party.

In denying certiorari to review orders directing payments by a special administrator which had been already made, the appellate court will not express its opinion for the benefit of the lower court as to the validity of those orders, which would affect the rights of the special administrator who was not a party to the proceedings for certiorari.

Application for certiorari by Mary Manoogian against the Superior Court for the County of Imperial to annul certain orders entered by that court. Writ dismissed.

C. K. Bonestell, of Fresno, for petitioner.

Ault & Anderson, of Calexico, and Guy L. Rockwell and H. B. Stewart, both of Brawley, for respondent.

FINLAYSON, P. J. This is an original application for a writ of review to annul two orders of the superior court of Imperial county, made in the Matter of the Estate of M. Manoogian, deceased, on, respectively, July 24, 1919, and March 3, 1920, and under which petitioner assumes that the special administrator claims authority for the payment by him of $6,000 commission for the picking, packing, shipping, and marketing of certain grapes, and the payment of the further sum of $9,000 to a certain bank to satisfy notes that the decedent, in his lifetime, had executed to the bank, and secured by a chattel mortgage on the grapes. No creditor's claim, as provided by section 1494 of the Code of Civil Procedure, was ever filed or presented for either of these disbursements. Petitioner claims that neither payment was authorized by the orders here sought to be annulled, for the reason that each order was, as she claims, in excess of the court's jurisdiction.

Petitioner is the widow of Manoog Manoogian, deceased, and as such one of his heirs. Her husband died intestate on July 7, 1918, leaving an estate in Imperial county consisting, in part, of a crop of perishable fruit, viz., a crop of grapes. This grape crop, the intestate, in his lifetime, had mortgaged to the American State Bank of Brawley to secure his notes to the bank for $12,000. At the time of his death the notes were overdue, and the bank, which had taken possession of the crop under the mortgage, was then actually engaged in picking, packing, shipping, and marketing the grapes. The intestate, prior to his death, had entered into a contract with J. Schoenburg Company to do the picking, pack-

ing, shipping, and marketing. On July 10, 1918, Peter P. Hovley was appointed special administrator. The original minute entry of the order appointing Hovley was no more than the entry of an order appointing him special administrator, and did not purport to confer upon him any special powers. The bank refused to deliver to the special administrator any of the grapes unless and until the balance due to it on the notes, amounting to about $9,000, was paid. Wherefore the special administrator filed in the superior court a petition setting forth the facts relative to the notes and mortgage to the bank and the bank's refusal to surrender possession of the grapes unless paid the balance due it; also, the defendant's arrangement with J. Schoenburg Company. Thereupon the court, on July 24, 1919, made its order, entered nunc pro tunc as of July 10, 1918, the date of Hovley's appointment, which, after reciting the facts set forth in the petition, is as follows:

"It is hereby ordered that Peter P. Hovley, special administrator of the estate of M. Manoogian, deceased, make such guaranty as shall be necessary to obtain possession from American State Bank of the aforesaid crop of grapes; that said special administrator proceed with the picking, packing, shipping and marketing of said grapes; that said crop of grapes be marketed through J. Schoenburg Company of Chicago, Ill., in accordance with the terms of a contract entered into by and between deceased and said J. Schoenburg Company prior to the death of deceased, and that said special administrator pay to said J. Schoenburg Company a commission of ——— per cent. (———%); that said special administrator be and he is hereby authorized and directed to make such other expenditures from the funds of said estate and from the returns of said crop of grapes as he shall find necessary for the proper care, picking, packing, shipping and marketing of said grapes, and for the benefit and profit of the estate of deceased."

This is one of the orders sought to be annulled by this proceeding.

Prior to the nunc pro tunc order so made on July 24, 1919, viz. in August 1918, the special administrator had paid the American State Bank of Brawley the balance due to it on decedent's notes, had received from the bank possession of the crop of grapes, and had picked, packed, shipped, and marketed them through said J. Schoenburg Company, paying the latter for its services about $6,000.

On March 3, 1920, the special administrator filed with the superior court affidavits showing that, at the time when he was appointed, the court had made an order conferring upon him authority to pay the bank the balance due to it, if necessary to do so in order to obtain possession of the grapes, and also to pay a commission to J. Schoenburg Company, but that, owing to a clerical error or oversight, such order was not entered in the minutes. Thereupon the superior court ordered the clerk to correct his minutes by adding to the entry of the order appointing Hovley special administrator the following:

"And said Peter P. Hovley is hereby authorized and instructed to do all things and to perform all acts necessary for the preservation of the estate and the whole thereof of the deceased; to pay off from the first available funds of said estate whatever liens or debts it may be necessary to pay in order to obtain for the special administrator aforesaid possession of said estate and the whole thereof, and to expend whatever moneys may be necessary in obtaining possession, and in picking, harvesting, packing, shipping and marketing that certain crop of grapes heretofore taken over by the American State Bank of Brawley, by virtue of a crop mortgage, and to keep a careful account, and to render to this court upon demand thereof, a full, true and accurate accounting of all transactions had in the handling of the property of said estate, and more particularly of the grape crop aforesaid."

Claiming that this order was beyond the superior court's jurisdiction, petitioner seeks to have it annulled by the judgment of this court in this proceeding.

[1] Assuming that each of the orders so sought to be annulled was in excess of the superior court's jurisdiction, and that therefore the payments by the special administrator to the bank and J. Schoenburg Company were unauthorized, nevertheless we think that the relief sought herein, and all the relief that could be given in this proceeding, viz. the annulment of the orders, would be of no material or beneficial consequence to the petitioner here. It would not restore to the estate the money paid by the special administrator. The force of each of the orders has spent itself. Each order has served its purpose, in so far as it may be claimed that either ever had any force or effect. Each order has become functus officio. Nor could any judgment that might be entered herein be competent evidence against the special administrator, who is not a party to this proceeding. The writ of review will not be granted where no beneficial result will follow. Burr v. Supervisors, 96 Cal. 210, 31 Pac. 38; Reagan v. Bahrs, 11 Cal. App. 234, 104 Pac. 589; 6 Cyc. 747.

[2] Moreover, petitioner has a plain and adequate remedy. If, as petitioner claims, each of the orders to which she objects was without and beyond the court's jurisdiction, then each is a void order; and, if void, no protection will or can be afforded the special administrator thereby. The special administrator must render an account, on oath, in like manner as other administrators. Section 1417, Code Civ. Proc. If, on the settlement of the special administrator's account, the superior court shall refuse to allow these payments as proper items of disbursement, then petitioner, as an heir of decedent, will

not be prejudiced by either of the orders of which she complains. If, on the other hand, in settling the special administrator's account, the superior court shall allow either the payment to the bank or that made to J. Schoenburg Company, and if the orders that petitioner is here seeking to have annulled were not within the court's jurisdiction, and, consequently, are void, as claimed by petitioner, nevertheless, there still will remain the right of appeal from the order settling the account. Subdivision 3, § 963, Code Civ. Proc. Thus there is afforded petitioner, by such right to appeal from any order settling the special administrator's account, a plain, speedy, and adequate remedy. See Burr v. Supervisors, supra.

[3] It is not incumbent upon us to anticipate the action that hereafter may be taken by the superior court in settling the special administrator's account, or that may be taken by the referee who was appointed by that court to state and take the account. It does not devolve upon us to pass upon the validity of either of the orders of which petitioner complains, merely to afford guidance to the superior court, or to the referee appointed by it, in its or his future conduct during the administration of the estate. The special administrator is not a party to this proceeding; and, whatever his rights may be when the time arrives for settling his accounts in the superior court, they should not be concluded until he has had his day in court.

The writ is dismissed.

We concur: THOMAS, J.; WELLER, J.

48 Cal. App. 647

JORDAN v. ALDERSON et al., State Board of Medical Examiners. (Civ. 3222.)

(District Court of Appeal, First District, Division 1, California. July 16, 1920. Rehearing Denied Aug. 13, 1920. Hearing Denied by Supreme Court Sept. 13, 1920.)

1. Physicians and surgeons ⟸11(3)—Conflicts in or erroneous rulings on admission of evidence not considered on certiorari to medical board.

The court, on certiorari to annul board's order revoking license to practice medicine, has nothing to do with conflicts of testimony before the board, nor with irregularity or erroneous rulings on admission of evidence; the record showing the jurisdictional requirements of proper evidence were fulfilled.

2. Physicians and surgeons ⟸11(3)—Evidence necessary to convict of crime not necessary for revocation of license.

That the act complained of in proceeding before the board to revoke a license to practice medicine is called a criminal abortion did not make the proceeding a criminal one, so as to make applicable the Code provisions with respect to evidence necessary to convict of crime.

3. Appeal and error ⟸1011(1)—Determination on conflicting evidence not disturbed.

Determination by the trial court on conflicting evidence is not interfered with by the appellate court.

4. Certiorari ⟸64(2)—Board's record finding quorum present conclusive.

A board's record showing it found the jurisdictional fact of presence of a quorum on the hearing must prevail on certiorari to annul its order in the proceeding before it.

5. Certiorari ⟸70(2)—Failure to answer not available where trial proceeded as though there were answer.

That no answer was filed to amended petition for certiorari cannot avail on appeal, no point having been made of this in the trial court, but the hearing there having proceeded as though a denial had been filed.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Certiorari by Fisher R. Jordan against Harry E. Alderson and others, members of the State Board of Medical Examiners. From an adverse judgment, petitioner appeals. Affirmed.

Frank M. Carr, of Oakland, and Samuel M. Shortridge, of San Francisco, for appellant.

Harry A. Encell, of San Francisco, for respondents.

KOFORD, Judge pro tem. This is an appeal from a judgment refusing on certiorari to annul an order of the state board of medical examiners revoking petitioner's license to practice medicine in the state of California.

The proceedings before the board were taken under the provisions of the Medical Practice Act (Stats. 1913, c. 354; Stats. 1915, c. 105, and also amended in 1917 [chapter 81] and 1919 [chapter 632]). The complaint charged the petitioner with unprofessional conduct under subdivision 1 of section 14 of the act, by procuring a criminal abortion upon a pregnant woman.

[1] Appellant contends that the record of the proceedings had and taken before the board shows such an absence of proper evidence as to amount to lack of jurisdiction in the board to make the order under review. It will serve no useful purpose to again state the powers of the court upon certiorari, particularly with reference to the action of the board of medical examiners in revoking a physician's license for unprofessional conduct in procuring an abortion. This subject has been fully discussed in several recent decisions: Thrasher v. Board of Medical Examiners, 185 Pac. 1006; Lanterman v. Anderson, 36 Cal. App. 472, 172 Pac. 625,

expressly approved in Suckow v. Board of Medical Examiners, 187 Pac. 965; Anderson v. Board of Dental Examiners, 27 Cal. App. 339, 149 Pac. 1006.

The record shows that there was an ample sufficiency of proper evidence to prove that the woman operated upon was pregnant at the time of the offense charged. The woman herself so testified, and on oath reaffirmed the truth of a full, detailed written statement giving circumstances, conditions, and symptoms, signed by her at the emergency hospital shortly after the offense. Also, expert medical testimony given by a physician who had made an examination of the patient shortly after the offense was proper evidence and of a convincing character. There was a conflict in the testimony of the expert witnesses, which is quite usual, and appellant complains that his cross-examination of the woman at the hearing on her belief as to her previous pregnancy was erroneously limited by the board. But it is well settled that on this proceeding the court had nothing to do with the conflict of testimony nor with irregular or erroneous rulings on admission of evidence where the record shows the jurisdictional requirements with respect to these matters have been fulfilled. Tinn v. U. S. District Attorney, 148 Cal. 774, 84 Pac. 152, 113 Am. St. Rep. 354; Lanterman v. Anderson, supra; Anderson v. Board of Dental Examiners, supra.

[2] The record also shows by the same testimony, and by proper and legal evidence, the performance of the illegal operation by petitioner. The testimony and denials of the petitioner who was a witness for himself, only created a conflict in the evidence before the board, with which, as we have already said, the court had nothing to do on the hearing of the writ of certiorari. The fact that the act complained of is called a criminal abortion does not make the proceedings before the board a criminal proceeding to the extent of making applicable to the hearing the provisions of the Penal Code with respect to evidence necessary to convict of a crime. Lanterman v. Anderson, supra.

Appellant contends that the order revoking petitioner's license did not receive the affirmative vote of seven members of the board who heard the testimony. The record shows the affirmative vote of eight members. The minutes do not show that Dr. Alderson was present at the beginning of the meeting at which this vote was taken, but even leaving out his vote there remained seven other affirmative votes.

Appellant also claims that seven members were not present during the entire hearing. The trial court admitted testimony on the question of which members were present. Appellant draws special attention to the testimony on this point given in the trial court by his own counsel during the hearing had on the writ. This testimony was to the effect that two of the members of the board conversed between themselves in one part of the room during the time that petitioner was on the witness stand in his own behalf. Under cross-examination, whatever effect this testimony would have melted away. The phonographic reporter and two of the members of the board also testified in court upon this question.

[3] The trial court, going further than is required or permitted upon certiorari, received and considered this testimony. It concluded by the judgment appealed from that the weight of such testimony was in favor of the regularity of the vote and hearing of the board. In other words, it determined in favor of the correctness of the record of the proceedings before the board returned into court under the writ. If the matter were open to us we could do no more than refer to the oft-repeated rule that the determination of the trial court on conflicting evidence will not be interfered with by the appellate court.

[4] However, not only the court but also the board of medical examiners determined the existence of these jurisdictional facts. It not only determined these facts impliedly, by making its order revoking the license, but again expressly, upon a motion to reconsider by appellant upon this ground after unfavorable action of the board had been taken. Its record showing this fact affirmatively made unnecessary the taking of testimony on the point. It was distinctly so held upon this precise question in Lanterman v. Anderson, supra.

[5] Appellant is in no position to take advantage of the failure of respondent to file an answer to the amended petition. The hearing before the trial court proceeded as though a denial had been filed. No point was made of this in the trial court. Furthermore, the petition and amended petition contain the entire record of the proceedings before the medical board. This record contradicts the allegations of the petition, and must prevail. Lanterman v. Anderson, supra.

The record of the proceedings before the board shows that the board did not act without jurisdiction in making the order complained of, and the court properly refused to annul the order on the hearing of the writ.

The judgment appealed from is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

48 Cal. App. 614

MILLAR v. BELL et al. (Civ. 3336.)

(District Court of Appeal, First District, Division 1, California. July 23, 1920. Hearing Denied by Supreme Court Sept. 20, 1920.)

1. Deeds ⊂=211(4)—Coercion and breach of confidence shown by evidence.

Facts warranted by evidence *held* to authorize cancellation, on the ground of coercion and breach of confidence, of a deed, without any adequate consideration, to a brother-in-law, executed by one when urgently wanting a comparatively small sum of money and overindulging in liquor.

2. Deeds ⊂=75—No ratification by acceptance of part of income of property.

Ratification of deed, without adequate consideration, barring suit to cancel it on the ground of coercion and breach of confidence, *held* not to arise from acceptance by grantee, for some time, of $200 a month; this being but a part of the income of the property, and the compulsion accompanying the execution not being shown to have been removed.

3. Deeds ⊂=75—No ratification from absence of claim in partition suit.

That one who, without adequate consideration, conveyed an interest in property, set up no claim thereto in a subsequent suit for its partition, to which he was made a defendant, *held* not a ratification of his deed barring suit to cancel it on the ground of coercion and breach of confidence, in view of assurances from one with whom he had confidential relations.

Appeal from Superior Court, Alameda County; Dudley Kinsell, Judge.

Action by James B. F. Millar against Charles H. Bell and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Morrison, Dunne & Brobeck, Herbert W. Clark, and Arthur E. Bolton, all of San Francisco, for appellants.

Edgar C. Chapman, of San Francisco, for respondent.

RICHARDS, J. This action was brought by the plaintiff for the cancellation of a deed of conveyance of an undivided one-third interest in the real property described in the complaint which he had executed and delivered to the defendants Charles H. Bell and Mary E. Bell by reason of the alleged coercion and breach of confidence of said Charles H. Bell. He also prayed for the cancellation of a deed of trust executed by said defendants to their codefendant Mercantile Trust Company. By its judgment the court granted the relief sought, and the defendants have appealed.

It is contended by them that the judgment is not supported by the evidence, for the reason that the evidence shows: First, that the deed of conveyance in question was freely and voluntarily executed by the plaintiff; and, second, that after discovery of the facts upon which the plaintiff bases his right of rescission and cancellation he ratified his act in executing said deed.

Findings were waived by the parties, but the record contains all of the evidence taken at the trial.

As might be expected in an action of this character, the evidence is strongly conflicting; but, resolving that conflict in favor of the version of the transaction adopted by the trial court in arriving at its judgment, the facts may be summarized as follows: Charles H. Bell is the brother-in-law of James B. F. Millar, the plaintiff, and Mary E. Bell is his wife and the sister of James. The father of the latter died about six months before the occurrence of the events out of which the present litigation arose, leaving an estate of the value of about $180,000, consisting principally of real property, one-third of which was bequeathed and devised to his said son. James had contracted the habit of drinking intoxicating liquors to excess, and when under the influence of this habit spent his money recklessly and contracted debts; indeed, on several occasions, for the purpose of procuring means to continue his excesses, he had resorted to the forgery of checks. On said occasions his brother-in-law had proved to be a staunch and loyal friend and invariably came to his assistance. In the early part of November, 1915, James was in urgent need of money, and so by letter informed Mr. A. E. Bolton, the attorney for the executors of his father's estate, and who had long been the attorney for James Millar, Sr., the father, and was intimately acquainted with the members of the family. James' father had been aware of his son's weakness and had realized that he might at some time be in trouble as a result thereof, and had expressed the desire to his attorney and friend, Mr. Bolton, that he come to his boy's aid should occasion arise. James at this time was residing in Dinuba, there engaged in the practice of dentistry, earning thereby some $2,000 or $3,000 a year. Upon receipt of his letter Mr. Bolton consulted with Charles H. Bell. They both realized that this demand of James for money indicated that if something were not done to control him he would probably upon coming into his share of his father's estate rapidly dissipate it in unwise and reckless expenditure when in his periodical debauches. They decided to visit James at Dinuba and talk things over. They accordingly did so, and there proposed to him that he should enter into some arrangement by which he would be protected from dissipating the inheritance of which he was soon to come into control. Several methods were suggested: One, that a guardian be appointed for James' estate; another, that an annuity be purchased for him; and,

again, that his property be placed in trust for his benefit. James refused to consider the proposed guardianship or the annuity, and they were not pressed, but it was made to appear quite plainly to him by his brother-in-law that unless he entered into some such arrangement he need expect no financial aid in his embarrassment. It is even testified by James that his brother-in-law at this time referred pointedly to his infractions of the law above mentioned and hinted at unpleasant consequences if he remained obdurate—which, however, seems quite improbable and in all likelihood found little credence in the trial court. At the conclusion of the interview Mr. Bell and Mr. Bolton advised James to consult a lawyer, make up his mind what he wanted to do, and to let them know. Testifying as to this interview Mr. Bolton said:

"The main thing at Dinuba was to get into his mind that something had to be done, and that is all that was accomplished then."

A few days thereafter, on November 15, 1915, James appeared in the law office of Mr. Bolton in San Francisco ready to enter into some arrangement for the purpose of carrying out the object suggested by his brother-in-law on the visit to him at Dinuba. He had not consulted an attorney, deeming it unnecessary to do so in view of his confidence in both Mr. Bell and Mr. Bolton and their known and appreciated friendship for him. In the meantime Mr. Bolton had given the matter some thought, and had arrived at the conclusion that in order to effectually protect James from the possibility of dissipating his inheritance and to assure him of future maintenance, the only feasible thing for James to do was to make an absolute deed of all his property to some person in whom he had confidence. It was explained to him by Mr. Bolton that if he did so he would no longer have control of it, nor could he direct such person in the expenditure of the funds derived therefrom. This fact was also emphasized by Mr. Bell when the plan proposed to be adopted was made known to him. According to the testimony of Mr. Bolton, James expressed the desire that Mr. Bell be named as such grantee, while the plaintiff's recollection of this part of the transaction is that the deed was presented to him for signature with Mr. Bell's name therein as grantee without any previous discussion of such selection. Mr. Bell at first strongly demurred to having the conveyance made to him, and insisted to James that it be made to the latter's sister and brother. This James would not consent to, but was willing that such a conveyance be made to his sister and Mr. Bell jointly, energetically protesting his greater confidence in Mr. Bell than in his brother. There was much discussion before this decision was finally reached, as a result of which James derived the conviction that, although he was executing an absolute deed to his property he would still receive the benefit of it. Evidently there was some assurance given him that he would receive a monthly allowance of $200, for Mr. Bell himself testifies that upon James saying he would like to have $300, he replied:

"Well $200 would be enough, but I will promise you nothing. I refuse to make you any promises."

This witness also testifies to a like categorical refusal to make any promises when James stated that his understanding was that the property would be returned to him in five years' time; but, as to this, James testified that such was the understanding. Mr. Bolton, testifying to this interview and the attitude of James and the effect of the discussion and negotiations upon his mind, said:

"In talking with Jimmie (the plaintiff) it was talked with Jimmie that a trust could be made. * * * I apprehend that it might be fair to state that Jimmie thought it would be put in trust. * * * There was enough said, to be perfectly frank with everybody, there was enough said in the transaction, considering the knowledge that Jimmie had of Dr. Bell—Jimmie would have had a fair right to have assumed. * * * 'Well, if I brace up as a man Dr. Bell would convey this property back to me.'"

The deed to Charles H. Bell and Mary E. Bell being executed, there was advanced to James sufficient money—about $1,000—to meet his pressing obligations, and thereafter Mr. Bell sent to him the sum of $200 monthly until, in March, 1916, Mr. Bell and his wife made a deed of trust of the property theretofore conveyed to them by James to the Mercantile Trust Company for the purpose of paying to James during his lifetime the sum of $200 monthly, reserving, however, a power of revocation. In the meantime distribution of the estate of James Millar, Sr., was had, James' one-third interest therein being distributed to the Mercantile Trust Company, to be subject to the terms of said deed of trust. Immediately after said distribution a suit was commenced for the purpose of partitioning the real property thus distributed in undivided interests to the heirs or assigns of said deceased, to which said James was made a party defendant by virtue of the interest therein created in his favor by said deed of trust so executed to the Mercantile Trust Company. The summons and complaint were served upon him; but, except for assisting in the actual physical partition of the lands, he took no active interest in the suit. His connection with it may be gathered from a letter written to him by Mr. Bolton wherein he said:

"The complaint will set forth the facts that distribution has been had, that it is desirable that partition be had according to the respective rights of the parties, and so forth. It will then be necessary for you and the other parties in interest to file an answer to the complaint

admitting the facts as set forth therein and requesting that partition be had. It is impossible for me to appear as attorney for both the defendants and the plaintiffs in the action; therefore I am inclosing herewith an authorization to be signed by you authorizing Mr. J. S. Shuman to appear for you in that action. Of course this is only a matter of form, and I will prepare all the papers in the office, and I will then have him sign them as attorney."

In order to give point to the contention of the appellants that the plaintiff ratified his deed of conveyance after discovery of fact claimed by plaintiff to confer upon him the right of rescission, one other detail should be added: On October 6, 1916, the plaintiff addressed to Charles H. Bell and Mary E. Bell a written notice of rescission and cancellation of his conveyance of October 15, 1915, stating therein as grounds for such action that said conveyance had been made without any valuable consideration, and at a time when he was incapable of managing his affairs, and was made under menace, duress, and undue influence. At the same time the plaintiff employed an attorney in Dinuba, a Mr. Smith, to look into the facts and circumstances attending his execution of said conveyance. Mr. Smith visited Mr. Bolton at his office in San Francisco, and was shown the deed or a copy thereof, also the deed of trust to the Mercantile Trust Company, and was informed of the reasons for and circumstances connected with their execution. He as also invited by Mr. Bolton to offer any suggestions that he might have to make in the interest of his client. Mr. Smith returned to Dinuba, and there the matter dropped until the commencement of the present action some two years later.

[1] We have no difficulty upon the foregoing facts in arriving at the conclusion that the judgment is supported by the evidence. While recognizing that the grantees named in the plaintiff's deed of conveyance and Mr. Bolton acted in the highest good faith and exercised their best judgment for the protection of the interests of the plaintiff, the fact still remains that when in dire need of a comparatively small sum of money, and in some measure for the purpose of procuring an advance of such amount, his judgment probably impaired by alcoholic excesses, being convinced that in urging the alienation of his property they were doing so for the purpose of protecting and preserving his interest therein and that it would eventually be returned to him, imposing in them a trust and confidence merited by long intimacy with his family and personal friendship and kindness to himself, by said deed he, without receiving therefor any adequate consideration, stripped himself of practically all he possessed in the world. To be sure, the grantees in said deed have since its execution voluntarily paid or caused to be paid to him the sum of $200 every month and have made provision for continuing this payment during the term of his life; but there is no legal compulsion upon them to do so, and they have the right and power to discontinue these payments at any time, and, while there is nothing in the record to indicate that that contingency is likely to arise, neither a court of law nor equity would be warranted in assuming that they will never do so, especially if irritated or their feelings wounded by what they might justly consider ungrateful or inconsiderate conduct on the part of the plaintiff, or by acrimonious litigation. In a transaction where the elements of trust and confidence enter as largely as in the present case a court of equity will not be slow to lend its aid where the absence of any of the essentials of a valid transfer of property is fairly established. We think the facts above set out, resolving any conflict concerning them in favor of the judgment of the trial court, fairly disclose such a case, and that the trial court was justified in setting aside the plaintiff's conveyance, unless the evidence established, according to the contention of the appellants, a legal ratification by its grantor.

[2, 3] Two circumstances are urged by the appellants as having this effect, namely, the continued acceptance by plaintiff of the monthly payment of $200 after he became aware that the defendants denied any legal obligation resting upon them as a result of the conveyance by plaintiff to them of his property, and the fact that the plaintiff as a defendant in the partition suit referred to above failed to set up therein any claim to the property therein sought to be partitioned, but acquiesced in the distribution of the one-third thereof that he now claims to the Mercantile Trust Company under the terms of the deed of trust executed by Charles H. Bell and his wife.

We do not think the first of these facts can be given the effect claimed for it by the appellants. If the transaction was as contended by them an absolute conveyance, imposing no obligation upon them, then such payments were not made by virtue of the terms of that transaction, so that the acceptance of such payments cannot be regarded as a recognition of its validity; and if the transaction is to be regarded as of the character testified to by the plaintiff, and that such payments were in accordance with its terms, it still remains the fact that the money so paid was a part—and a part only—of the income produced by the property so conveyed by him and which, according to his understanding of the transaction, was to be used for his benefit. His acceptance of such payments cannot therefore be said to estop him to assert the invalidity of his transfer, especially when the element of compulsion which accompanied its execution is not shown to have been removed, and the money thus received was equitably his own.

As to the plaintiff's conduct with regard to

the partition suit, by which he apparently acquiesced in the distribution of his property to the Mercantile Trust Company, it is very evident from the terms of Mr. Bolton's letter above given that the plaintiff's participation therein was purely perfunctory and nominal, and that he was entitled by reason of those confidential relations between him and Mr. Bolton (who was conducting said partition suit), to which we have already referred, to assume that nothing would result therefrom with regard to his property interests contrary to the understanding which, according to the trial court, he was justified in deriving from the negotiations culminating in the aforesaid conveyance of his property.

Entertaining these views, we are of the opinion that the judgment should be affirmed, and it is so ordered.

We concur: WASTE, P. J.; KOFORD, Judge pro tem.

48 Cal. App. 606

PEOPLE v. TORRES. (Cr. 720.)

(District Court of Appeal, Second District, Division 2, California. July 22, 1920.)

1. Kidnapping ⇐6—Whether girl consented to go with accused held for jury.

In a prosecution for child stealing under Pen. Code, § 278, whether the girl consented to go with defendant *held* for the jury.

2. Criminal law ⇐1159(3) — Conviction of child stealing based on conflicting evidence not disturbed on appeal.

In a prosecution for child stealing, where there was a direct conflict in the evidence as to both the taking and detaining of the child, a verdict of guilty cannot be disturbed on appeal.

3. Kidnapping ⇐1—Consent of child to accompany accused no defense.

In a prosecution under Pen. Code, § 278, for stealing a female child of the age of 13 years, it is no defense that the girl accompanied the defendant of her own volition.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Juan Torres was convicted of child stealing, and appeals. Affirmed.

Chas. D. Swanner, of Santa Ana, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and Thomas A. Wood, of Los Angeles, for the People.

THOMAS, J. Defendant was informed against, and, after trial, convicted by a jury of his peers of the crime of child stealing, under section 278 of the Penal Code—the child being a female of the age of 13 years—and sentenced to imprisonment in the state prison. A brief statement of the facts follows:

The child lived with her parents near Garden Grove, in Orange county, on and for some time prior to February 8, 1920, at which time, it is claimed, "she went away with the defendant." From the record it appears that at about 10 o'clock at night defendant and the minor went to a "little house," remaining there until about 3 o'clock in the morning, thence going to a "big house," where they went to bed. The next day defendant was arrested. The girl remained at the "big house" until about 2:30 o'clock of the afternoon of the day of defendant's arrest. The mother and stepfather of the child testified that neither had given consent to their girl's going with the defendant. There was conflict in the evidence as to the material allegations of the information, which the jury settled in favor of the people.

As we gather from the record, three points are urged by appellant here for reversal: (1) That the girl consented to go with appellant, and, hence, the latter could not be guilty of the offense charged; (2) that the court erred in refusing to grant defendant's request for certain instructions, his number 5 and 7; and (3) that the evidence is insufficient to sustain the verdict, particularly in this, that there is no evidence that defendant intended to or did conceal the said child.

[1] As to the first point, it will be sufficient to point out that the testimony of the minor shows that on the night of February 8, 1920, defendant came to her home and asked her to go away with him; that he wanted to marry her; that she informed him that she could not go until her father consented; that he took hold of her by the wrist and she then accompanied him; that they went to a "little house" and then to a "big house," as already set forth; that when she got up the next morning she wanted to go home, but could not because defendant told her she could not go; and that she tried to go but could not, for the reason that the lady of the house was following her around. Defendant, appellant here, testified that prior to the date in question—February 8, 1920—the child's parents had given their consent to his marrying the minor, but had subsequently revoked such consent; that he did not take the girl by force; that he asked her if she was willing to go with him, and that she answered in the affirmative; and that he did not tell her she could not go home. The "lady of the house," referred to in the child's testimony, denied that she followed the child around, and testified that, on the contrary, the child was at liberty to go and come as she pleased while there. The jury, as we have said, settled this conflict in the evidence in favor of the prosecution.

[2, 3] Appellant complains of the action of the learned trial judge in sustaining objec-

tions of the district attorney "relative to the acts and conduct of said minor, holding that she being a minor could not consent to leaving home." As supporting this, our attention is called to the case of People v. Black, 147 Cal. 426, 81 Pac. 1099; but we do not think that case in point. In the case cited there was no conflict in the evidence; there was no showing that defendant had any intent to conceal and detain the minor. In the case at bar there is direct conflict as to both the taking and detaining; the evidence of each being present, as already pointed out, and the jury having decided the conflict in such evidence in favor of the people, we are without authority to disturb that verdict on appeal. In the Black Case the court said that this "is true when the evidence, even though meager, is yet sufficient, if believed by the jury, to support their finding, and is always true when sufficient but conflicting evidence is presented upon the subject." It was the absolute absence of conflict in the evidence in that case as to defendant's intent to detain that caused the court to disturb the verdict. Such condition, as we have seen, is not present here. The question, therefore, whether the girl accompanied the defendant of her own volition is, in our opinion, immaterial; nor is it a defense in a case like this. 1 Cyc. 146; 8 R. C. L. 297; State v. Brandenberg, 232 Mo. 531, 134 S. W. 529, 32 L. R. A. (N. S.) 845; People v. Cook, 61 Cal. 478; Queen v. Biswell, 2 Cox. C. C. 279; Gould v. State, 71 Neb. 651, 99 N. W. 541. So far as we have been able to discover, the question of the consent of a minor, under the section which is the basis of the information here, has not been passed upon by any of the appellate courts of this state. Still, we believe the conclusion here reached is, as we have seen, supported by both principle and the weight of authority of the courts of other jurisdictions.

The court refused to grant defendant's request to give the following instructions:

"(5) Nor does the circumstance that she was a minor preclude you, gentlemen of the jury, from taking into consideration her conduct and actions for the purpose of ascertaining whether as a fact her will was dominated by that of defendant, and her freedom of action controlled and restrained entirely by his wishes, or whether her going to and remaining at the house of Mrs. Calderon overnight, as she did, was not a matter of her own volition, induced by the suggestion of defendant."

"(7) The court instructs you that if you find from the evidence that the minor child involved in this case went to the home of Mrs. Calderon and remained there overnight of her own volition, and that her will was not dominated by that of defendant, and her freedom of action controlled and restrained entirely by his wishes, then your verdict must be for the defendant."

Under the statute, one who maliciously or fraudulently "entices" away a minor child is guilty of child stealing. To entice is to instigate, by exciting hope or desire; to lead astray. The minor may be "enticed" away without any domination over his or her will. The desire to do something promised by the abductor may alone suffice to lead astray the most self-willed girl or boy. The rulings under consideration were correct.

In view of what we have said upon the first two points urged, discussion of the third point becomes unnecessary.

Judgment affirmed.

We concur: FINLAYSON, P. J.; WELLER, J.

48 Cal. App. 665

BIDEGARAY v. ORMACA. (Civ. 3209.)

(District Court of Appeal, First District, Division 2, California. July 27, 1920.)

1. Time ⟸10(1)—Act to be done on holiday may be performed on next business day.

By Civ. Code, § 11, an act appointed by law or contract, other than an act of necessity or mercy, to be done on a holiday, may be performed on the next business day.

2. Sales ⟸183—Buyer not bound to pay until delivery or offer to perform.

The buyer of lambs was not bound to pay for them until the seller delivered them or in good faith offered to perform.

3. Contracts ⟸279(2)—Obligation extinguished by offer of performance only under certain conditions.

An obligation is extinguished by an offer of performance only when made in accordance with the rules prescribed in Civ. Code, §§ 1485–1505, requiring a good-faith actual offer, which must be made to the person to whom performance is due, if an agent has not been appointed, while, if he is not at the place fixed for performance, it must be made wherever he may be found.

4. Sales ⟸176(1)—Party may not induce other to believe delivery will not be made, and then take advantage of reliance on representation.

Regardless of the rule requiring modifications of written contracts to be evidenced by writing, one party may not, on pretense of desire on his part to depart from exact performance of a nonessential detail, induce the other party to believe that delivery of goods sold will not be made, either at the time or place specified in the contract, and then take advantage of the other's reliance upon his representation, despite Civ. Code, § 1698.

5. Appeal and error ⟸1170(7)—Appellate court will not reverse for harmless error in admission of evidence.

In an action for failure to deliver lambs sold, if under a technical application of Civ. Code, § 1698, the trial court erred in admitting certain evidence tending to vary the written contract by parol, where there remained suffi-

cient evidence to support the findings, and there has been no miscarriage of justice, the appellate court, under the Constitution, will not reverse.

Appeal from Superior Court, Fresno County; M. F. McCormick, Judge.

Action by J. Bidegaray against Louis Ormaca. From judgment for plaintiff, defendant appeals. Affirmed.

C. K. Bonestell and J. A. Steele, both of Fresno, for appellant.

Harris & Hayhurst, of Fresno, for respondent.

BRITTAIN, J. The defendant appeals from a judgment against him for $1,250. He presents a single question of law in support of the appeal, based on an objection to the admission of evidence over the objection that it was an attempt to change the terms of a written contract by parol in contravention of section 1698 of the Civil Code. The respondent maintains that the section has no application to the facts of the case.

The respondent sued on two counts; the second being in the ordinary form of an action for debt. In the first count it was alleged that in May, 1918, the defendant sold to plaintiff 500 lambs at the agreed price of $7 per head; that the plaintiff then paid the defendant $250 on account, and the defendant agreed to deliver the lambs to the plaintiff at Helm station, in Fresno county, on or about May 26, 1918; that plaintiff was ready and willing to pay the balance of the purchase price on May 26 and thereafter; that the defendant had failed and refused to make delivery, and, on information and belief, that defendant had sold the lambs to others on or about May 26, and still retained the $250 paid him; and that plaintiff had been damaged in the sum of $1,750. The appellant alleged that the plaintiff agreed to take the lambs on May 26, at Helm station, and to pay for them; denied the readiness of the plaintiff to pay the balance of the purchase price; denied that the defendant had failed or refused to deliver; and alleged that he was willing to deliver on May 26, that he then offered delivery, that the plaintiff then refused to accept delivery, and that the defendant thereafter held the lambs for a period of five days, up to June 1. He denied damage, and denied the debt set up in the plaintiff's second cause of action.

The court made general findings: First, that all the allegations in the first cause of action in the complaint were true, except as to the amount of damages, which the court found to have been $1,250; and, second, that all the allegations of the second count were true, except as to the amount of the debt, which was found to be $1,250.

[1] Exclusive of the evidence to which the objection was interposed, the record shows that May 26, 1918, was Sunday. The appellant stands upon what he considers his strict contractual rights. An act appointed by law or contract, other than an act of necessity or mercy, to be done on a holiday, may be performed on the next business day. Civ. Code, § 11. The appellant's corral was about four or five miles from Helm station. The respondent's corral was about seven miles from the station, and about two miles from the appellant's corral. On Sunday morning the appellant stated that he went to the station about 7 or 8 o'clock and stayed all day. He left his lambs at his corral. On his direct examination he first testified that he went alone. Later he said that afternoon he came up to town. He ate lunch with his herder, about four miles from Helm. "We went out there," he said "and got lunch. Then we went back to Helm again, and back to camp again." It is immaterial whether he went to Helm on Sunday or not, or whether the respondent was there or not on that day. As a matter of fact, he was not.

The evidence is important in connection with the evidence concerning what he did on Monday. He testified that he went back to Helm early Monday morning; also that he went there on Tuesday and Wednesday, on which latter day, he testified, he sold the lambs to his brother-in-law, Ahado. The market price of lambs was then $10 a head. The appellant's herder testified that the appellant was at the corral on Sunday, and told them to put the lambs in the corral until Mr. Bidegaray came. He further testified that Ahado, who had also testified that he bought the lambs on Wednesday, had said on May 31, in the presence of Bidegaray and others, that he had bought the lambs on Monday, May 27. Another witness testified positively that at Huron, on May 31, in the presence of himself, Pete Irigary, and Bidegaray, Ahado said that he had bought the lambs from Ormaca, on Monday, May 27, at 10 o'clock in the morning, at Kutner-Goldstein's in Fresno. If the appellant was in Fresno at that hour on Monday, his testimony that he was at Helm, waiting to meet the respondent, could not have been correct.

The trial court resolved the conflict in the testimony against the appellant, and this court is bound in such a case by the implied finding of the trial court. Under the appellant's evidence, he never took the lambs to Helm, and he did not seek in any way, other than by going there, if he went, to find or communicate with Bidegaray. The respondent was not at the station, but there is no evidence that he would not have gone there, had the appellant taken the lambs there for delivery. On this appeal the appellant stands upon a rigid application of the law in regard to the evidence to which objection was made. In the foregoing no reference has been made to any part of the evidence in dispute.

[2, 3] The appellant contends that the respondent was bound to accept and to pay for

the lambs at Helm station. The respondent was not bound to pay for them until the appellant delivered the lambs, or in good faith offered to perform the contract. He never took the lambs to Helm station, and therefore must base his right on an offer of performance. His evidence shows affirmatively he made no such offer. An obligation is extinguished by an offer of performance only when made in accordance with the rules prescribed in sections 1485 to 1505 of the Civil Code. There must be an actual offer. Civ. Code, § 1487. It must be made to the person to whom performance is due, if an agent has not been appointed, and if he is not at the place fixed for performance, wherever he may be found. Civ. Code, §§ 1488, 1489. It must be made in good faith. Civ. Code, § 1493. It is only when these requirements have been fulfilled that actual production of the thing to be delivered is excused. The appellant failed to meet these requirements, and he never became entitled to resell the lambs he had already sold to the respondent, nor to retain the $250 paid on account, and which he testified he intended to keep. The evidence was sufficient to support the findings, and they in turn support the judgment.

The reason why the respondent did not go to Helm appears from the evidence to which objection was made. The respondent testified that on May 24 the appellant visited the respondent in his office in Fresno, and said that the 26th would be Sunday, and they could count the lambs on another day. The respondent replied that with stock Sunday or Monday was just the same, but that the appellant could bring them any time on Monday, Tuesday, or Wednesday to the respondent's main corrals. The appellant testified that he had a conversation with the respondent at the time stated, and that—

"I saw the contract dated on Sunday, so I went on the 24th, and asked him if he was going to take the lambs out on Sunday, and he said: 'Didn't you ever work on Sunday?' That was all that was said about it."

The trial court probably believed the evidence given by the respondent upon this subject. The essential conditions of the contract of sale were the delivery of the lambs and the coincident payment of the balance of the purchase price. Neither the time nor the exact place of delivery was of the essence of the contract.

[4, 5] Regardless of the rule requiring modifications of written contracts to be evidenced by writing, one party to a contract may not, on the pretense of desire on his part to depart from the exact performance of a nonessential detail, induce the other party to believe that delivery of goods sold will not be made, either at the time or place specified in the contract, and then take advantage of the other's reliance upon his representations. To apply section 1698 of the Civil Code to such a state of facts would be to make it an engine for the perpetration of fraud, instead of a defense against it. If, even under the most technical application of the section, the trial court was in error in admitting the evidence to which objection was made, there remains in the record sufficient evidence to support the findings, and there does not appear to have been any miscarriage in justice. The case is peculiarly within the constitutional restriction on the power of appellate courts to reverse judgments for error in the admission of evidence, unless the court is of the opinion that there has been such a miscarriage. Upon the entire record that is not the opinion of the court.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

48 Cal. App. 622

CONTRA COSTA CONST. CO. v. DALY CITY. (Civ. 3333.)

(District Court of Appeal, First District, Division 1, California. July 24, 1920.)

1. Municipal corporations ⟸360(2)—Not liable for extra work not approved as provided by contract.

Where a contract with a city for laying a pipe line provided that extra work should be paid for according to a prearranged schedule of prices, if authorized by resolution of the board of trustees, the contractor cannot recover on the express contract for extra work performed without prearranged prices or the approval of the trustees.

2. Municipal corporations ⟸360(2)—No implied liability for work under ultra vires contract.

There is no implied contract by a city to pay for extra work done for it under an agreement made ultra vires by its engineer.

3. Municipal corporations ⟸360(2)—Unauthorized promise of engineer to pay for extra work not binding.

Where a contract for a pipe line provided for payment for extra work according to a prearranged schedule of prices only if authorized by resolution of the board of trustees, a promise by the city engineer in charge of the work to the contractor that the city would make a fair settlement for certain extra work is not binding on the city, since it was beyond the authority of the engineer under the contract.

4. Municipal corporations ⟸230—Contractor chargeable with knowledge of limitation on powers of agents and officers.

A contractor dealing with a municipal corporation is chargeable with knowledge of the

limitations on the power of its agents and officers.

5. Municipal corporations ⟸360(2)—City engineer held not authorized to promise payment for extra work.

A clause in the contract for the construction of a pipe line for a city along a designated highway, whereby the city guaranteed the rights of way, did not authorize a city engineer to promise payment for extra work made necessary by the fact that the highway commissioner, in granting the right of way, required a trench deeper than that specified.

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by the Contra Costa Construction Company against the City of Daly City. Judgment for plaintiff, and defendant appeals. Reversed.

George Appell, of San Francisco, for appellant.

Ramsey Probasco and Robinson & Sizer, all of Oakland (Albert B. Harris, of counsel), for respondent.

KOFORD, Judge pro tem. This is an appeal from a judgment for extra work, in favor of plaintiff and against defendant, a municipal corporation.

The plaintiff and the city of Daly City, a municipal corporation, entered into a written contract for the construction of a water pipe line for the city's water supply. The pipe line was required to be laid, by the contract, plans, and specifications, in Mission road (outside of city boundaries) 3½ feet below the old curb line of the road. After plaintiff commenced work, it was stopped by an injunction not involved here, and before work recommenced it developed, or was discovered for the first time, that the state was undertaking the construction of a section of concrete paved highway along this portion of Mission road. The state highway commission, as it is popularly called, asserted and maintained exclusive possession of the road and the right of way, including the strip of land adjoining the pavement where the pipe was to be laid. The city's engineers thereupon wrote a letter to the highway commission, asking for a permit on behalf of the city to lay the pipe. This permit was granted, but only on certain conditions as to the manner in which the work should be performed. Among those conditions was the requirement that the pipe be laid 4 feet below the profile of the highway pavement, instead of 3½ feet below the old curb line.

The plaintiff was informed by the city engineers of this new requirement and of changes in the plan necessary to meet this requirement. The plaintiff continued with the work, and then discovered that this change in the plan would bring the pipe trench below the surface soil and into rock and it protested that this would entail considerable additional expense. The engineers orally directed the plaintiff to proceed with the work, and "keep a good record of it, and see what it costs, and when we get through we will make a fair settlement with you." After the work was finished, a claim for the extra work, labor, and materials necessitated by this change in the plan was presented to the board of trustees, and was by it rejected. This suit was commenced for the sum of $2,844.80, and resulted in a judgment for $1,432.98. The original contract price was $8,900.

The contract provided that the work should be done in strict accordance with the plans and specifications, and completed to the satisfaction of the engineers of the city, and its board of trustees, for the sum of $8,900; and it further provided that, in the event of any deductions or additions being made, certain unit prices established and specified in the contract would be used in determining the amount to be added or deducted. These, however, do not include the changed depth of the trench. The specifications contained provisions to the effect that the engineers should decide, in case of misunderstanding, as to the true interpretations of the plans and specifications, and correct errors or omissions in the plans and specifications when necessary for the proper fulfillment of their intention. The board of trustees might by resolution order alterations in quantities of materials specified, and in case of increase it should be paid for upon the established unit prices. All necessary rights of way for the construction of the work to be guaranteed by the city; also the following provision under the heading "Extra Work":

"Any work not contemplated in these specifications that may be requested of the contractor by the engineers shall be paid for according to a prearranged schedule of prices agreed to between the engineer and the contractor, and no payments will be made for such work unless they be authorized by resolution of the board of trustees."

[1] The muncipality had the right to specify in the contract the precise conditions under which alone it would be obliged to pay for extra work. This it did. But this method was not followed by the contractor. There was no prearranged schedule of prices for the extra work agreed to between the engineers and the contractors; neither was the extra work or alteration, nor any pay-

ment therefor, authorized by resolution of the board of trustees. As this provision of the contract was not complied with, there can be no recovery under the express contract. Gray v. La Société Française, etc., 131 Cal. 566, 63 Pac. 848.

[2, 3] The findings are prepared in such a way as to support the theory of an implied as well as an express contract. We are of the opinion that the evidence is insufficient to support the judgment on the theory of an implied contract. It is well settled that an implied contract does not arise for work done for a municipality under an ultra vires contract. Reams v. Cooley, 171 Cal. 157, 152 Pac. 293; Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96. That would have the effect of putting the power to contract where none existed, and would in effect change the charter of the city. As the engineers here were not permitted to contract on behalf of the city under the terms of the contract defining and limiting their powers, to hold that they could by their conduct give rise to an implied contract would in effect change the express contract and brush away the safeguards the city had placed in the contract for its protection. The city cannot be held liable for the acts of the engineers in ordering this work unless the engineers in fact had the power so to do.

[4, 5] One dealing with a municipal corporation is chargeable with knowledge of the limitations of power of its agents and officers. Wallace v. San Jose, 29 Cal. 180. The fact that the city guaranteed all rights of way did not enlarge the powers of the engineers nor authorize them to act as general agents with full power to secure the right of way. This was a matter which should have been taken up by the contractors with the board of trustees under the contract. An implied contract in this case could not arise at least without knowledge or action on the part of the board of trustees before the extra work was done. Griffiths v. Los Angeles, 6 Cal. Unrep. Cas. 119, 54 Pac. 383.

The only action of the board of trustees in regard to the matter is the rejection of the claim for payment for the extra work. The whole matter seems to have been handled between the engineers and contractors under the belief that equitable considerations would prevail, and not the strict terms of the written contract. The engineers had no power to obligate the city for this extra work. The judgment is not supported by the evidence, either on the theory of an express or implied contract.

The judgment is therefore reversed.

We concur: WASTE, P. J.; RICHARDS, J.

48 Cal. App. 670

BENNETT v. BENNETT. (Civ. 3469.)

(District Court of Appeal, First District, Division 2, California. July 27, 1920.)

1. Divorce ⟸37(22)—Criticism by wife, caused by husband's attentions to other women, is no justification for separation.

A husband cannot, by a course of improper conduct often repeated, arouse the suspicion and jealousy of his wife, and humiliate her by attentions to other women and by receiving love letters from such other women, and then claim immunity from the wife's criticism and reproach or that her accusations justified him in leaving her.

2. Divorce ⟸51—Wife's condonation is revoked by husband's desertion.

Under Civ. Code, § 121, though a wife condoned offenses on the part of her husband with other women by resuming marital relations with him, nevertheless the condonation was revoked as to all previous acts when the husband deserted the wife without cause, thus giving her another cause of divorce.

3. Divorce ⟸109—Presumption of adultery is rebuttable.

Though the charge of adultery is difficult of proof, and circumstances may be sufficient to justify a presumption of adultery, even under circumstances most strongly warranting the presumption, defendant may rebut it by an explanation of the purpose of his presence at the suspicious time and place.

4. Divorce ⟸129(16)—Evidence insufficient to warrant finding of husband's adultery.

In a husband's action for divorce, wherein the wife cross-complained for separate maintenance on the ground of his adultery, finding that the husband and corespondent had committed adultery *held* unwarranted by the evidence.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Action for divorce by Albert L. Bennett against Emma T. Bennett. From a judgment for defendant, plaintiff appeals. Affirmed.

Ben F. Gray and Geo. S. Hupp, both of Los Angeles, for appellant.

Ford & Bodkin, of Los Angeles, for respondent.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment denying him a divorce from the defendant and granting to said defendant a decree of separate maintenance from the plaintiff and an allowance for her support and the support of her minor child.

Plaintiff filed an action for divorce from the defendant upon the ground of extreme cruelty and also upon the ground of desertion. The specific acts of cruelty alleged included accusations, in public and private, of improper relations with various women and

reproaches and threats based thereon. Defendant filed an answer, specifically denying the alleged acts of cruelty and also the desertion, and also filed a cross-complaint wherein she alleged desertion by the plaintiff, and also alleged, upon information and belief, that the plaintiff had committed adultery with a young woman named as corespondent in this action, and also alleged that the plaintiff had treated the defendant in a cruel and inhuman manner—the specific acts of cruelty alleged being plaintiff's attendance at the theater and other places of amusement with women whose names were unknown to the defendant, and also plaintiff's conduct in riding in an automobile with the woman named as corespondent herein, and against whom the adultery charge is made. Defendant prayed for a decree of separate maintenance. To this cross-complaint, plaintiff filed an answer denying the desertion.

The court found that the defendant did not "falsely accuse plaintiff of associating with women, or falsely accuse him of being guilty of infidelity." Appellant's argument upon this question is that the record contains positive proof that the defendant did accuse the plaintiff of improper relations with women. We have read through the voluminous record with much care, and while it is true that the testimony clearly shows that the defendant did make such accusations at different times, it appears with equal clearness that the plaintiff's conduct over a long period of years presented a series of episodes abundantly warranting defendant's suspicions, protests, and accusations. The trial court did not find, as stated by the appellant, that the accusations alleged were never made by defendant, but found that the accusations were not "falsely" made by the defendant. The appellant's argument upon this point amounts to a contention that, if a man indulges in numerous improper relations with various women, it is inconsiderate and indelicate upon the part of his wife to mention the matter to him.

The court also found that the other alleged acts of cruelty by the defendant were not committed by her, and also found that the defendant did not desert the plaintiff. These findings, based as they are upon conflicting evidence, must stand undisturbed by us, and warrant a denial of the prayer of the plaintiff for a dissolution of the bonds of matrimony between himself and the defendant. The court also found that the plaintiff did, without cause, desert the defendant.

[1, 2] The appellant maintains his right to leave the defendant because of her accusations and threats against him, which he asserts rendered his condition intolerable. While such accusations and threats might have justified him in leaving her, if they had been unfounded, and due to no fault upon the part of the plaintiff, in the light of the present record, the initial fault was with the plaintiff, and the testimony clearly warrants the inference by the trial court that, if his conduct had been more conventional, he would not have been subjected to reproaches and accusations. It certainly cannot be successfully maintained that a man may, by a course of improper conduct oft repeated, arouse the suspicion and jealousy of his wife, and humiliate her by attentions to other women and by receiving love letters from such other women, and then claim immunity from criticism and reproach. The letter appearing in the record, received by the husband from a woman in Buffalo years before this action was commenced, is eloquent upon the proposition that his conduct was highly improper, to say the least, and was such as to warrant accusations and reproaches by his wife. While the wife may have condoned this and numerous other offenses, which the court was justified in finding from the record, by resuming marital relations with the appellant at Salt Lake City, nevertheless the condonation was revoked as to all previous actions when the husband deserted the wife, without cause, as found by the court, thus giving her another cause of divorce. Civ. Code, § 121.

[3, 4] Upon the finding which we have heretofore discussed, the decree of the trial court was warranted, and we may not interfere therewith. There is an additional finding to the effect that the plaintiff was guilty of adultery with the corespondent named herein. This finding is attacked by the appellant as being unwarranted. The evidence bearing upon this matter is uncontradicted in the record, and at most shows merely an opportunity for such action. There are no circumstances in evidence regarding the general conduct of the plaintiff and the corespondent toward each other, nor regarding the disposition of the corespondent which would afford a basis for the belief that given the opportunity, the parties would indulge in illegal relations. It is true that the charge here made is difficult of proof and that circumstances may be sufficient to justify a presumption of adultery; but it is also true that even under circumstances most strongly warranting the presumption, the defendant may rebut the same by an explanation of the purpose of his presence at the suspicious time and place. Johanson v. Johanson, 12 Cal. App. 635, 108 Pac. 55.

In the present action, the court found that adultery had been committed at the apartment of the corespondent. The testimony regarding the incident upon which the finding was made was that the plaintiff and corespondent had been riding in his automobile. They were followed by two detectives, and his wife and daughter. At about 10 o'clock in the evening, they drove to the apartment of the corespondent. The automobile was left outside, and the occupants went into the apartment, consisting of one room and kitchenette. After a short time, from 20 to 40 minutes according to the various witnesses, the detec-

tives knocked on the door, which was opened by the corespondent. The wife and daughter and the detectives then entered the room and found the plaintiff fully attired, seated at a table. The corespondent was also fully dressed, and there was nothing about the appearance of either to contradict their explanation, which was that they had spent the short time while they were in the apartment in talking about his affairs and in looking at pictures which had been sent to her by her husband in France. Under the circumstances in evidence here, we think this finding regarding the adultery of the plaintiff and of the corespondent is one unwarranted by the evidence. It is, however, unrelated to the other findings, which are amply sustained by the evidence, and which are sufficient to sustain the judgment. Upon the findings and evidence regarding the plaintiff's desertion of the defendant the judgment must be sustained.

The judgment is affirmed.

We concur: NOURSE, J.; BRITTAIN, J.

48 Cal. App. 646

PEOPLE v. CHRISTIAN. (Cr. 723.)

(District Court of Appeal, Second District, Division 2, California. July 26, 1920.)

1. Criminal law ⇐371(9)—Evidence of subsequent offenses admissible in rape case to prove purpose and to corroborate prosecutrix.

In a prosecution for rape, where the prosecuting attorney has elected the act on which he relied for conviction, evidence of subsequent similar offenses by defendant against prosecutrix is admissible, when limited to the purpose of proving defendant's purpose and corroborating the testimony of prosecutrix.

2. Criminal law ⇐1144(15)—Jury presumed to have obeyed in having limited evidence of other offense.

On appeal from a conviction of rape, it must be presumed that the jury obeyed the instructions of the trial court limiting the effect of evidence of other offenses which had been introduced.

3. Criminal law ⇐304(6)—Court takes judicial notice Calexico is in California.

On appeal from a conviction of rape, the court takes judicial notice that Calexico is within the state, so that evidence that defendant took prosecutrix there would not show a violation of the Mann Act (U. S. Comp. St. §§ 8812–8819).

4. Criminal law ⇐1137(5)—Defendant cannot complain that evidence showed another offense, when he alone testified to that charge against him.

On appeal from a conviction for rape, defendant cannot complain that evidence of subsequent offenses by him at another place was inadmissible, as tending to support a charge of child-stealing, when the prosecution's evidence made no reference to his taking prosecutrix to that place, and he alone testified that he had been charged with child-stealing.

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

J. T. Christian was convicted of rape, and he appeals from the judgment, and from the order denying his motion for a new trial. Affirmed.

M. G. Phillips and John S. Cooper, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and Thomas A. Wood, of Los Angeles, for the People.

WELLER, J. Defendant was convicted of the crime of rape, and appeals from the judgment and order denying his motion for a new trial.

The prosecutrix, a girl about 13 years of age, was a schoolmate of defendant's daughter, and was in the habit of visiting his home for some months prior to the commission of the offense. On several occasions defendant asked the girl to submit to his desires; but she repeatedly refused, until on the 20th of June, 1919, he succeeded in accomplishing his purpose. The two girls came from school about noon on that day; the defendant arriving home shortly thereafter. According to the testimony of the prosecutrix, at some time during the afternoon Christian indulged in sexual intercourse with her, on the bed in his room. Defendant's daughter stated on the stand that she saw the two sitting on the side of her father's bed, but that she did not witness the act. The prosecutrix further related the circumstances of several subsequent indulgences of a similar character, in Los Angeles. She also testified that in November of the same year she made a trip with defendant and his daughter to Calexico, where all three occupied one bed at a hotel, and that while there Christian more than once had carnal knowledge of her person. Defendant's daughter was a witness to some of the later acts in Los Angeles, and also to the instances in Calexico.

Appellant raises two points upon which he relies as ground for reversal: (1) That the court erred in permitting testimony relating to subsequent acts; and (2) error in allowing evidence of a separate and distinct offense to be presented to the jury.

[1] 1. The rule is well settled in this state that in cases of this character, after the prosecution has selected the particular offense upon which it relies, and has introduced evidence in support of the charge, testimony of subsequent acts of the same nature between the parties may be received for the sole purpose of corroboration. Within these limita-

tions proof of subsequent offenses is admissible to show the adulterous disposition of the defendant and as tending to sustain the charge alleged in the information. People v. Koller, 142 Cal. 623, 76 Pac. 500. The rule was followed in this case. After the prosecutrix had testified to the incidents occurring on June 20, 1919, the district attorney elected to stand upon that date as the one on which the crime was committed. Witnesses then testified to subsequent acts of sexual intercourse between the defendant and the prosecutrix, for the limited purpose, as expressly stated by the prosecution, of corroboration of the charge.

[2] The court instructed the jury that the succeeding acts were to be considered only to prove the adulterous disposition of the defendant, and as having a tendency to render it more probable that the act charged in the information was committed. In deliberating upon its verdict the jury is presumed to have obeyed the instructions of the court. Thus restricted, evidence of other similar acts, whether occurring before or after the date alleged in the information and selected by the prosecution, could be effective only to induce a belief in the probability of the truth of the main charge. Subsequent acts produce the same impression upon the mind as do prior acts. Each indicates the depraved character of the accused in the same manner and to the same extent. When it is shown that two persons have on a certain occasion indulged in sexual intercourse, it is a strong circumstance in support of testimony relating to previous similar indulgences. We can see no difference between the corroborative effect of evidence of such acts, whether preceding or following the date specifically charged in the information.

[3, 4] 2. Appellant contends that the testimony regarding the trip to Calexico was inadmissible, for the reason that it tends to support a charge of child-stealing, or a violation of the Mann Act (U. S. Comp. St. §§ 8812–8819). As to the latter, we take judicial notice of the fact that Calexico is within the limits of the state of California. The matter relating to child-stealing was brought out by the defendant in his own testimony. He stated that he had been brought back on a charge of child-stealing, and that afterward the charge of rape was lodged against him. We are not concerned with the charge on which defendant was arrested. In the information before us he is charged with the crime of rape, of which he was convicted. The prosecution made no reference to any other crime, but confined its testimony to occurrences at the hotel in Calexico after the child arrived there, simply for the avowed purpose of corroboration of the principal charge. Defendant cannot predicate error upon the admission of his own testimony.

We have carefully examined the entire record, and find no error therein.

Judgment affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

(48 Cal. App. 626)

PLEASANTS v. HANSON et al. (Civ. 2139.)

(District Court of Appeal, Third District, California. July 24, 1920.)

1. Deeds ⟸196(3)—No presumption that gift from parent to child is void.

There is no presumption that a deed by a parent conveying property to a child is void, and the burden is on one attacking such deed to prove fraud and undue influence.

2. Deeds ⟸196(3)—Prima facie evidence of fraud or undue influence requires grantee to overcome it.

Where a prima facie case has been made, showing that a deed was obtained by fraud or undue influence, it rests with the grantee to produce sufficient evidence to so weaken or destroy the effect of that presented by plaintiff that the latter no longer establishes a prima facie case.

3. Deeds ⟸72(7)—Gift of property to one of several children without reason closely scrutinized.

A deed from a parent to one of several children, made without valuable consideration, will be closely scrutinized by courts of equity, especially where thereby one child receives a large part of the parent's estate, since the relation of parent and child, though not strictly fiduciary, is naturally one of confidence and trust.

4. Deeds ⟸211(4)—Evidence held to support finding of fraud and undue influence.

Evidence tending to show that defendant, who was one of five children, and who alone of the five had not been contributing to his mother's support, obtained a deed of property constituting the greater part of her estate by falsely representing that he had no property, and that his wife, who had property, would desert him if the conveyance was not made, and that at the time of conveyance the mother was infirm with age and disease, though not mentally incompetent, *held* to sustain the court's finding that the deed was obtained by fraud and undue influence.

5. Deeds ⟸211(4)—Fraud and undue influence may be proved by circumstantial evidence.

Fraud and undue influence sufficient to invalidate a deed of gift may be established by circumstantial as well as direct evidence.

6. Appeal and error ⟸1011(1) — Trial court must determine weight of conflicting evidence.

Where plaintiff's evidence was sufficient to sustain a finding of fraud and undue influence, but the defendant's testimony gave an entirely

different version of the transaction, it was for the trial court to determine the weight of the testimony, and finally to say whether defendant succeeded in overcoming the prima facie case established by plaintiff.

7. Evidence ⟸220(2)—Failure to deny accusation of fraud admissible as admission.

Evidence of a conversation between grantee and grantor, since deceased, in which the grantor charged grantee with false representations, which he did not deny, is admissible as an admission by grantee against his interests.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by Mary Pleasants, as administratrix with the will annexed of the estate of Mary J. Hanson, deceased, against Isaac J. Hanson and others. Judgment for plaintiff, and defendants Isaac J. Hanson and wife appeal. Affirmed.

Grant & Bailey, of Woodland, for appellants.

Hugh K. McKevitt, of San Francisco, and E. E. Gaddis, of Woodland, for respondent.

HART, J. Action to have decreed null and void and to set aside a certain deed of conveyance on the grounds that the same was procured from the gantor by the grantee through imposition upon the former of misrepresentation and undue influence. Plaintiff was awarded judgment, from which the defendants prosecute this appeal.

The second amended complaint alleges and the court finds: That plaintiff's intestate, who died on the 5th day of December, 1915, was, on the 5th day of August, 1915, and for many years prior thereto, the owner in fee simple and in the actual and peaceable possession of a certain lot of land (the real property in controversy here), situated in the town of Winters, Yolo county, of the reasonable value of $2,000, and also was the owner and in like possession of another lot of land in said town, of the value of $600; that the total value of all the property, real and personal, owned by her on said day was $2,600; that said Mary J. Hanson was, on the day mentioned, the mother of five living adult children, exclusive of the said Isaac J. Hanson, and that all of said five children were for many years immediately prior to said day in constant and confidential association with said deceased, and that said five children had for many years prior to her death assisted her financially and in other ways, "and said Isaac J. Hanson had done nothing in any way toward assisting her for more than 28 years immediately prior to her death"; that said Mary J. Hanson on the day aforesaid, and for some time prior thereto and thereafter, was infirm physically, being at said time suffering from ailments of the limbs and severe attacks of heart trouble, and then more than 75 years of age, and required to be confined to her bed for long periods of time immediately prior to the day last mentioned on account of said years and illness, and that, by reason of her age and the ailments referred to, the deceased, on the said 5th day of August, 1915, was incapacitated from doing any business or entering into any contracts whatever; that the said Isaac J. Hanson, knowing his said mother's incapacity, infirmity, and disability, and for the purpose of defrauding her, procured her, by certain false and fraudulent representations, to execute a deed whereby she conveyed to him the tract of land in question; that the defendant Lillian Hanson, wife of said Isaac J. Hanson, was at the time mentioned herself the owner of real estate of the value of $100,000, standing in her own name, and that said Isaac J. Hanson falsely represented to his mother that, unless she conveyed to him the lot of land in question, his wife, the said Lillian Hanson, would desert him and turn him out into the world penniless, as he was without money or property of any character in his own right; that said Isaac J. Hanson represented to his mother that he could not return to the defendant, Lillian Hanson, unless his said mother executed said instrument of conveyance and that his said wife, Lillian Hanson, had sent him to his mother, Mary J. Hanson, to demand that she (said Mary J. Hanson) execute said conveyance; that, notwithstanding the representations so made by said Isaac J. Hanson, the said Mary J. Hanson still refused to sign or execute the instrument conveying the land in dispute to said Isaac J. Hanson, and that the latter thereupon became "greatly excited and red in the face and shook said instrument at Mary J. Hanson and cried, 'Oh, Ma, you have to sign this paper or I shall be a pauper;'" that said Mary J. Hanson, being weak in body and mind and by reason of the maternal love she bore said defendant, Isaac J. Hanson, and fearing that he would be deserted by his said wife, Lillian Hanson, if she (Mary J. Hanson) refused to sign said instrument, and "being alone at said time, and having no separate or independent advice, and believing all and each of said representations to be true, and by reason of said representations and wholly and only on account thereof, executed said instrument in writing and acknowledged the execution thereof and delivered the same to the defendant Isaac J. Hanson"; that each and all of said representations were false, and defendant Isaac J. Hanson knew each and all of said representations to be false when he made them to said Mary J. Hanson, and that he made said representations for the purpose of influencing said Mary J. Hanson to sign said instrument; that there was not then, and there never was, any consideration given for said instrument; that defendant Isaac J. Hanson is, and was at said time, a scheming and calculating business man, and had property of the value of more than $50,-

000; that said Mary J. Hanson at all times herein mentioned implicitly trusted said defendant Isaac J. Hanson, and reposed absolute confidence as to all matters in said defendant, Isaac J. Hanson, he being her oldest living child, and that her confidence was such, and her belief in said Isaac J. Hanson was so strong and implicit, that she would have executed and signed any papers presented to her by him for her signature; and that the said deed, referred to in the complaint as having been signed by said Mary J. Hanson for said Isaac J. Hanson, was in fact signed for him by her by and because of the confidence she had in him as hereinbefore set forth.

The complaint contains a second count or cause of action, setting forth the fact of the physical infirmities of Mary J. Hanson and the facts respecting the alleged misrepresentations made by Isaac J. Hanson to the deceased, as alleged and set forth in the first count, and upon these facts bases the allegation that Mary J. Hanson was induced to execute and deliver to said Isaac J. Hanson the deed in question through undue influence, and the court also found accordingly.

The most important question submitted here for decision is whether the evidence supports the findings of the court, to which we reply, in limine, that tested by the principles of law which govern in a case of this character, the evidence appears to be sufficient to have justified the decision. At any rate, as we must view the evidence, it amply supports the findings.

[1, 2] While it is true that there is no presumption that a deed by a parent conveying property to a child is invalid or void, and that, when such a deed is attacked on the ground of fraud or undue influence, the burden is cast upon the parent to prove such fraud or undue influence, it is also true that when a prima facie case of fraud or undue influence in the procurement of the conveyance is made by the parent, it then rests with the donee (defendant) to produce sufficient evidence to so weaken or destroy the effect of the evidence presented by the plaintiff as that the latter's evidence cannot longer stand as establishing a prima facie case either of fraud or undue influence or both. He (the defendant) may do this by showing in a proper way that the evidence of the plaintiff tending to show fraud or undue influence is not credible or for sufficient reasons not to be relied upon.

[3] But in cases of this class—that is, where property is obtained without a valuable consideration by a child from its parent—intrinsic circumstances may exist which call for the strictest scrutiny of such transactions. This observation has emphatic application to those cases where one child, to the exclusion of other children of the parent, receives from the latter, without a valuable consideration, a very large part of the patrimony to which all the children would in equal shares succeed under the law of descent or succession in case of intestacy. This rule follows from the fact that the relation existing between parent and child, although strictly not fiduciary, is naturally one of confidence and trust, and since, therefore, that would be upon its face an unnatural transaction, which would result in one of a number of children receiving from the parent as a gift the larger portion of the latter's estate, thus excluding the other children from the enjoyment of benefits growing out of the parent's estate to which naturally they would be entitled, it is not a harsh or unreasonable rule which requires the courts, on an issue as to whether the favored child had obtained the gift through the free and voluntary act of the parent or through fraud or undue influence, to scan or examine the transaction scrutinizingly or require the defendant, where fraud or undue influence is prima facie established as against the donee in the transaction, to make very satisfactory proof that the showing on the part of the plaintiff is wholly without foundation for its support.

The instant case, in the facts as indicated by the complaint and the court's findings, and, as we shall later see, as shown, by the evidence, finds almost a complete counterpart in the case of Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289. The following language taken from the opinion in that case (7 Cal. App. 20, 21, 93 Pac. 292) has peculiarly cogent application to the present case:

"But the relation of parent and child, where business transactions are carried on between them, is the source of the very highest considerations of confidence and trust. Confidence in such a case originates in and proceeds from natural laws, and, generally speaking, is innate and an essential part of the nature of both, for in whom could a parent repose a greater degree of confidence than in him to whom has been directly transmitted his own blood, and over whom he has exercised parental dominion and discipline from infancy to matured manhood. So, when a son, dealing with his parent with regard to the latter's property, gains an advantage or obtains title to such property without adequate or any consideration, the transaction should, upon principles of equity and fair dealing, be scanned with the strictest scrutiny. And, a fortiori, should such transaction be examined circumspectly when the parent is, as here shown to be, aged and mentally infirm, even though not altogether incompetent, and where there are other children, for the exclusion of whom from the parent's estate no reasonable account is given or apparent. The books are full of cases illustrating the application of the principle as thus stated."

In Comstock v. Comstock, 57 Barb. (N. Y.) 453, a case in which an aged parent conveyed property to her son and the deed set aside, the court said:

"It is a well-settled rule of equity jurisprudence, that all gifts, contracts, or benefits, from

a principal to one occupying a fiduciary or confidential relation to him, are constructively fraudulent and void. The court, in such cases, acts upon the principle 'that if confidence is reposed, it must be faithfully acted upon; if influence is acquired, it must be kept free from the taint of selfish interest, and cunning and overreaching bargains.' 'In this class of cases, there is often found some intermixture of deceit, imposition or overreaching advantage, or other mark of positive or direct fraud. But the principle upon which courts of equity act in regard thereto, stands independent of any such ingredient, upon a motive of general public policy. Among the relations subject to the foregoing rule are those of parent and child, attorney and client, and principal and agent.' "

See, also, Robins v. Hope, 57 Cal. 493, 497; Bacon v. Soule, 19 Cal. App. 428, 434, 126 Pac. 384; Cox v. Schneer, 172 Cal. 371, 378, 156 Pac. 509; 2 Jones on Evidence (Ed. of 1913) § 190.

[4] The evidence supporting the allegations of the complaint may be briefly summarized. It may first be stated that this evidence comes mainly from members of the family of deceased. The deceased, at the time of her death in the month of December, 1915, was of the age of 76 years, and the deed in question was executed and delivered by her to the defendant Isaac J. Hanson, on the 6th day of August, 1915, or approximately four months prior to the date of the passing of deceased. For a long period of time prior and down to the date of her death, deceased had been and was a sufferer from a serious heart affection, which, with other physical ailments which were of themselves of a less serious nature, often confined her to her bed for certain periods of time of varying duration. The deceased was a woman naturally of strong intellectuality, and had, in her time, been a devout lover of good book reading or literature of the higher order. The effect, however, of the long siege of physical ailments and like disability was to impair in no small or insignificant degree the natural strength of her mentality, and thus to render her power of self-will much less marked and positive than it had been when, in her earlier years, she was in the enjoyment of excellent physical health. In other words, she had, from her long, uninterrupted period of physical illness, grown noticeably feeble, not only physically, but also mentally, and, while it is not here claimed that she was wholly incompetent to transact ordinary matters of business with some degree of intelligence and judgment, it nevertheless appears to be reasonably inferable from the evidence that her condition, mentally, at and for some time immediately preceding the time at which the transaction from which this controversy arises, was such, by reason of her long years of physical suffering and her venerable years, that she could the more easily or the more readily than when she was in the enjoyment of her normal physical health be influenced by those in whom naturally or for other reasons she reposed confidence and trust.

The evidence further shows, and as to this there is no dispute, that, shortly after the disastrous and never-to-be forgotten earthquake and fire in the city of San Francisco in April, 1906, the deceased purchased the property in dispute and another lot in the town of Winters, Yolo county; that there were residence structures thereon, either erected by herself or those preceding her in ownership of the lots; and that, though she realized from both pieces of said properties at times an income in the way of rents, the same were scarcely sufficient to maintain her and that, for a period of 10 years immediately preceding her demise, she resided, during alternate periods, with her three married daughters, Mrs. Pleasants and Mrs. Willis, of Winters, and Mrs. Olds, of Piedmont, Alameda county. It further appears that these daughters thus took care of their mother, and received and asked for no compensation as in return for the performance of that service.

At the time of the transaction upon which this action is founded, Mrs. Mary J. Hanson was a widow, her husband having died in the year 1890, and she had five living children, to wit, the defendant Isaac J. Hanson, Edwin J. Hanson, and the three daughters above named. Isaac J. Hanson was a married man, and had lived in Brockton and Boston, in the state of Massachusetts, for something like 28 years before the date of the execution and delivery of the deed in controversy. During that period of time Isaac J. Hanson contributed nothing to the support of his mother, except that, upon an occasion when he was on a visit to California, he bought her a pair of shoes, for which he paid $10; and here we may well interpose that, while Isaac testified in chief that he had from time to time remitted small amounts to his mother from his Eastern home, he admitted, on cross-examination, that the sums so sent to his mother were in payment by installments of a loan of $100 with which his mother had previously accommodated him.

The evidence without controversy shows that the relations existing between the deceased and her three daughters and her son Edwin J. Hanson were always and mutually of the most affectionate character—that is, that she uniformly entertained for them and they for her that reciprocal love and fondness which may naturally be assumed to exist as a general rule between parent and child. Edwin J. Hanson testified that he worked in San Francisco for some 5 or 6 years and down to the time that he entered college; that during a part of that period of time he was engaged in the milk business; that during said time he sent and gave to his mother all his earnings, to be used by her for her

support; and that he continued to help his mother until the time he started to college.

As to the circumstances under which the deed in question was made by the deceased, it may be stated generally that there is testimony supporting the allegations of the complaint and the findings that Isaac J. Hanson represented to his mother that his (Isaac's) wife was wealthy in her own right; that he himself was the possessor of no means; that his wife was persistently insistent that Isaac should obtain from his mother a conveyance of the particular piece of property in dispute; that his wife had said to him that, unless he did obtain a deed to said property, she (the wife) would desert him and send him out into the world penniless; that the deceased, moved by these representations and the incessant importunities of Isaac that she convey to him said property, and thus save him from becoming "a pauper," finally yielded thereto against her own convictions, and so consented to and did execute and deliver to Isaac the conveyance.

Edwin J. Hanson testified that Isaac, when on a visit to California, either in the year 1914 or 1915, on one occasion, in the city of San Francisco, stated to him (Edwin) that he (Isaac) and his wife were jointly worth $100,000—that is, that each was worth the sum of $50,000. Mrs. Pleasants testified that Isaac and his wife, having gone to the state of Washington in the year 1914 to attend to some property matters they had in that state, passed through California on their way to their Eastern home; that they went directly to Winters, and inquired about the deceased and as to where she was then living. Mrs. Pleasants replied that deceased was then in Piedmont, stopping with Howard Willis during the absence from home of the latter's parents, to which Isaac interrogatively retorted, "Oh, she's alone, is she?" Mrs. Pleasants answered affirmatively, and shortly thereafter Isaac and his wife left Winters and went to Piedmont; that it was upon this visit to his mother (July, 1915) that Isaac succeeded in prevailing upon his mother to make the conveyance to him of the property in controversy.

Harvey Olds, a grandson of deceased by her daughter of that surname, testified that, on the evening of the departure of Isaac and his wife for their home in the East, a farewell gathering of the family was had at the family home of the Oldses; that he (the witness), during the evening, had occasion to go into the kitchen, where the deceased and Isaac were together and alone and engaged in conversation; that he overheard his grandmother, "in excited tones," say to Isaac, "Why did you make me believe that Lillian would leave you?" And he said, "Oh, what's the difference; don't worry;" and then she said, "I will worry; you had no right to tell me that Lillian would leave you unless this property was deeded over to you;" and he said, "Oh, forget it, Ma; it's all right; don't say anything about it; you will come out all right"—or something like that.

Thus there has been presented, in synoptical fashion, sufficient of the evidence introduced in support of the charge that the conveyance under attack was obtained by Isaac by the exercise of undue influence upon his mother to show that this court cannot justly hold, as a matter of law, that the findings upon which the judgment rests are not so fortified evidentially as to render them entirely immune from successful attack.

[5] It is true that there is no direct testimony showing coercion or the exercise of undue influence by Isaac in the procurement of the deed. But there can be no successful impeachment of the legal proposition that in a case of this character, no less than in any other case, the ultimate fact may be established by circumstantial evidence. Indeed, in this case, in considering the evidence with a view of determining its logical effect, the court was authorized to, and doubtless did, take into account the general atmosphere, so to speak, or, in other words, the general surroundings, of the controversy, as they were opened up by the proofs, and as to this consideration these facts were singularly significant: That the deceased and her children, who were with and near her nearly all their lives, were always on excellent terms, and that said children at all times manifested and practiced in their treatment of their mother the love and affection which alone spring from filial duty, and that the deceased in full measure reciprocated that love and affection; that said children, for years, contributed to her support, and otherwise gave her that care and attention in the helplessness of her venerable years and physical disability which it is the natural duty of all children to bestow upon their parents similarly circumstanced; that Isaac had been away from her for many years, had not during these years companionized with her, had in a sense or to an extent thus become estranged from her, although, quite naturally, she still bore for him a mother's love, and that, unlike his brother and sisters, he had contributed nothing towards her support, maintenance and care; that, finally, and as a most rational conclusion from all those facts, no sane or sound reason existed, or at least, none such was shown, why, to the exclusion of her other children, she should have given the bulk of her estate, or by far the larger portion thereof, to Isaac.

It is to be conceded that the evidence, as it appears in the record, does not appear to show as clearly or satisfactorily as such a fact should be shown, where it is relied upon to vitiate a deed of conveyance or a will, that the deceased, at the time of the making of the deed in question, was mentally incompetent to transact business; but the evidence, as we have shown, is undisputed that she had

been for a long time prior to that transaction in poor physical health, being at times required to remain in her bed, and upon the whole evidence it was for the trial court to determine whether or not her mental condition had been so affected as the result of her physical sufferings as to have rendered her more tractable, and therefore more susceptible to external or extrinsic pressure or influences, than she would have been under normal circumstances or conditions, and so, under the force of persistent importunity by one for whom naturally she entertained a strong sentiment of affection and love, and in whom consequently she reposed confidence, would be likely to perform or do some act which, if left wholly to her own volition with reference thereto, she would not have done or performed. And we doubt not that the situation as developed by the evidence was such as to have warranted the court in finding that, in her weakened physical condition, the deceased would the more readily believe the representation made by Isaac that his wife would desert and leave him penniless, if he did not succeed in obtaining the conveyance in question, and that, so believing and actuated by a mother's love, she would the more readily accede to his demand for the conveyance. The conclusion would naturally follow that the procurement of the deed by Isaac was the result of the prosecution by him of undue pressure upon the donor, which, of course, means that undue influence was exercised by Isaac upon his mother to induce her to give him the property.

[6] The defendants, it is true, gave an entirely different version of the transaction from that presented by the witnesses for the plaintiff. But it was for the trial court to determine the weight of all the testimony, pro and con, received into the record, and finally to say whether the defendants succeeded in overcoming or repelling what clearly appears to be a good prima facie case of undue influence made by the plaintiff.

The appellants have cited a number of cases, some from this and some from other jurisdictions, which they vigorously contend fit the facts of this case as they view them, and so, they insist, established the legal invalidity of the findings and the judgment. Among the cases so cited is that of Boardman v. Lorentzen, 155 Wis. 566, 145 N. W. 750, 52 L. R. A. (N. S.) 476, in the opinion in which the Supreme Court of Wisconsin said:

"There must be shown a subject unquestionably susceptible to undue influence, either as the result of old age, mental weakness, or both; also some clear evidence of opportunity, and a disposition on the part of the beneficiary to exercise such influence, in order to raise the presumption of such exercise, and call upon the defendant to so far weaken it, at least, as to destroy efficiency to establish the ultimate fact. It must follow that to warrant such a result as was reached here as to undue influence, the fact of susceptibility to such influence must be left at the end of the trial unquestionably established, and the disposition to exercise such influence established by clear evidence."

That was a case in which the father, aged and infirm mentally and physically, transferred his small estate to his son-in-law in consideration of an agreement on the part of Lorentzen, the donee, and his wife (daughter of the donor), that they would care for and support him during the few remaining years of his life. The children of the donor, other than the married daughter above referred to, had not lived with or in any way cared for the donor for over 25 years, while Mrs. Lorentzen, who was his youngest daughter, remained and lived with him until after her mother's death and down to the day that she was married to Lorentzen. It is plain that that case is, so far as the facts are concerned, wholly different from this. Indeed, it is the reverse of this case, since here the donee was the only child of the five of the deceased who had not been with, or to any extent contributed to the support of, his mother, while the other children had always lived near and contributed to her support and otherwise ministered to her wants.

The California cases named by appellants as supporting their position as to the question whether the evidence in this case is sufficient to sustain the finding of undue influence are In re Calkins, 112 Cal. 296, 302, 44 Pac. 577; In re Kaufman, 117 Cal. 288, 296, 49 Pac. 192, 59 Am. St. Rep. 179; Estate of Donovan, 140 Cal. 390, 396, 73 Pac. 1081; Estate of Gleason, 164 Cal. 756, 762, 130 Pac. 872. An examination of these cases and a comparison of them with the case at bar, however, will at once disclose to the mind that there is a clear distinction between them founded in the facts. It is not regarded necessary to review said cases herein for the purpose of determining the verity of his statement.

[7] The last and only other point made by the appellants is that, over their objection, the court erroneously permitted the witness Harvey Olds to relate the conversation he overheard between the deceased and Isaac J. Hanson, in the kitchen of the Olds home, and to which conversation reference is above made. It is claimed that the ruling was erroneous under the doctrine of the case of Estate of Gleason, 164 Cal. 756, 130 Pac. 872, supra. But this claim is not well founded. In the Gleason Case, the declarations objected to were by the deceased to a third party, and not in the presence of the beneficiaries under her testament. The court therein held, as all the cases hold, that the declarations of a decedent which contravene the provisions or terms of a testament previously made by him are not admissible as evidence of undue influence having been used to induce him to make the will, but that, where the testamentary incapacity of the testator is

an issue and sought to be established, any declarations he may have made, before or subsequent to the testamentary act, tending or reasonably having a tendency to establish that he was of unsound mind at the time he executed the testamentary instrument, are competent and admissible for that purpose. In the case at bar, the conversation objected to was between the deceased and the defendant Isaac J. Hanson himself, after the deed had been executed by the former and by her delivered to Isaac, and therefore said conversation constituted the subject of competent evidence which was admissible upon the theory that the conversation, in so far as Isaac's part therein was concerned, included an admission against his own interest—"admission," in the juridical sense of that term. In fact, the proof of the conversation involved, necessarily, proof of extrajudicial statements concerning the transaction in dispute, which, except where they are mere self-serving declarations of the declarant, are always admissible under the familiar rule of evidence that they are against the interest of the declarant.

As stated, no other points are made. We have in our examination of the record found no legal reason for disturbing the decision below.

Judgment affirmed.

We concur: NICOL, Presiding Judge pro tem.; BURNETT, J.

48 Cal. App. 681

BLACKWELL v. AMERICAN FILM CO., Inc., et al. (Civ. 3470.)

(District Court of Appeal, First District, Division 1, California. July 27, 1920. Hearing Denied by Supreme Court Sept. 23, 1920.)

1. Abatement and revival ⟹68—Action for personal injury does not abate on death of plaintiff after judgment.

An action for personal injuries to plaintiff does not abate on death of plaintiff while a judgment in his favor rendered before his death had not been vacated or set aside.

2. Carriers ⟹320(21)—Where testimony as to colliding automobiles was conflicting, reconciling it is for jury.

In an action against the owners of two automobiles which collided for injuries to a passenger in one, where the evidence was conflicting as to the operation of the two cars at the time of the accident, it was for the jury to pass on and reconcile the conflicting statements in the light of the circumstances surrounding the accident and the opportunity of the witnesses to observe the facts to which they testified.

3. Carriers ⟹306(1)—Where negligence of both automobile operators contributed to a passenger's injuries, each is liable.

Where injuries to a passenger in one of two colliding automobiles were proximately caused by the negligence of the operators of both automobiles, each operator is liable to the passenger for the full damage sustained by him, so that where appellant was negligently driving on the left side of the road it was no defense to his liability that the codefendant, against whom no verdict was rendered, was operating at negligent speed.

4. Trial ⟹205 — Refusal of instruction that burden of proof was on plaintiff held error.

In an action for injuries to an automobile passenger brought against the operators of both colliding automobiles, it was error to refuse a charge requested by one defendant that plaintiff, to recover against that defendant, must establish its negligence by a preponderance of the evidence where there was no other instruction as to the burden of proof against that defendant and there was an instruction as to burden of proof against the other.

5. Appeal and error ⟹1064(1)—Charge that judgment may go against one or both defendants not prejudicial, where verdict for both would be erroneous.

In an action for injuries to an automobile passenger brought against the operators of the two colliding automobiles, where there was no proof that the passenger was contributorily negligent or that it was an inevitable accident, an instruction that plaintiff could recover against one of the defendants and may be against both, though erroneous, was not prejudicial, since a verdict for both defendants would have been contrary to the evidence.

6. Appeal and error ⟹1064(1) — Failure to submit form of verdict for both defendants held not prejudicial.

In an action against two defendants for injuries to an automobile passenger where a verdict in favor of both defendants would have been contrary to the evidence so that it would have to be set aside, it was not prejudicial error for the court to fail to submit a form of verdict in favor of both defendants.

7. Appeal and error ⟹1064(1)—Negligent defendant not prejudiced by inconsistent instructions as to burden of proof against codefendant.

In an action against the operators of two colliding automobiles for injuries to a passenger in one, appealing defendant, who was guilty of negligence proximately causing the injury to plaintiff and therefore liable for such injuries, was not prejudiced by inconsistent instructions as to the burden of proof of the negligence of the codefendant.

8. Appeal and error ⟹1064(1)—Instruction as to testimony of all parties held not prejudicial error.

An instruction that plaintiff was interested in his case and that the employés of both defendants were interested but that such interest did not require disregard of their testimony,

though it should be considered in weighing such testimony, was not prejudicial, since it referred to all parties, but it is unsafe for the court to call attention to the testimony of witnesses.

9. Trial ⊂228(3) — Instruction referring to proximate cause of accident, instead of injury, not error.

In an action for injuries to a passenger in an automobile which collided with another, instructions which referred to the negligence of defendant as the proximate cause of the accident, instead of proximate cause of the injury, to plaintiff, were not erroneous.

10. Appeal and error ⊂1064(1), 1067—Errors as to instructions held not prejudicial.

Where plaintiff was, under the evidence, entitled to recover from one or the other, or from both, of the joint tort-feasors, and the instructions made it clear that the jury should fix the responsibility on one or both, errors by the court in giving instructions and refusing requests did not result in a miscarriage of justice and do not warrant reversal.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Edward Blackwell against the American Film Company, Incorporated, and another, in which Rachael E. Blackwell, as administratrix, was substituted as plaintiff after the death of the original plaintiff subsequent to judgment in his favor. From the judgment against the American Film Company, Incorporated, that defendant appeals. Affirmed.

Thompson & Robertson, of Santa Barbara, and Ford & Bodkin, of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondent.

Duke Stone, of Los Angeles, and W. P. Butcher, of Santa Barbara, for United Stages.

WASTE, P. J. The plaintiff's intestate, her husband, Edward Blackwell, was seriously injured in a head-on collision between an automobile, owned by the American Film Company, with one owned and operated by the defendant United Stages. Both defendants denied any liability in the premises and alleged the negligent operation of the automobile of its codefendant as the proximate cause of the accident. It is not claimed by either that the plaintiff was guilty of contributory negligence, or that the injury was caused by inevitable accident. The jury rendered a verdict in favor of the plaintiff, and against the defendant American Film Company alone, awarding damages in the sum of $13,762. From the judgment entered, that defendant has appealed.

[1] Blackwell has since died, but the action did not abate; the judgment in his favor, rendered before his death, not having been vacated or set aside. Fowden v. Pacific Coast S. S. Co., 149 Cal. 151, 153, 86 Pac. 178. Rachael E. Blackwell, as administratrix of Blackwell's estate, has been substituted as plaintiff in his place.

In seeking a reversal of the judgment, appellant places its reliance upon errors in giving and refusing instructions, and in submitting to the jury three forms of verdict claimed to be misleading and unfair to the film company.

[2] The collision occurred at night on a straight section of the highway, and the evidence demonstrates that each machine was in plain sight of the other for approximately a half mile. There is testimony that the automobile of the defendant film company was on the left-hand side of the road, and that the driver of the stage, his automobile being then on the right-hand side, turned off the paved section of the highway to his right, just before the collision occurred, in order to avoid the crash, and that the film company auto lights "made a straight line toward the stage." There is other evidence which would reverse the respective positions of the automobiles, and also indicate that the stage was being operated at the speed of 40 to 45 miles an hour, while that of the film company was proceeding at a rate of 30 to 35 miles per hour. These were all matters for the consideration of the jury, whose duty it was to pass upon and reconcile the conflicting statements, in the light of the circumstances surrounding the accident and the opportunity of the witnesses to observe the facts concerning which they testified.

[3] The injury suffered by plaintiff was not self-inflicted; it resulted either from the negligence of the defendant, the American Film Company, or from the negligence of the defendant United Stages, or from the negligence of both. All the authorities recognize the right of a plaintiff to recover, under such circumstances, against either, or both of the defendants, whose concurring acts of negligence united in producing the injury. Doeg v. Cook, 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171. If it were established to the satisfaction of the jury that the plaintiff's injuries were caused by the concurring negligence of the appellant film company, and the respondent stage company, the appellant was liable without regard to the negligence of its codefendant. Muller v. Hale, 138 Cal. 163, 168, 71 Pac. 81. When the question arises between two parties, who are jointly charged with negligence, it is only necessary to show that both contributed to the injury, notwithstanding the fact that one may have been wanton and reckless and that the other simply manifested want of ordinary caution. Although the act of each defendant alone might not have caused the injury, there is no good reason why each defendant should not be liable for the damage caused by the different acts of all. Spear v. United Railroads, 16

Cal. App. 637, 659–661, 117 Pac. 956. If the film company was guilty of negligence in the instant case, it has no defense in the fact that the negligence of the stage company may have also contributed to that damage, through the operation of its stage at an excessive rate of speed. Forsythe v. Los Angeles Ry. Co., 149 Cal. 569, 572, 87 Pac. 24.

In the light of these authorities, if the jury believed that the automobile of the appellant was being negligently operated on that portion of the highway reserved to the use of the auto of the stage company, and that such fact contributed to and was a proximate cause of the accident, then the jury was justified in bringing a verdict against the appellant, notwithstanding that the excessive rate of speed of the stage may have been a concurring cause. Appellant is reluctant to concede that the law, as we have stated it, is particularly applicable to the facts in this case, which explains some of the contentions it has made.

[4] The appellant requested the court to instruct the jury:

"That the burden of proving the negligence of defendant American Film Company rests upon plaintiff, and in order for plaintiff to recover against defendant American Film Company it must establish such negligence by a preponderance of the evidence."

The request was refused, and no reason appears, or suggests itself to us for such action by the lower court, for the instruction contained a correct statement of law. All the court did in that regard was to state to the jury that—

"In civil cases * * * a preponderance is all that is required. That is, such evidence as when weighed with that opposed to it has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests."

The jury were thus left uninformed as to where the burden of proof rested, as to appellant's negligence. Later in its charge, in dealing with the other defendant, the United Stages, a common carrier, the court gave a proper instruction as to the burden of proof in considering its negligence. The refused instruction should have been given. It was error, but, as we shall presently show, in our further consideration of the instructions, not prejudicial, to refuse it.

[5] The court instructed the jury:

"In this case the plaintiff is entitled to recover of at least one of these defendants and perhaps both of them. That is a question for you to determine. There is no question of contributory negligence or unavoidable accident involved in this case. One or either of these defendants and perhaps both of them, for you to determine, were guilty of negligence."

Again, in the course of its charge, the court said:

"As I have told you, the plaintiff is entitled to recover against one of these parties, and maybe both."

It was error for the court to thus charge the jury that the plaintiff was entitled to recover; but, as the entire record so clearly establishes the fact that a verdict for both the defendants would have been contrary to the evidence, the error should be regarded as immaterial. Levitzky v. Canning, 33 Cal. 299, 305; Green v. Ophir C. S. & G. M. Co., 45 Cal. 522, 527; In re Spencer, 96 Cal. 448, 454, 31 Pac. 453; City of Santa Ana v. Gildmacher, 133 Cal. 395, 399, 65 Pac. 883.

[6] In this same connection, the court submitted but three forms of verdict to the jury: One for damages against both defendants; the second for damages as against the defendant United Stages, and in favor of the defendant American Film Company; and the third against the defendant American Film Company, and in favor of the United Stages. No other form or forms of verdict appear to have been requested. In fact, as already stated, none other could have been rendered under the evidence. Both appellant and the other defendant, to all intents, acknowledged that plaintiff's intestate was injured in the accident, and each industriously sought to fasten the liability for his injuries upon its codefendant. That appears to have been the theory upon which the case was tried. No prejudicial error resulted from the failure of the court to submit to the jury, with the others, a form of verdict finding in favor of both defendants. Upon this record, such a verdict, if found, would be clearly erroneous. (Cases last cited.)

After fully and correctly instructing the jury as to the reciprocal duties owed plaintiff by each defendant, the court further charged it:

"If you believe from the evidence that the sole and proximate cause of the accident was the negligence of the American Film Company or its servants, then it will be your duty to find a verdict against that company and in favor of the United Stages.

"If, on the other hand, you believe that the sole and proximate cause of the accident was the negligence of the United Stages, then it will be your duty to find a verdict against that company and in favor of the American Film Company.

"And if you find that both were guilty of negligence in any degree which proximately contributed to the accident, you will find against both.

"But if the evidence is equally consistent with the exercise of due care on the part of the defendant American Film Company no recovery can be had against that defendant. *Of course, if the evidence is equally balanced as to either defendant then you will find in favor of that defendant.*"

[7] Appellant contends that the sentence italicized conflicts with another portion of

the charge, wherein the jury was told that as the United Stages was carrying plaintiff's intestate as a passenger for hire, when he was injured, a presumption of negligence arose which threw upon that defendant the burden of showing that the injury was sustained without any negligence on its part. It argues that if the evidence was equally balanced the stage company had not overcome its burden, and the verdict should necessarily have been against it. Assuming such a state of the evidence to exist, the instruction did no violence to the right of the appellant. As one of two joint tort-feasors it was liable to plaintiff for the injuries received, regardless of whether a verdict was returned against its codefendant or not.

[8] The court also instructed the jury:

"Plaintiff, of course, is interested in his case, and the employés of both defendants are interested. You are not on that account, however, solely to disbelieve any of them. You are merely to consider that interest in passing upon their credibility."

Appellant contends that this was error. In our opinion it was not prejudicial error, because it included witnesses on all sides of the case (Pennsylvania Co. v. Versten, 140 Ill. 637, 30 N. E. 540, 15 L. R. A. 798), but there was no occasion for giving the instruction. It is never safe for a trial judge, in instructing a jury, to comment upon or call attention to the testimony of one or more witnesses. In the instant case the court had already instructed the jurors that they might, in weighing the evidence and determining the credibility of the witnesses, consider "their relation to the parties" and "their interest in the case." That was sufficient, and the instruction should have stopped there.

[9] In two places, in its charge, the trial court used the following language: "Negligence is of no consequence unless it is the proximate cause of the *accident*." Appellant complains of the use of the word "accident" instead of the word "injuries," contending that, granting its negligence might have caused or contributed to the accident, the negligence of the other defendant might have been the sole or an aggravating cause of the injuries suffered by the plaintiff's intestate. Appellant attempts to make a distinction without a difference. Furthermore, the charge, in other apt instructions, properly related the negligence of the defendants in this case to the injuries of plaintiff's intestate.

[10] Except in the particulars considered, the charge was a corrrect and fairly adequate statement of the law of the case. The plaintiff's intestate was seriously injured by the collision of the automobiles of the two defendants, without any fault of his own. As bluntly stated by the court to the jury, he was entitled to recover from one or the other, or from both, of the joint tort-feasors. The instructions made it clear that it was for the jury to decide and fix the responsibility on one or both defendants. The errors committed by the court in refusing, and in giving instructions, therefore, did not result in a miscarriage of justice, and are not such as would warrant a reversal. It does not require the invocation of the remedial provision of the Constitution, which is clearly applicable, to so hold. The authorities already cited establish the rule that such errors are immaterial and should be disregarded when, as in the instant case, a verdict finds abundant support in the law and the facts. Levitzky v. Canning, supra; Green v. Ophir C., S. & G. M. Co., supra, and other cases first cited.

The judgment is affirmed.

We concur: RICHARDS, J.; WELCH, Judge pro tem.

48 Cal. App. 640

HUMBOLDT COUNTY v. VAN DUZER et al.

(Civ. 3335.)

(District Court of Appeal, First District, Division 1, California. July 26, 1920. Hearing Denied by Supreme Court Sept. 23, 1920.)

1. Adverse possession ⟸8(1)—Land dedicated to public use not acquired by.

Land dedicated to public use cannot be acquired by adverse possession.

2. Dedication ⟸44—Finding that land conveyed to county was used by public supported by evidence.

In an action by a county to quiet title to land conveyed, evidence *held* sufficient to support a finding that the land conveyed was impressed with a trust for public use, and was accepted and used as a public road and ferry crossing.

3. Dedication ⟸16(1)—Conveyance and use as road constituted dedication.

The public use of a road to a ferry, together with a map of appraisers designating the land as a road, followed by a deed of conveyance to the county, constituted a dedication to public use of the land conveyed, although the deed did not designate the purpose of the conveyance.

4. Navigable waters ⟸44(1)—Law of accretion applied to county property.

Where landowner conveyed a strip of land to county, to be used as a roadway to a ferry on a stream bisecting the land, and the river changed its course, the law of accretion applied to the county's property, as well as to the landowner's.

5. Dedication ⟸63(2)—Intent to abandon by county must be clearly manifest.

To effect an abandonment of an easement for public use of property acquired by grant

to the public authorities, the intention to abandon must be clearly manifest, and mere nonuser of an easement acquired by grant does not amount to an abandonment.

6. Highways ⊂⊃79(1)—No abandonment of roadway to ferry shown.

Action of board of supervisors of county, releasing one from operating ferry and later granting a license to another, the latter operating the ferry in whole or in part between new lands, and using different approaches to the landing by reason of the changeableness of the river, was no evidence of an abandonment of a roadway conveyed to the county by a landowner to the original landings.

7. Estoppel ⊂⊃62(8)—County not estopped from asserting title to land.

A county was not estopped from asserting title to a roadway to a ferry crossing by reason of its permitting the grantor to clear and cultivate the land for years, where the landowner profited by the use of the land in excess of the expenditure made in clearing it; landowner not paying any taxes upon the same.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Action by Humboldt County against Isaac Van Duzer and others. Judgment for plaintiff, and defendants appeal. Affirmed.

G. W. Hunter, of Eureka, for appellants.
A. W. Hill and H. C. Nelson, both of Eureka, for respondent.

KOFORD, Judge pro tem. This is an appeal from a judgment in favor of plaintiff, quieting title against defendants to a strip of land in Humboldt county, acquired by the county in the year 1880, for the purpose of a public road and ferry crossing over Eel river.

The land in question was deeded in 1880 to the county by defendant Van Duzer's predecessor, George H. Singley, for a money consideration, by an ordinary grant deed describing the land conveyed by metes and bounds, conveying the fee, and not specifying that the land was conveyed for road and ferry purposes. The deed was made in pursuance of the report of a board of appraisers appointed by the board of supervisors in 1879 for the purpose of selecting and appraising land to be acquired for ferry purposes at the place on the river called Singley's ferry. The report of the appraisers contained a map or plat showing the location of the land to be acquired, connecting roads, river bank, and other pertinent objects near by. The land itself, as shown on the map, was designated "New Road." It was filed and recorded in 1880.

Singley had been licensed by the board of supervisors to operate Singley's Ferry November 5, 1879. In December, 1880, Singley petitioned the supervisors to be relieved from the obligation of operating the ferry, specifying in his petition the difficulties of operation, occasioned by the erratic behavior of the river in shifting its course, throwing up sand bars and the like. This petition was granted, and no license to operate a ferry at this place existed until a year later. On December 20, 1881, a license was granted to Martin McDonald to operate a ferry at Singley's Ferry. Defendant Van Duzer, who had during the same year acquired the lands of Singley, signed and filed an instrument consenting to the use of his lands and dedicating the same for the purposes of landings for the ferry to be operated by McDonald.

It appears that McDonald, in whole or in part, used McDonald lane as an approach to the ferry landing, instead of the Singley road, the land here involved. McDonald lane was also involved in this action, but as to it the defendants filed a disclaimer. The Singley road fell into disuse as a result of the ferry changing its landing places from time to time. The defendant Van Duzer eventually took possession of the arable portion of the land which had been deeded to the county by Singley, and he and his tenants have been cultivating and farming it for upwards of 30 years.

[1] Appellants claim title to a part of the land by adverse possession. It is recognized that land dedicated to public use cannot be acquired by adverse possession, but it is claimed that this land was never impressed with a trust for public use. It is pointed out that the deed itself did not dedicate the land for road or ferry purposes, and it is contended that the finding of the court that the land had been accepted and used as a public road and ferry crossing is not supported by the evidence.

The findings, following the testimony, show that the river has undergone many changes, annually moving and shifting about, throwing up sand bars, so that there was a constant struggle between the ferrymen and the river. The ferry had to move up or down the river for deep water and suitable landings, as the river in its whim changed deep water to sand bar, or river bank, and back again. The testimony of witnesses who had seen the ferry operated in 1880 was heard at the trial. The face of the ground had changed so much in 30 years that these witnesses were not able with great exactness to designate the precise boundaries or location of the river approach used by the public in 1879, 1880, and thereabouts. Appellants claim that the testimony shows the land so used was at one side of and not within the boundaries of the land in suit. The surveys and testimony are both conflicting on this point.

However, before the trial commenced, the boundaries of the disputed land had been marked out by rows of white flags by a surveyor and several witnesses testified that these flags marked the river approach used by the public in 1880 and other dates specified.

[2, 3] The findings of the trial court upon this conflicting evidence are sufficiently supported by the testimony. The public use of the road, together with the map of the appraisers, referred to, which designated the land "New Road," followed by the deed of conveyance to the county, constituted a dedication to public use of the land conveyed.

[4] Whether the ferry be a highway or not, the ferry crossing was a public use, and it is no great consequence to this case whether the land was dedicated to one public use or another. We see no application in the argument of appellant that a ferry is not a highway. The land, originally bisected by the river, is now all dry land, owing to the fact that the river has moved south. In this process of moving, whatever land involved was used strictly for ferry purposes, as distinguished from a public road to and from the ferry landings, became a part of the road proper. The law of accretion would apply to the county's property, as well as to the defendants.

Appellants contend that, if it is held that this land was once dedicated or impressed with a public use, nevertheless this public use was abandoned by the county; that after abandonment of the public use the land was thereafter held by the county in its proprietary capacity, as distinguished from its governmental capacity, and that thereupon the land, no longer being held for a public use, was subject to acquisition by adverse possession. It is claimed that the release of Singley as ferryman, the changes in the river course, and the location of the ferry, the fact that there is now no water touching the land upon which a ferry could be floated, the establishment of other approaches and the recent construction of a concrete bridge across the river, constitutes such an abandonment of the public use of the land.

It is not to be doubted that land held for a public use cannot be acquired by adverse possession. This is established in this state by a long line of authorities. These authorities are cited and reviewed in People v. Kerber, 152 Cal. 735, 93 Pac. 878, and Patton v. Los Angeles, 169 Cal. 531, 147 Pac. 141. But it has been held that property held by a city or county in its proprietary capacity is subject to acquisition by adverse possession. Ames v. San Diego, 101 Cal. 390, 35 Pac. 1005. Furthermore, it has been intimated that property held for a public use may be converted into proprietary property by an abandonment of the public use by the public authorities, and thereafter become the subject of acquisition by adverse possession. People v. Kerber, supra; Patton v. Los Angeles, supra.

We have been referred to no case where a street or highway, once dedicated by formal act or conveyance, has been held to have been abandoned by implication. We do not regard People v. Goodin, 136 Cal. 455, 69 Pac. 85, as so holding. The case of Myers v. Daubenbiss, 84 Cal. 1, 23 Pac. 1027, deals with Pol. Code, § 2620, before it was repealed in 1883. In McRose v. Bottyer, 81 Cal. 122, 22 Pac. 393, Pol. Code, § 2631, and Civ. Code, § 806, and section 811, subd. 4, were construed together, to the effect that a servitude acquired by user was extinguished by nonuser, but this, by express limitation of section 811, Civ. Code, has no application to a grant as in the case at bar.

On the contrary, many authorities hold that property, once dedicated, set apart, or held for a public use, cannot be acquired by a private owner by adverse possession, even while its public use may be discontinued. Archer v. Salinas City, 93 Cal. 51, 28 Pac. 839, 16 L. R. A. 145; County of Yolo v. Barney, 79 Cal. 375, 21 Pac. 833, 12 Am. St. Rep. 152; San Francisco v. Sharp, 125 Cal. 534, 58 Pac. 173; People v. Myring, 144 Cal. 351, 77 Pac. 975; Wheeler v. City of Oakland, 35 Cal. App. 671, 170 Pac. 864; Visalia v. Jacob, 65 Cal. 435, 4 Pac. 433, 52 Am. Rep. 303; London, etc., Bank v. Oakland (C. C.) 86 Fed. 30; Id., 90 Fed. 701, 33 C. C. A. 237; San Leandro v. Le Breton, 72 Cal. 171, 13 Pac. 405.

[5] To effect an abandonment of an easement or public use of property acquired by grant to the public authorities, the intention to abandon must be clearly manifest. Mere nonuser of an easement acquired by grant does not amount to an abandonment. Hayford v. Spokesfield, 100 Mass. 491; Smith v. Worn, 93 Cal. 206, 28 Pac. 944; Gardner v. San Gabriel Valley Bank, 7 Cal. App. 106, 93 Pac. 900.

If mere nonuser shall be held to be an abandonment of a public highway or street, every encroachment or nuisance on the public highway would effect an abandonment to the extent of the encroachment. The negligence of the public authorities in not removing the encroachment or obstruction would then be a legal substitute for the formal action or proceeding of abandonment provided by law. In that case the possessor, by thus separating the public use from the fee, could, by a system of "divide and destroy," acquire title by adverse possession in face of the long line of well-established authority to the contrary. Some of these decisions involve facts showing a period of nonuser for as long a period as in the case at bar.

[6] In this case there was no formal abandonment, and no action of the public authorities clearly showing an intention to abandon the public highway. The action of the board of supervisors in releasing Singley from the obligation of operating a ferry at Singley's Ferry, and a year later granting a license to McDonald to operate a ferry at Singley's Ferry, was a change of ferrymen only. This action did not affect the highway. That McDonald operated the ferry in whole or in part between new lands, and used different approaches to the landings, and that other roads and approaches were used to ferry and ford across the river, does not affect the land in question, by showing any action on the part of the public authorities indicating an intention to abandon the road. These subsequent events are merely evidence of the subsequent nonuser of the land in question by the public as a highway.

In view of the foregoing considerations the findings of the trial court against abandonment of the public use of the land must be sustained. The findings are very full on this point, and from these it is further made to appear that the land in question may again be found necessary as an approach to the river crossing; that, although the river channel is at present far removed from its old channel, it has recently shown indications of returning to the old river channel, which would leave the present concrete bridge entirely on one side of the stream. This fact, of course, by itself does not indicate the intention of the public authorities 30 years ago, but it emphasizes the peculiar feature of this case, the changeableness of the river, and indicates that the nonuser, though long in point of time, was temporary in character. In such case abandonment is not inferred. Lake View v. Le Bahn, 120 Ill. 92, 9 N. E. 269; McAlpine v. Chicago, etc., Ry., 68 Kan. 207, 75 Pac. 73, 64 L. R. A. 85, 1 Ann. Cas. 452.

[7] Appellants finally claim that the plaintiff is estopped from asserting title by allowing them to clear and cultivate the land. But the trial court found against this contention, holding that the appellants had profited by the use of the land in excess of the expenditure made in clearing it. Likewise the proof did not show the payment of taxes on the land by appellants; the tax bill description excepting lands sold, which under the facts excluded the land in question. Moreover, these things do not raise an estoppel. San Leandro v. Le Breton, supra; Sacramento v. Clunie, 120 Cal. 29, 52 Pac. 44.

The judgment appealed from is therefore affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

48 Cal. App. 650

SCHALK CHEMICAL CO. v. R. W. PRIDHAM CO. (Civ. 3455.)

(District Court of Appeal, First District, Division 2, California. July 26, 1920.)

1. Contracts ⊂=10(4) — Buyer's right to increase amount of order was a unilateral provision.

Where a certain number of cartons was ordered at prices quoted, with the statement that "we have the privilege of increasing the amount of the original order at any time during the period the original contract is in effect," the provision as to the privilege of increasing the amount of the original order was unilateral, and the purchaser could not recover damages by reason of the seller's refusal to deliver more than the original number ordered.

2. Sales ⊂=89—Agreement to extend contract without consideration.

A letter from a manufacturer of cartons, which had been selling the same to plaintiff, "We herewith agree to extend your contract for W. P. cartons to August 31, 1917, at the prices now in effect," was without consideration, and was unenforceable against the manufacturer after notice of withdrawal, although deliveries were made upon orders received after the expiration of the original contract.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by the Schalk Chemical Company against the R. W. Pridham Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Frank J. Thomas and A. G. Ritter, both of Los Angeles, for appellant.

Donald Barker, of Los Angeles (Wm. H. Neblett, of Los Angeles, of counsel), for respondent.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment against it in an action for damages for failure to deliver to plaintiff a quantity of pasteboard cartons in accordance with an alleged contract between the parties. The plaintiff is a corporation engaged in the manufacture and sale of a certain washing powder packed in pasteboard cartons of different sizes. The defendant is a corporation engaged in the business of manufacturing and selling such cartons.

There is only one question presented by the appeal, and that is as to the existence of a binding contract between the parties for the delivery of the cartons ordered by plaintiff which the defendant refused to deliver. The alleged contract is evidenced by correspondence between the parties which it is necessary for us to consider in some detail. On December 3, 1914, the plaintiff wrote to the defendant requesting quotation of prices on cartons. The material part of the letter is as follows:

"We would be pleased to have you submit your bid on 2,010,000 Hydro Pura cartons, basing your estimates on the following specifications and requirements."

Then follow detailed specifications as to size, quality, quantity, etc., of three different types of cartons, and also dates of delivery of each different style. To this letter defendant replied on December 23, 1914, as follows:

"We herewith beg to quote you on the following cartons as per specifications attached. These cartons to conform with your request for bids under date of December 3d, and to be as per your samples in every respect.

10M Hydro-Pura display cartons.....	$37.50	per M.
900M large size Hydro-Pura cartons.....	3.70	" "
600M small size Hydro-Pura cartons....	1.85	" "
500M sample cartons.....	1.00	" "

"Delivery on above as per your letter of December 3d."

Plaintiff thereupon, on January 6, 1915, sent to defendant the following letter:

"We are in receipt of yours of December 23d, in which you quote us prices on Hydro Pura cartons according to number and specifications named in your letter of December 3d."

Then follow quotation of prices, amounts, etc., in accordance with letter of December 3d. The letter then continues:

"You can enter our order for the above amount of cartons at the prices stated, to be delivered according to our requirements between January 1, 1915, and July 1, 1916. These cartons must be satisfactory to us at all times in regard to printing, color, and quality, and we have the privilege of increasing the amount of the original order at any time during the period the original contract is in effect."

On January 12, 1915, defendant wrote to plaintiff, acknowledging its order, as follows:

"We are in receipt of your order of January 6th for:

10,000 Hydro-Pura display cartons at.....	$37.50 M
900,000 large Hydro-Pura cartons at.....	3.70 M
600,000 small Hydro-Pura cartons at.....	1.85 M
500,000 Hydro-Pura sample cartons at.....	1.00 M

"These cartons to be taken out between January 1, 1915, and July 1, 1916."

The quantity of cartons contracted to be furnished by the above correspondence was duly delivered, and no question arises over this portion of the transaction. However, on February 3, 1915, defendant wrote to plaintiff a letter which is one of the things upon which plaintiff relies to establish the contract under which recovery is sought here. This letter is as follows:

"We beg to advise that the prices quoted you on December 23, 1914, on Hydro-Pura cartons will apply upon any excess quantity, over the quantity specified, which you may take between January 1, 1915, and July 1, 1916."

[1] The position of the trial court with reference to this last letter was, apparently, that as the record contained no evidence of any agreement on the part of the plaintiff to take any quantity of cartons whatever in excess of the 2,010,000 ordered by its letter of January 6, 1915, this letter of February 3, 1915, was in effect nothing more than a quotation to plaintiff of the same prices at which deliveries were to be made under the contract contained in the letter of December 23, 1914; that this quotation of prices, being an offer without consideration, could be withdrawn at any time before acceptance. Plaintiff and appellant seeks to save this alleged contract from the objection that it is lacking in mutuality by arguing that the intent of the parties appears from the correspondence to be that the defendant was obliged to order all its requirements of cartons from the plaintiff during the period from January 1, 1915, to July 1, 1916. We think a mere reading of the foregoing correspondence demonstrates that the defendant could not have recovered damages from the plaintiff for its failure to order from defendant all of its requirements in cartons in excess of the 2,010,000 specifically ordered in the letter of January 6, 1915. Unless defendant had this right, the contract is a unilateral one, and plaintiff may not recover upon the same. Jenkins v. Anaheim Sugar Co., 247 Fed. 958, 960, 160 C. C. A. 658, L. R. A. 1918E, 293; Bartlett v. Standard Box Co., 16 Cal. App. 671, 674, 117 Pac. 934.

There are numerous cases upon this question which are cited to us by the respondent, and there are many others to be found, but we consider it unnecessary to discuss the matter more fully. Since we are of the opinion that the plaintiff was not bound to purchase from the defendant all its requirements of cartons in excess of the specified quantity ordered during the period mentioned in the letters, it becomes immaterial whether or not the defendant knew, because of previous dealings with the plaintiff, approximately what plaintiff's requirements were each year. Plaintiff being required to purchase nothing under the letter of February 3, 1915, before quoted, the offer contained therein was without consideration. The plaintiff claims that this offer contained in said letter of February 3, 1915, was kept in force and effect until August 31, 1917, by reason of the following letter, written by defendant to plaintiff on April 5, 1916:

"We herewith agree to extend your contract for Washing Powder cartons to August 31, 1917, at the prices now in effect."

This letter in no way removes the objection to the enforcement of the alleged contract. It remained an offer, which, being without consideration, could be withdrawn at any time. The defendant did accept orders for cartons under the extension offer up until July 1, 1916. It is because of the refusal to fill orders after that time at the prices quoted

in the letter of December 23, 1914, that this action is brought. The plaintiff continued to demand the filling of orders at the old prices during the months of September, October, November, and December, 1916, and on February 21, 1917, the defendant wrote to the plaintiff in response to a letter from said plaintiff:

"We have heretofore notified you, orally and otherwise, and we now again notify you, that these prices are withdrawn, particularly because of the disturbed market conditions, and the price hereafter must be fixed as each order is given and accepted."

Thereafter the plaintiff was compelled to order its cartons in the open market at a higher price than it had previously paid for the same, and it is for this excess in price that recovery is sought in the present action.

[2] In our opinion the trial court did not err in its holding that this offer to furnish cartons up until August 31, 1917, at the same prices at which they had been furnished under the contract of December 23, 1914, was without consideration. For this reason it was unenforceable against the defendants after notice of withdrawal.

There are numerous matters urged by appellant in its brief which we consider immaterial. The fact that some deliveries were made upon orders received by the defendant after July 1, 1916, cannot operate to give binding force to this unilateral contract. This proposition scarcely needs the citation of authority, but the case of Cold Blast Trans. Co. v. Kans. City Bolt & Nut Co., 114 Fed. 77, 80, 52 C. C. A. 25, 57 L. R. A. 696, seems to be precisely in point. The further fact that the plaintiff company did order from the defendant all the cartons required by it during the time specified in the letters, and up until the time of the refusal of the defendant to furnish the cartons at the old prices, is also immaterial, in view of our conclusion that plaintiff was not obligated to do this.

The judgment is affirmed.

We concur: NOURSE, J.; BRITTAIN, J.

183 Cal. 628

SILVIUS v. MORDOFF et al. (L. A. 6077.)

(Supreme Court of California. Sept. 8, 1920.)

1. Mortgages ⟸559(3)—Deficiency judgment for less than mortgage from defaulting defendants held error.

Where the mortgagors defaulted in an action to foreclose a mortgage, and the court decreed foreclosure as against a junior lienholder for a part only of the face of the note secured by the mortgage, it was error to render judgment against the mortgagors for the deficiency after the foreclosure sale, for only the amount found due as against a subsequent lien.

2. Mortgages ⟸183—Payment by mortgagee, in violation of promise to pay for building, imposes liability without negligence.

Where a mortgagee promised one who took a trust deed on property subject to the mortgage that he would pay the amount of the mortgage only for labor and materials used in a dwelling which was being erected on the premises, he is liable to the subsequent incumbrancer for breach of that promise, without proof of negligence on his part.

3. Appeal and error ⟸837(11)—Incompetent evidence disregarded in determining sufficiency to support findings.

In determining the sufficiency of the evidence to support the findings, incompetent evidence admitted over proper objection thereto cannot be considered.

4. Mortgages ⟸183—Agreement between parties as to application of money does not benefit junior lienholder.

A promise by the mortgagor to the mortgagee that he would apply the proceeds of the mortgage to payment for labor and material used for the erection of a house on the mortgaged premises does not inure to the benefit of the holder of a trust deed subject to the mortgage who was not in privity to the promise.

5. Mortgages ⟸183—Agreement to pay money to contractor for building does not require mortgagee to see to application.

A promise by the mortgagor to the mortgagee that he would pay the money loaned to a contractor for material and labor for the construction of a building on the mortgaged lot is performed by payment of the money to the contractor for that purpose, though the contractor thereafter diverted it to other property, so that the mortgaged property did not receive the benefit.

6. Trial ⟸25(4)—Junior mortgagee, defending for breach of senior's promise to apply funds, has right to open.

In a suit to foreclose a mortgage, where the holder of a trust deed subject to the mortgage defended on the ground of the mortgagee's breach of agreement to apply the money borrowed to the construction of a house on the premises, the burden of proof is on the holder of the trust deed, in the absence of any showing of confidential relations between her and the mortgagee, and she has the right to open and close.

Department 1.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by F. D. Silvius against J. M. Mordoff and others. From a judgment decreeing foreclosure for only a part of the face of the mortgage, plaintiff appeals. Reversed.

W. T. Sprowls, of Phoenix, Ariz., for appellant.

H. S. McCallum, of Los Angeles, and Wm. J. Variel, for respondent.

SHAW, J. The plaintiff appeals from the judgment in his favor in an action by him to foreclose a mortgage. His objection to the judgment is that it does not cover the amount secured by the mortgage. The mortgage was executed by J. M. Mordoff and Olive Mordoff, husband and wife, on a lot in Hollywood, to secure the payment of their note to Silvius for $3,000. The defendant Elizabeth Snow was made a party to the suit, under the allegation that she had or claimed an interest in the premises which was subject to the lien of the mortgage.

The defendants J. M. Mordoff and Olive J. Mordoff suffered default. Elizabeth Snow appeared and answered. Upon the issues raised by her answer the court made findings, and thereupon gave judgment against all of the defendants, foreclosing the mortgage for the sum of $1,400, with interest and attorney's fees, amounting to $1,664.98, together with costs. The judgment directed that, if the foreclosure sale did not produce enough to pay said sums, a deficiency judgment should be entered against Mordoff and wife for the balance. The judgment was apparently given upon the theory that the Mordoffs were not indebted to Silvius for the full amount of the note.

[1] The failure to direct a deficiency judgment against Mordoff and wife for the full amount of the note, interest, attorney's fees and costs was plainly an error and probably an inadvertence. They made no defense, the complaint states a good cause of action against them for the recovery of the full amount of the note, and a deficiency judgment should have been directed accordingly. The plaintiff is entitled to a reversal of the judgment with respect to them with directions to the lower court to enter a judgment correcting this error.

The court found, in effect, that prior to the execution of the mortgage Elizabeth Snow was the owner of the lot mortgaged; that it was agreed by and between Mordoff and Elizabeth Snow that she should convey the lot to him in consideration of $300 in cash

and his note for $1,700, secured by a trust deed of the lot, and that Mordoff should then borrow $3,000 by means of a first mortgage on the lot, the same to be paramount to such trust deed, of which sum $2,500 was to be used by him in erecting on said lot a dwelling house to cost at least $3,000. It further found that thereupon she executed the deed to Mordoff, and that Mordoff and wife executed to Silvius the note and mortgage sued on, and also the trust deed to Snow; that all these instruments were placed in escrow with the Title Guarantee & Trust Company, to be delivered by it in proper order to the respective parties entitled thereto, together with $500 of the mortgage money to be paid to Mordoff; that the plaintiff was a party to the said escrow agreement; that the escrow agreement was that the balance of $2,500 called for by the mortgage was to be paid outside of the escrow by Silvius "in the construction of said proposed dwelling house as the construction work progressed; that the construction of a dwelling house on said premises was commenced and partially constructed by a contractor for said Mordoff, but no building was ever completed thereon, and the construction thereof was abandoned in the fall of 1917; that of the $2,500 left in the hands of said F. D. Silvius, to be used in the construction of said proposed dwelling," he paid out in the matter of the construction of the building the sum of $900, and no more. It also found that no money had been paid to Elizabeth Snow on the balance of her purchase price for the lot secured by the deed of trust, and that the mortgage note was wholly unpaid; that Silvius had notice of the agreement between Snow and Mordoff above described, and of the escrow instructions, and knew that the mortgage was given for a building loan, to be used in paying for labor and material in the construction of the building on said mortgaged premises; "that the said F. D. Silvius was negligent in the disbursement of said money intrusted to him, in paying out of the said sum of $2,500 only the sum of $900, that went into or that was used in the construction of said building."

[2] The answer of Elizabeth Snow did not purport to state the defense to which these findings relate. It charges fraud by Mordoff and Silvius toward Elizabeth Snow, setting up, with much detail, a scheme by them to induce her to sell the lot to Mordoff upon the faith of his promise to borrow $3,000 on a first mortgage on the lot, give her a subordinate lien for the price of the lot by a trust deed thereon, use the borrowed money to build a house thereon for the better security of both liens, and, having thus obtained title from her, to defraud her by converting the borrowed money to their own use and leave the lot unimproved. With respect to this defense the court found that Silvius was not guilty of any fraud or misrepresentation. In narrating the facts concerning the alleged fraud, the answer sets forth the facts stated in the findings as above summarized, except on the point of negligence of Silvius in paying out the borrowed money. Negligence is not alleged. Construing these findings in the sense most favorable to the judgment (Paine v. San Bernardino Co., 143 Cal. 656, 77 Pac. 659; Breeze v. Brooks, 97 Cal. 77, 31 Pac. 742, 22 L. R. A. 257), they appear to show that Silvius made a promise running to Elizabeth Snow that he would pay $2,500 of the borrowed money for labor and material actually used in the construction of the proposed house on the lot, and that he failed to do so, except as to $900. If this be so, he would be responsible for the failure to perform his agreement, even if such failure was not the result of his negligence. Roussinet v. Rebout, 76 Cal. 456, 18 Pac. 423.

It thus appears that the findings and judgment proceed upon a theory not pleaded in the answer. It is very doubtful if the record can be said to show that the parties proceeded, without objection, to try the case upon the theory that the defense shown by the findings and judgment was in issue, so that plaintiff is now precluded from raising the objection, as held in Illinois, etc., Co. v. Pacific Ry. Co., 115 Cal. 297, 47 Pac. 60, and Gervaise v. Brookins, 156 Cal. 112, 103 Pac. 332. But, as we think the evidence does not support the findings and judgment, even upon the theory upon which they are apparently founded, and as the appellant bases his appeal upon this claim, it is unnecessary to consider any other question, except the sufficiency of the evidence, to which we now proceed.

The deal was accomplished by the deposit of the instruments in escrow with the Title Guarantee & Trust Company and the subsequent complete delivery thereof by said escrow holder. There were four separate deposits with the trust company, each accompanied with separate written instructions, signed by the depositor alone—one by Silvius, under date of April 4, 1917, of a check for $500, to be used when Mordoff's first mortgage was filed for record; one by Elizabeth Snow, under date of April 4, 1917, embracing her deed of the lot to Mordoff, to be delivered on payment by Mordoff for her of $300, and execution by him and his wife to her of the trust deed of the lot, subject to a $3,000 mortgage; and two by Mordoff, both under date of April 6, 1917, the first being a check of $300, for Elizabeth Snow, and the trust deed of the lot to her, subject to the $3,000 mortgage, and the second being the mortgage on the lot by Mordoff and wife to Silvius, to be delivered on payment of $500, and stating that the balance of the money borrowed thereon was to be paid "outside of

escrow." The instructions of Silvius also stated that "balance of funds are to be paid outside of escrow."

None of these instruments contained anything indicating or implying that Silvius was to pay out the $2,500 balance only upon bills for material and labor used in constructing the proposed house, or anything at all with respect to the manner in which he was to make such payment, or the purpose for which the balance of $2,500 of the borrowed money was to be used.

[3] The only evidence produced by Elizabeth Snow tending to prove any agreement as to the application of the money to be borrowed by Mordoff from Silvius was her own testimony to the effect that she was the owner of the lot prior to the deal; that she never knew Mordoff in the transaction, but dealt through her own agent, J. J. Mann; that Mann represented to her that Mordoff was a prosperous builder who had a large amount of lumber and material on hand, and that after obtaining title to the lot Mordoff would borrow $3,000 on the property and build a house on it to cost not less than $4,000; that she relied on Mann's representations in selling the lot, and that she never saw Silvius, nor had any communications with him, until after Walters, the contractor, had abandoned work on the house. This evidence was objected to by the plaintiff on the ground that the representations made by Mann to her were not made in the presence or hearing of Silvius, but the court overruled the objection. It does not appear that Silvius had any knowledge of them, nor that Mordoff ever made any agreement with her to build a house on the lot with the money he borrowed, except from the evidence contained in a document signed by Mordoff and wife and Elizabeth Snow and delivered to Silvius on May 21, 1917, more than six weeks after the transaction was closed which was given in evidence by Silvius. This writing stated that "Mordoff has agreed to construct one certain eight-room house on the lot." The representations of Mann were incompetent against Silvius, and, having been objected to by him, that evidence must be disregarded. The information contained in the aforesaid document came to Silvius long after the deal was closed, and it did not inform him that Elizabeth Snow was relying on him, or even on Mordoff, to do anything with respect to the borrowed money then remaining in his hands, if any there was, which does not appear, although it did inform him that the plans of the house had been changed. It does not even state that the house was to be built with the money borrowed on the mortgage.

The only evidence of any agreement by Silvius respecting the money borrowed was produced by him. He testified that Mordoff made a written application to him for a loan on the lot and that he agreed to make the loan. The application was then introduced in evidence. It directed Silvius to pay $500 of the money to be borrowed to the trust company and to "pay unto J. M. Walters such and sundry sums for material and labor for the construction of one certain eight-room double residence according to the plans herewith. When you can certify that you have paid the above amounts above enumerated, the accounting for the amounts due on the face value of the said mortgage will have been complete." This application was dated April 6, 1917.

[4] The application of Mordoff, accepted by Silvius, was an agreement between himself and Silvius, to which Elizabeth Snow was not a party. There is no evidence that Silvius was informed that Elizabeth Snow was relying on him to protect her trust deed by seeing to it that the money which he loaned to Mordoff, and paid out on Mordoff's order to Walters for "material and labor for the construction of" the house on the lot, was actually paid out for labor and material which was actually used in the construction of the building. Under the evidence, he was responsible to Mordoff alone for the proper payment of the money. There does not appear to be any privity of contract between Silvius and Elizabeth Snow, whereby he was put under obligation to her for the proper application of this fund, or became her trustee for that purpose. Holder Lumber Co. v. Scarborough, 28 Cal. App. 154, 151 Pac. 674.

[5] Moreover, the application of Mordoff does not by its terms bind Silvius to see that the material and labor for which the money was to be paid out was actually used in a building on the lot. It states that he should pay the same to Walters "for material and labor for the construction of such building." There is no evidence to show that the materials and labor for which bills were rendered to him by Walters, and which he paid to the amount of $2,500, were not bills for material purchased for the construction of the building on that lot, or that the labor which the money paid for was not labor upon the house. In a technical aspect of the case, therefore, there is no evidence of any actual breach of the obligation to Mordoff. It does not appear but that Mordoff sanctioned the payments that were made to Walters. It is entirely consistent with the evidence that Walters may have purchased the material for the construction of this building and thereafter diverted it to one or more other buildings which he was erecting at the same time. The evidence shows that he was then erecting other buildings under similar conditions and indicates that he may have done this very thing. It also tends to show that Walters was the real defaulter, and that all the other parties concerned suffered injury therefrom.

[6] It must be remembered that the burden of proof was on defendant Snow to establish the facts of her defense. The execution of the note and mortgage was not denied. In the absence of any evidence, Silvius was entitled to judgment of foreclosure against her for the full amount of the note. Consequently, she should have opened the case at the trial. Silvius opened the case, apparently on the theory that she should first exculpate him from the charge of fraud. He had no such burden. There was nothing to show any confidential relation between the two, or to put him in the position of a trustee for her as to the expenditure of the money he loaned.

We are therefore of the opinion that the evidence does not support the findings, so far as they may be construed to declare that Silvius was responsible to Elizabeth Snow for the application of the $2,500 solely to the payment for materials and labor actually used in erecting the building on the lot. Without this construction, the findings do not support the judgment. A reversal is therefore necessary as to all the defendants.

The judgment is reversed.

We concur: OLNEY, J.; LAWLOR, J.

183 Cal. 618

BEESON v. SCHLOSS et al. (L. A. 6038.)

(Supreme Court of California. Sept. 8, 1920. Rehearing Denied Oct. 7, 1920.)

1. Appeal and error ⟸694(1)—Specifications necessary to review sufficiency of evidence to sustain findings.

The sufficiency of the evidence to sustain the findings cannot be reviewed, where the bill of exceptions contains no specifications of particulars wherein the evidence is insufficient to justify any of the findings.

2. Appeal and error ⟸694(2)—Denial of nonsuit presents sufficiency of evidence, without specifications.

The denial of a motion for nonsuit presents a question of law whether or not there is any evidence which may be reviewed on appeal from the judgment, where the evidence is brought up by bill of exceptions, though it contains no specifications as to the sufficiency of the evidence, or as to errors of law, and under Code Civ. Proc. § 647, the decision denying such motion is deemed to be excepted to.

3. Appeal and error ⟸871—Denying nonsuit on preliminary hearing as to limitations presents question for review.

Where the court, in advance of the trial on the merits, heard the question of the bar of plaintiff's action by a contractual limitation, and at the close of such hearing denied defendant's motion for nonsuit, because the evidence showed the action was barred, the question whether there was any substantial evidence to support the conclusion of the trial court that the limitation was unreasonable and void is presented.

4. Limitation of actions ⟸14 — Parties may contract for shorter period, not unreasonable.

Parties to a contract may stipulate therein for a period of limitation shorter than that fixed by statute, which is not contrary to public policy, provided the period fixed is not so unreasonable as to show undue advantage.

5. Limitation of actions ⟸14 — Contractual limitation of 6 months held not unreasonable, because service cannot be made within state.

A stipulation in a contract for employment of plaintiff by defendants, who were nonresidents of the state at all times, that an action for commissions must be brought within 6 months after the statement was rendered, is not made unreasonable by the fact that defendants could not be personally served within the state, and might not have, during the period limited, property therein subject to attachment.

6. Limitation of actions ⟸14 — Contractual limitation of 6 months held not unreasonable as matter of law.

A stipulation in a contract for personal services limiting the commencement of an action for commissions earned thereunder to 6 months after statements were rendered is not unreasonable as matter of law.

7. Limitation of actions ⟸14—Evidence held not to show contractual limitation of 6 months to be unreasonable.

Evidence showing that plaintiff delayed bringing his action for commissions after the 6-months period limited in his contract, waiting until defendants' accounts within the state were sufficient to justify proceeding by attachment, and until he could determine the amount of the commission more accurately, *held* not to show that the 6-months limitation was unreasonable, since he would have had 3 years to wait the accrual of sufficient funds to attach after action was begun, under Code Civ. Proc. §§ 581a, 583, and he could have taken defendants' deposition to ascertain the amount due, and then amended his complaint accordingly.

8. Attachment ⟸12 — Agent, suing for accounting, held entitled to attach principal's property.

An agent, claiming commissions from his principal and not knowing the exact amount thereof, may sue the principal for the amount he believes to be due, and the fact that he asks for an accounting does not prevent attachment of defendant's property, who was a nonresident.

9. Limitation of actions ⟸14 — Falsity of statement does not prevent running of contractual limitation.

Where a contract provided that statements rendered by employers to their salesmen should be deemed correct, unless objected to within 10 days, and required suits therefor to be brought within 6 months after the accounts were rendered, the fact that the account as rendered was not correct does not, in the ab-

sence of fraud or bad faith, prevent the operation of the contractual limitation.

10. Appeal and error ⊂=846(5) — Estoppel against defense not raised, where court made no findings thereon.

Though estoppel against a claim in the answer is deemed to be controverted and need not be pleaded, as is ordinarily necessary, plaintiff cannot avail himself thereof to sustain a judgment on appeal, where the findings of the trial court contain nothing on that issue.

Department 1.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Joe Beeson against Nathan Schloss and others. Judgment for plaintiff, and defendants appeal. Reversed.

Bicksler, Smith & Parke, of Los Angeles, for appellants.

Wm. L. Jarrott and Crail & Crail, all of Los Angeles, for respondent.

SHAW, J. The defendants appeal from a judgment in favor of the plaintiff. The complaint sets forth a cause of action for the recovery of commissions alleged to be due from the defendants to the plaintiff for services rendered by the plaintiff to the defendants as traveling salesman, under a written contract between the parties. The defendants are partners doing business under the name of Schloss Bros. & Co. By the terms of the contract the plaintiff was employed to solicit orders for the defendants at prices and terms to be stated by them and in so doing to travel for such time and cover such territory as defendants should direct. Plaintiff was to receive 7 per cent. on the net amount of the sales, being the difference between the gross amount of the accepted sales and certain deductions which the contract provided should be made therefrom. The contract was originally made on September 18, 1913, and covered the period from May 1, 1913, to April 30, 1914. It provided that it was renewable on like terms and conditions for periods of one year, provided both parties so desired and gave notice 30 days before the expiration of such year. It was so renewed for the years including 1914 and 1915, and ending April 30, 1916. The original complaint, filed June 2, 1917, alleged that $10,903.51 was due to the plaintiff from the defendants on account of commissions earned under said contract. The first amended complaint filed February 21, 1918, alleged the balance due plaintiff to be $14,510.16.

In addition to denials of the allegations as to the money due and services performed, the defendants pleaded that the action was barred by a contractual limitation contained in the contract of employment. This clause of the contract was as follows:

"The place of this contract is expressly agreed to be the executive offices of said Schloss Bros. & Co., at Baltimore, Md., and whenever said Schloss Bros. & Co. shall render the said salesman a statement of his account, the said statement shall be deemed to have been correct in all particulars, and so accepted as final and binding on said salesman, his heirs and assigns, unless written objections thereto be filed within 10 days after the rendering of said statement, and the said Schloss Bros. & Co. shall not be liable, nor shall any suit or proceedings of any kind be brought against Schloss Bros. & Co. after the lapse of 6 months from the rendering of any of said statements."

The answer alleged that on May 25, 1916, defendants delivered to plaintiff a full, true, and complete statement of all sales, commissions, drawings and charges, and the amount owing to or payable by said plaintiff prior to said date and for the spring season of 1916, that said statement covered all credits and commissions to plaintiff and all charges against plaintiff under the contract prior thereto, and that no suit or proceedings of any kind was brought against the defendants on any claim of the plaintiff for commissions earned during the time covered by said statements within the period of 6 months from receipt thereof by the plaintiff.

The court made findings to the effect that the defendants on May 25, 1916, delivered to plaintiff a statement of his account as alleged in the answer and that no suit or proceeding of any kind was brought against the defendants for his said claim within the period of 6 months from the receipt by him of said statement. The conclusion of law was that the plaintiff was entitled to judgment for the full amount of his claim and judgment was entered accordingly. This conclusion and judgment were evidently based on finding V, to the effect that the 6-months limitation fixed by the contract was unreasonable. The defendants contend that the conclusion or finding that 6 months is an unreasonable time within which to begin the action is without support in the evidence.

[1] The bill of exceptions contains no specifications of particulars wherein the evidence is insufficient to justify any of the findings. "The question of the sufficiency of the evidence to sustain the findings cannot be considered on appeal from the judgment where the bill of exceptions relied on contains no specification of insufficiency of evidence." Millar v. Millar, 175 Cal. 799, 167 Pac. 394, 395 (L. R. A. 1918B, 415, Ann. Cas. 1918E, 184); Carter v. Canty, 186 Pac. 348. Consequently, we are unable to consider the point that the evidence in the case does not sustain the finding.

[2] The rule is equally well settled, however, that a decision denying a motion for nonsuit presents the question whether or

not there is any evidence to support it and that this is a question of law which may be reviewed on appeal from the judgment, where the evidence is brought up by a bill of exceptions, although it contains no specifications either as to the sufficiency of the evidence or as to errors of law. Shadburne v. Daly, 76 Cal. 355, 18 Pac. 403; Barfield v. South Side Irr. Co., 111 Cal. 119, 43 Pac. 406, disapproving the remark to the contrary in Miller v. Wade, 87 Cal. 411, 25 Pac. 487, and approving Shadburne v. Daly, supra; Martin v. S. P. Co., 150 Cal. 124, 131, 88 Pac. 701; Carter v. Canty, supra. Some of the decisions say that the bill must show an exception to the decision in order to authorize a review thereof, but the Code now provides that a decision denying a motion for nonsuit is deemed to be excepted to. Code Civ. Proc. § 647. Hence, a formal exception is now unnecessary.

[3] At the opening of the trial the attention of the court was called to the contractual limitation set up in defense and at the request of the parties the court proceeded to try, in advance of the trial on the merits, the question of the bar of plaintiff's action by reason of said limitation. Upon this issue evidence was introduced by the parties, and thereupon the defendants moved for a nonsuit on the ground that it appeared from the evidence introduced that the contract contained the clause above noted, that more than 6 months before the suit was begun the defendants had delivered to plaintiff a statement of his account for commissions under said contract, and that consequently the plaintiff's action was barred. This motion was denied and the court thereupon proceeded to a trial of the case on the merits. This presents the question whether or not there is any substantial evidence to support the conclusion that the limitation was unreasonable. We are satisfied that the motion for nonsuit should have been granted.

[4] It is a well-settled proposition of law that the parties to a contract may stipulate therein for a period of limitation, shorter than that fixed by the statute of limitations, and that such stipulation violates no principle of public policy, provided the period fixed be not so unreasonable as to show imposition or undue advantage in some way. Tebbetts v. Fidelity etc. Co., 155 Cal. 137, 99 Pac. 501; Case v. Sun Ins. Co. 83 Cal. 473, 23 Pac. 534, 8 L. R. A. 48; Fitzpatrick v. North American, etc., Co., 18 Cal. App. 266, 123 Pac. 209; Garido v. Am., etc., Co., 8 Pac. 512;[1] 1 Wood on Lim. (4th Ed.) 145; 25 Cyc. 1017.

[5] In making its ruling denying the nonsuit the court below put it on the ground that the limitation was unreasonable because of the fact that the plaintiff could not get jurisdiction of defendants by personal service of process in California. This was not a sufficient reason. The contract shows that the defendants were residents of Maryland when it was made. There was no agreement that they should ever become residents of California. It must therefore be assumed that the plaintiff understood that if he desired to recover a personal judgment against the defendants it would be necessary for him to bring his action in the state of Maryland, unless he was fortunate enough to find some one of the defendants in some other state within the period of limitation fixed. It cannot be supposed that the parties contemplated or intended that the 6 months should not begin to run with respect to an action in any other state than Maryland until some one of the defendants should enter the other state so that summons could be there served upon him. To give the contract such effect would be to practically destroy the limitation entirely. The facts that the services of plaintiff were chiefly performed in California; that plaintiff never resided in Maryland; that he resided in California when the cause of action accrued and has resided in Illinois ever since June 1, 1916, do not appear to us sufficient to show that the 6-months limitation was unreasonable. The courts of Maryland were open to plaintiff and he could have sued there at any time, as the contract implies that he should if he desired a personal judgment; and the courts of California were available at all times for an attachment suit to reach property of defendants here, in case any could be found. Neither the law nor the contract required the defendants to hold property in this state or elsewhere to afford plaintiff a remedy by attachment. We are aware of no decision declaring that such a limitation does not begin to run in any state until the plaintiff can attach property in such state and thereupon obtain constructive service on the defendants by publication of summons. The ground upon which the court below ruled is, in our opinion, wholly untenable.

[6] The limitation of 6 months was not unreasonable as a matter of law. In Tebbetts v. Fidelity, etc., Co., supra, it was held that a period of 3 months was not in itself unreasonable. Numerous cases to the same effect may be found in note 18 on the subject in 10 Corpus Juris at page 344. See, also, 1 Cyc. 281; 19 Cyc. 906; 25 Cyc. 910.

[7] It is claimed that the circumstances shown by the evidence render the time unreasonable. We will state them as briefly as possible: The defendants notified plaintiff in January, 1916, that the contract would be terminated on March 14, 1916. On January 12, 1916, they rendered him a statement of his account up to that date, which he im-

[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 68 Cal. xix.

mediately challenged as incorrect. On May 25, 1916, they rendered another statement, also showing nothing due to him. This he also objected to. It was admitted that the only difference between them related to commissions due on large sales of clothing made by the defendants to Foreman & Clark, a firm of clothiers doing a large business with stores in Los Angeles, Chicago, and several other cities, whose trade had been secured to them by the plaintiff. Some of these sales were negotiated by the plaintiff at their respective stores and others at Baltimore, Md., by some representative of Foreman & Clark. The contract provided that, unless it was specially so agreed in writing, the plaintiff should not be entitled to commissions on sales known as "jobs," or on goods sold at less than "regular selling prices." The defendants claimed that almost all the goods sold to that firm came within one or the other of these classes, and made out their statements accordingly. The plaintiff was employed by that firm as manager of its Chicago house from and after April 1, 1916, and at that date he left his former residence in Los Angeles and thereafter resided in Chicago. On March 1, 1916, he made out a statement of his account, which he left with his attorney there during that month, directing him to bring suit on it against defendants and attach the account of Foreman & Clark with defendants, when advised that their account with defendants was large enough to satisfy his claim. This did not occur until some time in May, 1917, and this action was not begun till June 2, 1917.

Said statement of March 1, 1916, was for a balance due him of $10,903.51, and was the one set forth in the first complaint herein. The account sued on contained as credits to defendants a note of $3,495, which he owed them, and $18 for an overcoat, both of which were in some manner satisfied before the first amended complaint was filed, and they were not mentioned therein. Without these credits the balance due plaintiff by the original complaint would have been $14,416.51, only $93.65 less than shown in the first amended complaint. The second amended complaint, filed on June 4, 1918, the day before the trial began, showed a balance of only $12,894.82, which was $1,485.69 less than in the original complaint. The charge on account of sales of the spring and summer season of 1916 was $2,273.46 more, and for the fall and winter of 1915 $3,866.25 less, in the original complaint than in the last one. Plaintiff testified that it took him "several months" to get the data to show how much had been sold by defendants to Foreman & Clark through his instrumentality. He began this work in Chicago "immediately" upon arriving there. During April and May, 1916, the parties were endeavoring to settle the differences by arbitration. This plan was abandoned some time in June or July of 1916. During all the period from April 1, 1916, to May, 1917, he was also trying to ascertain whether or not Foreman & Clark owed enough to defendants to justify an attachment. In March, 1916, he advised with his attorney about bringing suit in Maryland. About June 1, 1918, he obtained the further information on which his last amended complaint was made. These are the facts as shown by the entire record.

These conditions did not prevent the bringing of a suit within the 6 months beginning May 25, 1916, nor make it at all difficult to do so. The cause of action had accrued at least as early as May 1, 1916, and the plaintiff had concluded in March, 1916, that an action was necessary. As we have said, the courts of Maryland were open to him at all times thereafter, and the courts of California were also available. He could await the accrual of a sufficient debt from Foreman & Clark to defendants after the action was begun, as well as before. He would have three years for that purpose, unless the defendant appeared without having been served with summons. Code Civ. Proc. §§ 581a, 583. It was not necessary for him to delay his action for the purpose of ascertaining the exact state of the account. The relation between the parties was that of principal and agent.

[8] Under the decisions in this state, when an agent claims commissions from his principal, and he does not know the exact amount thereof, but the principal knows and refuses to inform him, he may sue the principal, alleging the amount he believes to be due him, and asking for an accounting between them, and for judgment for the amount alleged to be due, and in such action he may attach the property of the principal for such amount. De Leonis v. Etchepare, 120 Cal. 409, 52 Pac. 718; Kohler v. Agassiz, 99 Cal. 16, 33 Pac. 741; Halldie v. Enginger, 175 Cal. 509, 166 Pac. 1. It might have been necessary, of course, for him to have taken the depositions of the defendants in Maryland, as the record shows he did. It further shows that it was by this means that he discovered the data on which he stated the account in the last amended complaint. But if further time would have been necessary to do so, in case he had begun the action within the 6 months, it would have been good cause for a continuance, and it must be presumed that it would have been granted on application. And if such depositions had shown the advisability of amending his complaint, as it appears they did, that fact would have required the court to allow the appropriate amendment if the suit had been commenced earlier, just as it did in the present action, begun a year after the 6 months began to run. It is cer-

tain, therefore, that the plaintiff, if he had begun his action in time, would have had the same facilities for pleading and proving his case as he had in the action begun some 5 months too late.

[9] The plaintiff further claims that the defendants' statements of account were false, and that they concealed from the plaintiff the facts constituting his claim against them, which were known to them, but unknown to him. They contend, first, that the contract by its terms requires that statements furnished by defendants as therein specified shall be correct in fact in order to set the limitation in motion; second, that by the rendition of a false statement they are estopped from setting up the claim that the 6-months period began to run at that time. We cannot agree to the proposition that under the terms of the contract the 6-months period does not begin to run at all, unless the statement of account is absolutely correct. It implies the contrary, for it provides that it shall be deemed to be correct, unless written objections thereto be filed within 10 days after the rendition thereof. It is evident that it contemplated differences between the parties with respect to the amount due thereon, and this implies that it was not intended that a correct statement should be absolutely necessary in order to make the limitation of any effect. It may be conceded that the rendition of a willfully false statement for the purpose of hindering the plaintiff in the bringing of his action might create an estoppel against the defendants, preventing them from availing themselves of the contractual bar. It is not necessary to decide this question. There is no evidence that the statements were willfully false or were rendered in bad faith. They showed no balance in favor of the plaintiff.

[10] But the defendants still earnestly contend that they owe him nothing. The principal part of the trial was consumed in an effort by them to establish this claim and by the plaintiff to controvert it. Upon this appeal the larger part of their argument is devoted to the proposition that the plaintiff is not entitled to anything on account of the sales to Foreman & Clark, except that which the defendants' statements allowed him. Moreover, this presents a question of estoppel. In order that the party may avail himself of an estoppel, it is ordinarily necessary to plead it. In this case the estoppel arises against a claim made by the defendant in his answer, which is deemed to be controverted, and in such a case it is not necessary to plead the estoppel. But in order that the plaintiff may avail himself thereof, and obtain a judgment based thereon, it is necessary that the court should make a finding thereof. Blood v. La Serena, etc., Co., 113 Cal. 229, 230, 41 Pac. 1017, 45 Pac. 252; Young v. Blakeman, 153 Cal. 484, 95 Pac. 888. The findings contain nothing on that subject, and it is obvious that the court below did not attempt to decide the question. For these reasons we think there is no merit in this argument for the plaintiff.

The conclusion that the action was barred by the contractual limitation renders it unnecessary to consider other errors assigned by appellants.

The judgment is reversed.

We concur: LAWLOR, J.; OLNEY, J.

48 Cal. App. 597

POPST et ux. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 3380.)

(District Court of Appeal, Second District, Division 2, California. July 21, 1920.)

1. Master and servant ⊂⊃386(1)—Compensation to dependents receiving fluctuating amounts for support held discretionary.

Since Workmen's Compensation, Insurance and Safety Act 1917 prescribes no rule for determining the "annual amount" devoted by a deceased employé to the support of dependents, where his contributions for support during the year preceding death have not been constant, either in amounts or times of payment, the determination of what is such amount rests in the sound discretion of the commission, based on the evidence.

2. Master and servant ⊂⊃417(7)—Compensation award to dependents held a finding of fact, not reviewable; "determination of question of fact."

In a proceeding by parents, claiming benefits under Workmen's Compensation, Insurance and Safety Act 1917, § 9, par. 3, subd. 2, as amended by St. 1919, p. 917, § 4, for death of a son, who had contributed to their support irregularly and in differing amounts, so that the "annual amount" was not capable of any mathematically exact measurements, a conclusion of the Industrial Accident Commission as to what is the "annual amount" within the statute is the determination of a question of fact, within section 67, subd. (c), and not subject to review if there is any evidence to support it.

Proceeding by Hermon D. Popst and Mary M. Popst under the Workmen's Compensation Act to obtain compensation for the death of a son, Lynn Popst, opposed by the Los Angeles Gas & Electric Corporation, the employer. There was an award of less compensation than was claimed, and the applicants bring certiorari. Petition denied.

Benj. M. Stansbury, of Riverside, for petitioners.

A. E. Graupner, of San Francisco, for respondents.

PER CURIAM. This is a proceeding in certiorari, having for its purpose the modification of an order of the Industrial Accident Commission whereby these petitioners, the parents of Lynn Popst, who died as the result of injuries sustained in the course of his employment, were awarded a certain amount as a death benefit under subdivision 2 of paragraph 3 of section 9 of the Workmen's Compensation, Insurance and Safety Law (Stats. 1919, p. 917). The commission found that petitioners were partially dependent upon their son for their support at the time of his death, and that the "annual amount" that he so devoted to their support was $400.

[1] Nowhere in the Workmen's Compensation, Insurance and Safety Law is any rule or basis prescribed for the determination of what shall be deemed to be the "annual amount" devoted by a deceased employé to the support of his dependents, where, as here, the sums contributed to such support during the year preceding the demise of the injured employé have not been constant, either in amounts or times of payment. In the very nature of the case, the determination of what is such "annual amount," when, as here, the support contributed by the injured employé has fluctuated considerably during the year preceding his demise, must largely rest in the sound discretion of the commission, based upon the evidence before it.

[2] The deceased employé, Lynn Popst, was injured while in the employ of the Los Angeles Gas & Electric Corporation. During the greater portion of the year immediately preceding the accident he had been in the service of the United States navy. After his discharge from the navy he was unemployed for a considerable period. While in the navy he had contributed a much smaller sum to the support of his parents than during the comparatively short period that he was in the employ of the gas and electric corporation. Petitioners, who are dissatisfied with the amount allowed them by the commission in its award for partial dependency, say that the commission's method of computing the "annual amount" contributed by their son to their support was incorrect. But the commission did take evidence upon the subject, and it made its finding upon such evidence. Under the circumstances, the "annual amount" was not capable of any mathematically exact measurement. The conclusion of the commission that, at the date of their son's death, $400 was the annual amount contributed by him to his parents' support, was the determination of a question of fact, based upon evidence adduced before and considered by the commission.

Without intimating that the method of computation adopted by the commission was erroneous or unreasonable, our conclusion is that this court has no power to set aside the award or to remand the case for further proceedings.

"The findings and conclusions of the commission on questions of fact shall be conclusive and final and shall not be subject to review." Subdivision (c), § 67, of the Act; Stats. 1917, p. 876.

"Our authority, with respect to the commission's conclusions on questions of fact, goes no further than to permit the annulment of an award where the commission's finding of a fact is without any evidence whatever to support it. Where there is a conflict in the testimony, or where opposing inferences may reasonably be drawn, the commission is the final arbiter." Walker v. Industrial Acc. Com., 177 Cal. 738, 171 Pac. 954, L. R. A. 1918F, 212.

See, also, Williams v. Industrial Acc. Com. (Sup.) 177 Pac. 989; San Francisco-Oakland, etc., Rys. v. Industrial Acc. Com. (Sup.) 179 Pac. 386; Frankfort Gen. Ins. Co. v. Pillsbury, 173 Cal. 56, 159 Pac. 150; Crosaro v. Industrial Acc. Co., 38 Cal. App. 758, 177 Pac. 489.

What was said by the New York Supreme Court in Rhyner v. Hueber Bldg. Co., 171 App. Div. 58, 156 N. Y. Supp. 904, is worth quoting here:

"The appellant contends that the method of computing the deceased's wages was incorrect. We think the conclusion reached by the commission was correctly worked out. Of course, we are unable to say what mental processes the commission employed in arriving at the figures given in their decision; but it seems to us that, under the evidence, the figures given might, very properly, have been the result of the method of computation pointed out in subdivision 3 of section 14. But here again a finding of fact, based upon evidence, is presented to us, and we are powerless to criticize, modify, or revoke. It is not well for this court to fall into the habit of discussing the facts, even for the purpose of showing that the findings of fact are reasonable and meet with our approbation. We cannot, except by usurpation, invade the realm of facts; for it was the clear intent of the Legislature that 'the decision of the commission shall be final as to all questions of fact.' Of course, if there are no facts, and the decision is arbitrary, unfair, and unreasonable, a question of law arises, and we may right the wrong. Matter of Lizzie Gardener v. Horseheads Construction Co., 156 N. Y. Supp. 899, handed down herewith. But it is wholly improbable that the commission will make any such decision. The commission is the sole judge and the 'final' judge of the facts, and this court is not only forbidden to trespass upon the jurisdiction of the commission in this field, but, by section 20 of the act, it is circumscribed, even, in its review of questions of law. It was the purpose of the Legislature to create a tribunal to do rough justice—speedy, summary, informal, untechnical. With this scheme of the Legislature we must not interfere; for, if we trench in the slightest degree upon the prerogatives of the commission, one encroachment will breed another, until finally simplicity will give way to complexity, and informality to technicality."

The petition for the writ is denied.

48 Cal. App. 674

OHIO ELECTRIC CAR CO. v. DUFFET et al. (Civ. 3449.)

(District Court of Appeal, First District, Division 2, California. July 27, 1920. Hearing Denied by Supreme Court Sept. 23, 1920.)

1. **Fraudulent conveyances ⊂=242(2)—Defendant may not question merits of judgment against debtor.**

In an action against a wife to hold her as involuntary trustee for property received from her husband, a judgment debtor, without consideration, the wife and other defendants cannot argue the merits of the legal questions decided by the judgment against the husband.

2. **Fraudulent conveyances ⊂=295(4)—Judgment prima facie evidence of creditor's claim as against grantees of debtor.**

Where a judgment creditor attacks his debtor's conveyance as fraudulent, his judgment against the debtor is prima facie evidence of his claim as against the grantees of the debtor.

3. **Fraudulent conveyances ⊂=297—Execution returned nulla bona prima facie shows insolvency.**

When it appears that an execution has been issued and returned nulla bona, there is a prima facie showing of insolvency on the part of the judgment debtor for purposes of suit attacking an alleged fraudulent conveyance to his wife.

4. **Fraudulent conveyances ⊂=297—Insolvency of grantor proved prima facie by return of execution nulla bona.**

In suit to hold a wife as involuntary trustee of property received from her husband without consideration, in view of all the circumstances in evidence, return of execution against the husband nulla bona made out a prima facie case of his insolvency at the time of the transfer to defendant wife.

5. **Fraudulent conveyances ⊂=104(2)—Husband's conveyance to wife held void.**

Under Civ. Code, § 3442, conveyance by a husband to his wife without consideration, after demand had been made on him for payment of an indebtedness past due, and a month before action was commenced against him on the demand, was fraudulent and void as to existing creditors, including the creditor which had made demand.

6. **Fraudulent conveyances ⊂=182(5)—Equity could follow trust funds in hands of debtor's wife.**

A creditor, injured by a fraudulent conveyance of the debtor to his wife, which chose to treat the wife as a trustee of the property, holding for the debtor for the benefit of his creditors, had the right to follow the trust property, regardless of its form; it being immaterial whether the property was in the form of the house originally transferred, or had been converted into improvements on another house owned by the wife, so that judgment decreeing lien on the property in which the funds had been invested was proper.

7. **Fraudulent conveyances ⊂=268—Plaintiff creditor properly permitted to ask declaration of lien on defendant wife's property.**

In suit against a wife by her husband's creditor to hold her as involuntary trustee of property received from her husband without consideration, the trial court properly permitted plaintiff creditor to file supplemental complaint asking that a lien be declared in its favor on the property of the wife for the amount received from the sale of her husband's property and invested in hers, the amended complaint having contained a prayer for general relief, so that the supplemental complaint did not state an entirely new cause of action and ask different relief.

8. **Fraudulent conveyances ⊂=181(1)—Grantee cannot validate void title by changing form of property or filing declaration of homestead.**

Where a husband's conveyance to his wife was void under Civ. Code, § 3442, as fraudulent to his existing creditor, the wife could not make her void title good by changing the form of the property, nor by filing a declaration of homestead covering it, and securing its exemption in her bankruptcy proceedings.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by the Ohio Electric Car Company against Josephine Duffet and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Perry F. Backus, of Los Angeles, for appellants.

Parker & Parker, of Pasadena, for respondent.

LANGDON, P. J. This is an appeal from a judgment for the plaintiff for $1,261 and interest in an action to recover from Josephine Duffet, one of the defendants, the net amount which she had received from the sale of certain real property which had been transferred to her without consideration by her husband, at a time when it is alleged he was indebted to the plaintiff company and at a time when he was insolvent. The plaintiff also asked by the prayer of its supplemental complaint to have its judgment declared a lien upon real property owned by said Josephine Duffet because of the fact that the funds so received by her had been invested in improvements upon said real property. This order was also included in the judgment.

It appears from the record that George E. F. Duffet, the husband of Josephine Duffet, together with one Le Sage, had guaranteed to hold the Ohio Electric Car Company harmless from any loss or damage suffered by it by reason of the nonperformance of the terms of a certain contract by the Washington Street Electric Garage Company. This contract was for the sale and purchase of automobiles. The Washington Street Electric Garage Company was a fictitious name used by the daughter and son-in-law of George

Duffet in the conduct of their business. The persons doing business under this fictitious name failed to meet their obligations under the contract with the plaintiff, and were sued, together with Duffet and Le Sage, for the amount due under the contract for goods sold and delivered. Judgment was secured in this action (No. B–32522 in the superior court for the county of Los Angeles) against all of the defendants named therein, including George Duffet. The record in this action was introduced in evidence in the present action to establish the plaintiff's claim and the indebtedness of George Duffet.

[1, 2] The appellants object to this judgment as evidence against Josephine Duffet. The argument advanced is that, although the question of whether or not George Duffet was indebted to plaintiff is res adjudicata between him and the plaintiff because of this judgment in case No. B–42522, nevertheless the defendant Josephine Duffet may require proof of these facts as against her, and is not bound by this judgment. Upon this theory appellants seek to argue the merits of the legal questions decided by said judgment No. B–42522. We find no merit in this contention. In the present action Josephine Duffet is not sued individually; she is sought to be held as an involuntary trustee of property received from her grantor without consideration. The judgment against her goes no further than the amount of the property so received by her. Where a judgment creditor attacks his debtor's conveyance as fraudulent, his judgment against the debtor is prima facie evidence of his claim as against the grantees of the debtor. Hills v. Sherwood, 48 Cal. 386, 394. The record contains a copy of the execution issued in said action No. 42522, and a return thereon, showing that the sheriff was unable to find any property of the defendants not exempt from execution, and that the execution was returned wholly unsatisfied. This return bears date of May 12, 1917. The property was conveyed by George Duffet to his wife in August, 1916. This was after demand had been made upon George Duffet for payment of the indebtedness which he had guaranteed and which was then past due, and just a month before action was commenced against him upon said demand. This property was conveyed to said Josephine Duffet without valuable consideration.

[3, 4] When it appears that an execution has been issued and returned nulla bona, there is a prima facie showing of insolvency on the part of the defendant. Calkins v. Howard, 2 Cal. App. 233, 83 Pac. 280. It is said in Woolridge v. Boardman, 115 Cal. 74, 46 Pac. 868, that, although subsequent insolvency is not of itself foundation for an inference of insolvency at the date of a gift six months previous thereto, yet the subsequent insolvency, occurring within a short interval of time, without any considerable reverse of business through the happening of any casualty, is a fact pertinent to the inquiry whether the like condition did not exist at the time of the gift to the wife, and to illustrate the intent of the donor. In view of all the circumstances in evidence in the present case, we think the return of the execution nulla bona made out a prima facie case of insolvency at the time of the transfer, and this prima facie case was not met by any proof that the defendant George Duffet had any other property of substantial value at the time of the transfer.

[5] The matters heretofore discussed bring this case within the application of section 3442, Civil Code; the transaction was void as to existing creditors, and the plaintiff was such an one. Said Code section provides that such transfers shall be void as to existing creditors. It has been held (First Nat. Bank of L. A. v. Maxwell, 123 Cal. 360, 55 Pac. 980, 69 Am. St. Rep. 64), that, so far as existing creditors are concerned, the title and ownership of the property conveyed with intent to defraud creditors remains in the fraudulent grantor as fully as though no transfer had been attempted, and the transfer being void as against them, a creditor may seize and sell the property under execution, and the sheriff's deed thereto transfers the legal title itself, and not a mere equity. Under such circumstances, then, in so far as this creditor was concerned, the property transferred was yet the property of its debtor. The creditor chose in this action to treat Josephine Duffet as a trustee of said property, holding for its debtor for the benefit of his creditors.

[6] In doing this it had the plain right to follow the trust property, regardless of the form in which it was found. It is quite immaterial in this equitable action whether the property was in the form of the house originally transferred, or whether it had been converted into improvements upon another house owned by Josephine Duffet. This being an equitable action, in which Josephine Duffet is sought to be held as a trustee, equity will follow the trust funds wherever they may be found. The judgment, therefore, decreeing a lien upon the property in which the funds had been invested, to the extent of such investment, was a proper exercise of equitable jurisdiction. Swinford v. Rogers, 23 Cal. 233, 236.

[7] In connection with this matter, appellants object to the action of the trial court in permitting the plaintiff to file a supplemental complaint asking that a lien be declared in its favor upon the property of Josephine Duffet for the amount received from the sale of her husband's property, and invested in her said property. It is contended that this supplemental complaint states an entirely new cause of action, and asks for an entirely different relief. We are of the opinion that the court did not err in permitting the filing of this supplemental pleading. The amend-

ed complaint contained a prayer for general relief, and under the well-known equitable rule a court of equity will do full justice in the premises, and render such relief as will fully settle the controversy between the parties wherever possible. Under the prayer of the amended complaint, we think a court of equity would have had power, not only to declare the money judgment against the defendant, but to go further and declare such judgment a lien upon her property under the circumstances in evidence here.

[3] The appellants further object to the creation of this lien upon the property, because Josephine Duffet, on November 26, 1918, while this action was pending, filed a declaration of homestead upon the property sought to be charged with the lien. The answer of defendants to the supplemental complaint, also set up the fact that the defendant Josephine Duffet had been adjudicated a bankrupt on January 23, 1919, and that in said bankruptcy proceedings the homestead had been set aside to her as exempt.

As we have stated, under section 3442, Civ. Code, and under the holding in the case of First Nat. Bank v. Maxwell, supra, and numerous other California cases, the deed conveying this property to Josephine Duffet was void, as to the plaintiff. It was void ab initio, and, as to plaintiff, Josephine Duffet never acquired any title to this property. By turning the same into money, and by reinvesting this money, she could not improve this condition. She could not make a void title good by changing the form of the property, and she cannot make a void title good by filing a declaration of homestead covering the property. In so far as her home represented the funds received from her husband, under the circumstances in this case, it was not a proper subject for inclusion in her declaration of homestead, and cannot be impressed with this character. In so far as this property is not her property, but is property belonging to another and impressed with a trust, it is beyond the protection of the homestead laws. It is not sufficient that if the property had remained in its original form, as a house belonging to the husband and the family had resided there, this might have been homesteaded. The fact remains that these necessary elements did not exist. This situation was considered in the case of La Point v. Blanchard, 101 Cal., at page 552, 36 Pac. at page 99, where it is said:

"The premises had not been selected as a homestead by a declaration by either husband or wife at the time of the transfer, and might have been attached by the creditors. It was not, therefore, property exempt from execution."

The money received by Josephine Duffet from the sale of the property transferred to her was used to pay off incumbrances and make improvements upon her homestead. It was said in Riddell v. Shirley, 5 Cal. 488, that a homestead may not be relieved of debts and charges against it by the disposition of all the other property of the debtor, leaving nothing for the satisfaction of other creditors. This language is quoted with approval in Bishop v. Hubbard et al., 23 Cal. 514, 83 Am. Dec. 132.

With reference to the setting aside of the homestead in bankruptcy proceedings, this money is recovered from Josephine Duffet, not from her property, but as and from the property of her husband—property which the record shows he had before his marriage. If the deed from him to Josephine Duffet was void, and title never passed, then this property could not be set apart to Josephine Duffet in bankruptcy proceedings dealing with her estate. The property is simply property outside of the scope of such proceedings. The mistake made by appellants is in basing their arguments upon the premise that this action is brought to recover as upon a debt owing from Josephine Duffet. This is merely an action to reach the property of the real debtor, George Duffet, and to brush aside the technical legal obstacles in the form of his conveyance, which interfere with the creditors' right in this regard. In Sewell v. Price, 164 Cal. 265, 128 Pac. 407, it is said:

"A bill maintained by a judgment creditor to subject to the payment of his demand property fraudulently transferred by the debtor is not, strictly speaking, an action upon his judgment. It is really an action for equitable relief against the obstruction caused by a transfer, which hinders him in satisfying his claim by the ordinary process of law; that is to say, by an execution."

The other matters urged by appellants we consider to be without merit.

The judgment is affirmed.

We concur: NOURSE, J.; BRITTAIN, J.

48 Cal. App. 720

CITY OF LOS ANGELES v. KOYER et al.
(Civ. 1683.)

(District Court of Appeal, Second District, Division 1, California. July 28, 1920. Hearing Denied by Supreme Court Sept. 23, 1920.)

1. Eminent domain ⟸25—Power to condemn for wharf does not include warehouse separate from wharf.

Though the erection of a warehouse on a wharf is reasonably necessary or incidental to the use of the wharf, that fact does not authorize a city to condemn a site for warehouse, situated several blocks from any wharf, under the power given it by Code Civ. Proc. § 1238, before its amendment in 1913, and by the city charter, to condemn lands for public wharves.

2. Eminent domain ⟸1—Power not grant by implication.

A grant of power of eminent domain, which is one of the attributes of sovereignty, will never pass by implication, and, when the power is granted, its extent is limited to the terms and the clear implication of statute.

3. Eminent domain ⟸1—Municipal corporation has no inherent power.

A municipal corporation has no inherent power of eminent domain and can exercise it only when expressly authorized by the Legislature.

4. Eminent domain ⟸25—Charter authorizing bonds for warehouses held not to authorize condemnation for warehouses.

The provisions of Los Angeles City Charter, § 262, authorizing the city to issue bonds for the purpose of erecting wharves and warehouses, and acquiring the necessary land therefor by purchase or condemnation, does not give to the city any power to condemn not already possessed by it, and therefore does not authorize condemnation of property having a warehouse site separate from any wharf.

5. Eminent domain ⟸9—Condemnation of property not "municipal affair," within control of charter city.

The exercise of the power of eminent domain for any purpose is not to be classed as a "municipal affair," within Const. art. 11, § 6, as adopted November 3, 1896, authorizing cities to adopt their own charters, but making them subject to general laws, except in municipal affairs.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Municipal Affairs.]

6. Eminent domain ⟸9—Statute and charter amendment do not enlarge rights in pending proceedings.

The amendment of Code Civ. Proc. § 1238, in 1913, and of the charter of Los Angeles, so as to authorize condemnation of site for a warehouse, does not enlarge the power of the city to condemn warehouse site by proceedings begun by the issuance of summons before the amendments took effect.

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by the City of Los Angeles against A. S. Koyer and others. From a judgment allowing condemnation of land, and denying motion for new trial, defendants appeal. Reversed.

Robert Young, of Los Angeles, for appellant Koyer.

Andrews, Toland & Andrews, of Los Angeles, for appellant Outer Harbor Dock & Wharf Co.

Charles S. Burnell, City Atty., and Clyde M. Leach, Asst. City Atty., both of Los Angeles, for respondent.

CONREY, P. J. Action to condemn lands for warehouse purposes. Judgment was entered in favor of the plaintiff. The defendants Outer Harbor Dock & Wharf Company and A. S. Koyer appeal therefrom, and from an order denying their motion for a new trial.

Appellants rely upon numerous alleged errors of the court in rulings upon evidence offered, and in the manner of conduct of the trial by the judge before whom the case was tried, and in other particulars, by reason whereof they contend that the judgment should be reversed. All of these matters may be dismissed from further attention, if it be held that, as claimed by appellants, the city at the time of the commencement of this action did not have the right to maintain any action for the condemnation of land for warehouse purposes.

The action was commenced by the filing of a complaint and the issuance of summons on the 6th day of September, 1910. Pursuant to the verdict of a jury, judgment was entered on the 5th day of September, 1912, which was followed by the final judgment of condemnation entered on the 26th day of November, 1912. A motion for new trial was duly presented, and was denied by the court on the 28th day of September, 1914. The action was tried upon an amended complaint, which was filed on the 8th day of August, 1911. An amendment to the amended complaint was allowed and filed on the 28th day of August, 1912. The amended complaint alleged:

"That the public interest and necessity require that certain municipal improvements be made by the plaintiff, the city of Los Angeles, to wit, that public warehouses for facilitating and accommodating commerce and navigation in waters within the limits of said city, the same to be owned and operated by the said city, be constructed; and for that purpose it is necessary that the plaintiff take and condemn for public use for the purpose of constructing and operating public warehouses thereon" the lands described.

The amendment consisted of an additional paragraph which alleged:

"That the public interest and necessity require, and ever since prior to the 3d day of September, 1910, have required, that certain municipal improvements be made by the plaintiff, the city of Los Angeles, to wit: That public wharves for facilitating commerce and navigation in waters within the limits of said city be constructed, such wharves to be owned and operated by said city. That the plaintiff, the city of Los Angeles, proposes, and ever since prior to said last mentioned date has proposed, to construct such public wharves for said purpose on lands upon said waters and adjacent to and in the vicinity of the lands described in paragraph III of this complaint. That the aforesaid public warehouses to be constructed upon said lands are and will be necessary for the purpose of operating said public wharves, and said city intends to use said warehouses in connection with the operation of such wharves."

The evidence shows without conflict that the proposed warehouse location on the lands of appellants is on a bluff some 50 feet, more or less, higher than the nearest wharves of the city, and at a distance equal to several ordinary city blocks from those wharves. From this the necessary conclusion follows that the warehouse is not to be located upon any wharf or adjacent to any wharf of the city. Separate means of transportation from the wharves to the warehouse will be as completely necessary as if the warehouse was to be located many miles distant from the wharves. In other words, the warehouses are to be physically separate and distinct from the wharves and have no connection therewith, except that commodities delivered upon those wharves or destined thereto may be placed in the warehouse after delivery upon the wharves or prior to being sent thereto for transportation. The evidence further shows by undenied testimony of the city's witnesses that the proposed warehouses are to be general warehouses, irrespective of any special interest, and not conserving the interests of the city wharves alone.

[1] At the time of the commencement of this action it was provided in section 1238, Code of Civil Procedure, that—

"Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses: * * * 4. Wharves, docks, piers, chutes, booms, ferries, bridges. * * *"

At that time this was the only provision of the general law, as expressed in our Codes or other statutes, showing or designating any uses by reason of which respondent makes claim that the right of condemnation might be exercised. The only other basis of authority relied upon by respondent is found in the provisions of the charter of the city of Los Angeles. The charter at that time contained the following provisions:

"Sec. 2. The said corporation shall have the power: * * * (7c) To acquire or construct and operate public wharves, docks, piers or moles upon the seashore, in connection with the transportation of passengers and freight between the ocean and the city, and to fix and collect charges therefor." Stats. 1909, p. 1291.

"Sec. 258. * * * The city of Los Angeles shall also have, throughout the whole of said city, * * * the exclusive power to acquire, construct, own, operate and maintain docks, wharves, piers, canals and seawalls. * * *" Stats. 1909, p. 1303.

"Sec. 262. For the purpose of opening, improving, constructing or maintaining streets, highways, or other means of public transportation, to navigable waters within the county of Los Angeles, and acquiring the necessary land therefor by purchase or condemnation, and for the further purpose of constructing and maintaining canals and waterways between such navigable waters and any such streets, highways, or means of transportation, and acquiring the necessary land therefor, by purchase or condemnation, and for the further purpose of constructing docks, wharves, and warehouses, within or without the city boundary, to be owned and operated by the city and acquiring the necessary land therefor by purchase or condemnation, the city of Los Angeles shall be authorized to incur an indebtedness, in addition to any amount now authorized by law, and to issue bonds therefor, to be designated as 'Harbor Improvement Bonds.'" Stats. 1909, p. 1305.

Referring to Clark v. City of Los Angeles, 160 Cal. 317, 116 Pac. 966, which case involved the validity of harbor improvement bonds intended to supply funds for the same harbor improvements in connection with which the city claims the right to condemn the property of appellants, counsel for respondent contend that the Supreme Court specifically held that under the charter provisions quoted above the city had the power to construct and maintain warehouses. In the proceedings leading to the election held to authorize the issuance of the bonds, the resolution of the council had declared as one of the purposes of the proposed improvement that it was intended to construct "docks, wharves and warehouses" upon or adjacent to the city water front bordering upon navigable waters comprising a described portion of the harbor of San Pedro. The Supreme Court affirmed a judgment whereby the superior court refused to enjoin the sale of the bonds. Referring to warehouses, the court said that "warehouses are a necessary, or at least a convenient, adjunct to a wharf." And again: "Warehouses, as stated, are convenient parts of a wharf, being necessary, for the safe-keeping of goods thereon, while awaiting shipment." This was in line with the other decisions to which we are referred by respondent, which are to the effect that the maintenance of sheds, warehouses, and elevators on a public wharf does not create any new or additional servitude or burden upon property dedicated for wharf purposes, but

they are simply a means of using the wharf and incidental to the use of the wharf for the very purposes for which it was dedicated or condemned. Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co., 101 Mo. 192, 13 S. W. 822, 8 L. R. A. 801; Reighard v. Flinn, 194 Pa. 352, 44 Atl. 1080; Illinois & St. L. R. & C. Co. v. St. Louis & P. El. Co., 2 Dill. 70, Fed. Cas. No. 7,007.

[2, 3] To hold that a warehouse constructed upon a wharf must be regarded as a part of the wharf, or as an incident of its use, is by no means equivalent to a ruling that the power to condemn property for use as a warehouse at a location distinctly different and separate from that of the wharf is included in the power to condemn property for use as a wharf. We have been referred to no decision or other legal authority which carries this doctrine of implied power to the extent contended for by respondent.

"A grant of the power of eminent domain, which is one of the attributes of sovereignty most fraught with the possibility of abuse and injustice, will never pass by implication, and when the power is granted, the extent to which it may be exercised is limited to the express terms or clear implication of the statute in which the grant is contained. A municipal corporation has no inherent power of eminent domain, and can exercise it only when expressly authorized by the Legislature." 10 Ruling Case Law, p. 196, and cases there cited.

[4] But respondent insists that it has the right here sought to be exercised because of the power which it claims was vested in it by section 262 of its charter, which we have quoted. That section does not directly state that the city shall have power to condemn lands for warehouse uses. The thing directly authorized by the section is that the city shall incur indebtedness and issue bonds therefor, to be designated as harbour improvement bonds, which authorization is granted for certain designated purposes. One of those purposes is therein described as the purpose of constructing docks, wharves and warehouses, and "acquiring the necessary land therefor by purchase or condemnation." The method of acquiring land is not a necessary part of the described purpose. It was sufficient that the charter authorized the city to incur indebtedness for the purposes stated and it might then acquire land for those purposes by any lawful means of acquisition. Section 262, as we construe it, was not intended to assert a new power at that time not possessed by any person or corporation within the state, viz. the power to condemn land for warehouse purposes.

Moreover, appellants very reasonably argue that section 262, if its terms might be held to apply to all of the purposes contended for by respondent, was open to the objection that it was an attempt at special legislation, contrary to the provisions of section 25 of article 4 of the Constitution of the state of California, which prohibits the Legislature from passing local or special laws granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity, or in any case where a general law can be made applicable. We do not ignore the fact that the Constitution, as in force at the time of the commencement of this action, provided for the framing of a charter by a city "for its own government, consistent with and subject to this Constitution" (Const. art. 11, § 8), and that for many years the city of Los Angeles has had such a charter. It was further provided with respect thereto that such charters, "except in municipal affairs, shall be subject to and controlled by general laws." Const. art. 11, § 6, as adopted November 3, 1896.

[5] But it is contended by appellants that the construction and maintenance of public wharves for facilitating commerce and navigation, and the construction and maintenance of warehouses "necessary for the purpose of operating said public wharves," as alleged in the complaint in this action, is a matter of much wider scope in its relation to the state at large and to the general public than is any merely municipal affair. Whether this be so or not, it is true that the exercise of the power of eminent domain for any purpose is not to be classed as a municipal affair. In city of Tacoma v. State (in the Supreme Court of the state of Washington) 4 Wash. 64, 29 Pac. 847, the principle to which we adhere was applied by denying to a city organized a freeholders' charter the right to create for itself a "complete code of condemnation proceedings" in the absence of a general law applicable to the exercise of the power in question by that city. The court said:

"But the exercise of the power of eminent domain is so high and peculiar a thing that nothing less than an act of the Legislature of a state can support it, and that act must not only confer the power, but prescribe the method by which it is to be done. This statement would apply were there no requirement of conformity to the general law, but with the requirement in the same act which confers the power the rule is doubly binding. Because the Constitution permits certain cities to frame charters for their own government is no sufficient reason for their assuming a branch of the sovereignty of the state which has no element of municipal government in it, and the provisions of the charter must therefore be held void. Says Judge Cooley, in his Constitutional Limitations, p. 653: 'The right to appropriate private property to public uses lies dormant in the state until legislative action is had, pointing out the occasions, the modes, conditions, and agencies for its appropriation.'"

[6] By amendment of the charter of respondent city, in effect March 25, 1911, in subdivision 10 of section 2 thereof, it was provided, among other things, that the city shall have power to provide, by purchase, lease, condemnation, or otherwise, and to own and

maintain warehouses. This amendment, even if it were competent for the city to assume the power in that way, could add nothing to the powers possessed by the city, as of the time of the commencement of the action. An action of this character is commenced at the time when the summons is issued. City of Los Angeles v. Pomeroy, 124 Cal. 597, 647, 57 Pac. 585. It was not until the year 1913 that section 1238 of the Code of Civil Procedure was amended (St. 1913, p. 544), by inserting in subdivision 4 thereof the words "warehouses" after the words "Wharves, docks, piers."

Appellant A. S. Koyer has withdrawn his appeal from that part of the judgment affecting that part of his property described as "lot 11, block 92, of the town of San Pedro, except the westerly 30 feet of said lot 11." Subject to this withdrawal, by reason whereof the appeal of Koyer, as to that property is dismissed—

The judgment entered on the 5th day of September, 1912, against appellants, A. S. Koyer and Outer Harbor Dock & Wharf Company, and the final judgment of condemnation entered against them, are, and each of them is, reversed. The order denying the motion of said appellants for a new trial is reversed.

We concur: SHAW, J.; JAMES, J.

48 Cal. App. 517

HANNAH et al. v. SOUTHERN PAC. R. CO. (Civ. 3308; L. A. 6170.)

(District Court of Appeal, Second District, Division 1, California. July 14, 1920. Opinion of Supreme Court in Bank Denying Hearing Sept. 10, 1920.)

1. Railroads ⊂⊃72(7)—Right of way deed held to convey title on condition subsequent.

Deed to a development company, conveying grantor's right, title, and interest in a 100-foot strip of land, "and to its successors and assigns for the purpose of a railroad and the uses incidental thereto," with proviso that, if any land should not be continuously used for railroad purposes, portions not used should be excepted from grant and revert to grantor, conveyed title, and not merely an easement; proviso constituting a condition subsequent.

2. Railroads ⊂⊃72(5)—Reversionary right of right of way grantor in deed on condition subsequent transferable.

The right of a grantor of a strip of land to a development company for railroad purposes to take advantage of breach of condition subsequent that any portion of the land which ceased to be used for railroad purposes should revert is a right capable of transfer by the grantor.

3. Railroads ⊂⊃72(5)—Successors of grantor held to be without interest in right of way conveyed on condition.

Successors of the grantor of a strip of land to a development company for railroad purposes, subject to condition subsequent that any portions which ceased to be used for such purposes should revert, have no estate or interest in the strip granted the company, unless the right of reversion reserved by the grantor has passed to them by virtue of their deeds from him, which is not the case where their deeds expressly reserve the strip.

4. Constitutional law ⊂⊃165—Railroads ⊂⊃82 (3)—Statutory provisions for forfeiture of right of way cannot be applied, so as to impair pre-existing contract.

If the provisions of Civ. Code, § 468, looking to forfeiture of a railroad right of way, may be enforced at the suit of private persons only, without prior action by the state establishing forfeiture of the railroad's right to operate, they cannot be applied in aid of a forfeiture claimed under a contract or condition created before enactment of the statute, as this would violate the constitutional inhibition against impairing contract obligations.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action to quiet title by Richard Henry Hannah and others against the Southern Pacific Railroad Company. From a judgment quieting title, defendant appeals. Reversed.

Frank Thunen, of San Francisco, and Frank Karr and R. C. Gortner, both of Los Angeles (W. R. Millar, of Los Angeles, of counsel), for appellant.

W. R. Garrett and Garrett & Coburn, all of Orange, for respondents.

CONREY, P. J. Action to quiet title. Judgment in favor of the plaintiffs, and an appeal therefrom by the defendant.

On the 5th day of May, 1876, Alfred Robinson, trustee, being at that time the owner of all of the land described in the complaint, executed a deed of grant to the Western Development Company, a corporation, conveying all of his right, title, and interest in a strip of land 100 feet in width within and across the lands so owned by him, "and to its successors and assigns, for the purpose of a railroad and the uses incidental thereto." Following the description there were certain reservations and exceptions and the following proviso:

"Provided, also, that if any portion of the land herein described and set off for the purposes of a railroad and the uses incidental thereto shall not be continuously used for such purposes and uses, then such portions ceased to be so used shall be excepted from this grant and revert to the grantor."

There are nine causes of action stated in the complaint. The allegations of each are

to the same effect, except as to the particular parcel of land involved in each claimed by the plaintiffs severally. The complaint was filed on the 4th day of January, 1917. The several plaintiffs claim title to the several parcels to which they assert ownership under a deed executed by Robinson, trustee, dated June 1, 1880, to a grantee through whom the plaintiffs derived their titles to the lands owned by them, on which titles they base their claim to the strip of land in question. The lands owned by the several plaintiffs (other than said strip of land conveyed by Robinson, trustee, to the Western Development Company and afterwards conveyed by that company to the defendant Southern Pacific Railroad Company) are immediately adjacent to sundry portions of said strip of land claimed by the defendant. The deeds under which the several plaintiffs derived their titles were made subject to reservations or exceptions of said strip of land. Instances of these numerous reservations are in form as follows:

"Also reserving a strip of land 100 feet wide for the right of way of the Southern Pacific Railroad Company;" "containing 20.61 acres, less 1.75 acres, right of way of said Southern Pacific Railroad 100 feet wide, 18.87 acres net;" "excepting therefrom a strip of land 100 feet wide containing 1.75 acres, being the right of way of said Southern Pacific Railroad Company;" "also reserving a 100-foot strip granted by Alfred Robinson, trustee, as a right of way for a railroad by deed recorded in Book 44, page 496, of Deeds, records of Los Angeles county, California."

The deed to plaintiff Ida C. Hamilton is expressly bounded by "the line of the right of way of the S. P. R. R."

It is alleged in the complaint that shortly after the execution of the deed from Robinson of May 5, 1876, "a railroad was constructed and completed on the strip of land therein described, and that a railroad track now exists thereon, and that said Southern Pacific Railroad Company claims and pretends to keep a railroad in full operation thereon; that for more than six months last past said defendant has not kept said railroad in full operation, as required by section 468 of the Civil Code of California, and by an act entitled 'An act to compel railroad corporations, or individuals owning railroads, to operate their roads,' approved April 15, 1880 (Statutes of 1880, page 43), over or upon" the strip or parcel of land of which ownership is in controversy in this action. It is further alleged:

"That for more than five years last past said defendant Southern Pacific Railroad Company has not, nor has any one, continuously used said portion of said strip of land for the purposes of a railroad, or the uses incidental thereto. That more than ten years ago said Southern Pacific Railroad Company constructed a railroad from a point in said strip of land described in paragraph four hereof, lying about due west of the center of the city of Anaheim, being northwesterly from the land of said plaintiffs above described, easterly to the central portion of said city of Anaheim, thence southerly and connecting with said strip of land described in paragraph 4 hereof, at a point southeasterly from the land of said plaintiffs above described, and ever since said time defendant has used the railroad so constructed, and has ceased and failed to use that portion of said strip of land described in paragraph 4 hereof lying between said two points therein connected with said railroad extending through the central portion of the city of Anaheim, as hereinbefore described."

It thus appears that the plaintiffs rely upon forfeiture by the railroad company of its rights in said strip of land, first, by a failure to comply with the requirements of the specified statutes; and, second, by failure to operate the railroad over said strip of land continuously, as specified in said deed of May 5, 1876. It should be noted here that by amendment made in the year 1905 (Stats. 1905, p. 574) the provisions of the statute of 1880 were codified and added to section 468 of the Civil Code.

Appellant contends that Robinson, trustee, from and after the time of his deed to the Western Development Company, had no reversion or possibility of a reversion or any estate in said strip of land, but that he had only a right in the nature of a right of action in the event of a breach of the condition subsequent set forth in the deed to the Western Development Company; that upon such breach of the condition subsequent the title would be restored to the grantor, Robinson, trustee, only by forfeiture of the condition, and not by reversion; that this mere possibility was not coupled with any present interest in the land, and could not be transferred, since the entire title was vested in the grantee, the Western Development Company, and later in its grantee, the defendant herein, since a mere possibility not coupled with an interest cannot be transferred (Civ. Code, § 1045); that therefore the respondents have no estate in the strip of land in controversy. Appellant further contends that even if Robinson had a vested interest capable of transfer at the time when he made the deed under which plaintiffs claim title, the various reservations and exceptions above mentioned in the deeds, constituting the several chains of title through which the plaintiffs claim as successors to Robinson, show on their face that Robinson's interest in said strip of land was not conveyed to the plaintiffs. In this connection appellant contends that the trial court erred in overruling its objections to the introduction in evidence of the deeds constituting the basis of the plaintiffs' alleged titles. Respondents, on the other hand, con-

tend that the deed of Robinson to the Western Development Company conveyed, not the fee, but merely an easement for a right of way; that Robinson remained owner of said strip of land, subject only to the easement, and therefore with full right to convey the title thereto; that in fact the deeds under which they claim do convey to them all of Robinson's title in said strip of land subject only to the granted easement.

[1] The deed of Robinson to the Western Development Company conveyed title to the land therein described, and not merely an easement. The proviso contained in the deed, and which we have quoted herein, constituted a condition subsequent. In Behlow v. Southern Pacific R. R. Co., 130 Cal. 16, 62 Pac. 295, the Supreme Court was called upon to decide this question upon a deed granting to a railway company a described strip of land containing this provision:

"The conveyance of these lands is made for railroad purposes only, and, if not so used, then it is to revert to the parties of the first part."

The court held that this grant—

"created in the grantee an estate in fee in the lands described in the complaint, determinable upon the nonperformance of the condition therein specified. This being a condition subsequent, its terms are to be strictly construed. 'Conditions subsequent are not favored in law and are construed strictly, because they tend to destroy estates.' 4 Kent's Commentaries, 129. Forfeitures are not favored in law, and conditions providing for the forfeiture of an estate are to be construed liberally in favor of the holder of the estate and strictly against an enforcement of the forfeiture. Civ. Code, § 1442. 'Conditions subsequent, especially when relied on to work a forfeiture, must be created by express terms or clear implication, and are construed strictly.' Washburn on Real Property, 447."

[2] Respondents insist that the deed and condition in the Behlow Case are radically different from those presented in the case at bar. So far as the effect of the condition is concerned as conveying the title upon a condition subsequent, we are satisfied that the Behlow Case is sufficiently similar to the Robinson deed to make that decision an authority applicable in the present instance. Nevertheless we are of the opinion that the right of Robinson, trustee, as grantor, to take advantage of a breach of the condition, was a right capable of transfer. That a grantor's right of re-entry or of repossession for breach of a condition subsequent is in this state a right which can be assigned or devised, either before or after breach of the condition, has been definitely settled by decision. Johnston v. City of Los Angeles, 176 Cal. 479, 168 Pac. 1047.

[3] But respondents have no estate or interest in the strip of land in controversy, unless the right of reversion reserved to himself by Robinson, trustee, has passed to the plaintiffs by virtue of the deeds under which they claim title as hereinabove stated. The reservations and exceptions contained in those deeds are such that no estate in the land constituting the right of way property was conveyed or purported to be conveyed to the plaintiff; and since the plaintiffs offered no other evidence than those deeds to sustain their claim of title, it follows that the evidence is insufficient to support the finding made by the court to the effect that the various plaintiffs are the owners of those portions of said strip of land claimed by them and described in their several causes of action.

Since it appears that, for the reasons above state, the judgment must be reversed, and that those reasons indicate that the plaintiffs cannot maintain this action, an extensive review of the other grounds of appeal relied on by appellant is omitted. It is argued very forcibly by counsel for appellant that the statutory provisions now contained in section 468 of the Civil Code cannot be applied as a reason for enforcement of any right of forfeiture; that those requirements of the statute were not in existence until four years after the execution of the deed of May 5, 1876; that that deed constituted a contract establishing the sole terms and conditions under which the title then transferred might be defeated, and that the contractual obligations thus established cannot be changed and made more burdensome by any subsequent statute.

[4] Assuming, without deciding, that such statutory provisions looking to a forfeiture of a railroad right of way might in any case be enforced at the suit of private persons, or of private persons only, without prior action by the state establishing forfeiture of the company's right to operate the road, we think that such statutory provisions cannot be applied in aid of a forfeiture claimed under a contract or condition created before the enactment of the statute. To apply the statute as insisted upon by respondents would violate the constitutional right of protection against laws impairing the obligations of contracts.

Appellant contends that the evidence shows no forfeiture by appellant, either under the provisions of the deed from Robinson, trustee, or under the provisions of the statute. We deem it unnecessary to discuss these matters, or the other points relied upon, since, even if the operation of the railroad has been so defective as to constitute a breach of the condition upon which defendant's title is held, nevertheless the plaintiffs could not recover in this action.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. In denying the application for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District, Division 1, we deem it proper to note that the statement in the opinion reading as follows, viz.:

"The reservations and exceptions contained in those deeds are such that no estate in the land constituting the right of way property was conveyed or purported to be conveyed to the plaintiff"

—is without error in so far as anything shown by the briefs is concerned. The claim that an examination of the record will show that this statement is erroneous as to several of the plaintiffs, that there was no difference in this respect between their deeds and the deeds of the other plaintiffs, appears to be made for the first time in the petition for hearing filed herein.

The application for a hearing in this court is denied.

(48 Cal. App. 589)

BORTON v. BARNES. (Civ. 3334.)

(District Court of Appeal, First District, Division 1, California. July 20, 1920. Rehearing Denied Aug. 18, 1920. Hearing Denied by Supreme Court Sept. 16, 1920.)

1. Principal and agent ⟸155(4)—Agent, without authority, employing a broker, is liable as principal.

Under Civ. Code, § 2342, declaring that one assuming to act as agent warrants that he has the authority assumed, section 2343, declaring him responsible, as a principal, when entering into a written contract in the name of his principal, not believing, in good faith, that he had authority to do so, and section 3318, declaring the measure of damages for breach of such warranty, one as agent, knowing he had no authority, by written contract employing a broker to sell the principal's property, is liable as principal for the amount that the broker could have recovered of the principal, had the agent had authority.

2. Principal and agent ⟸155(4)—Agent, without authority employing a broker, held liable to broker as a principal.

Defendant, who as agent of the owner of land, but without authority, employed plaintiff broker to sell it, having accepted an offer of purchase, by a customer procured and presented by plaintiff, as performance of plaintiff's contract of employment, any variance in the terms of the offer from the terms given plaintiff will not avail defendant, sued on his liability as principal, under Civ. Code, §§ 2342, 2343, 3318; the landowner having repudiated the transaction as unauthorized, as it would not have availed the landowner, had defendant had authority as agent.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action by C. C. Borton against J. J. Barnes. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. C. Boynton, of San Francisco, for appellant.

Dunn, White & Aiken, of Oakland, for respondent.

WASTE, P. J. The plaintiff seeks in this action to recover from the defendant the reasonable value of his services alleged to have been rendered under a written contract, entered into by the defendant, in the name of the J. D. Barnes Company, Incorporated. It is the theory of the plaintiff that the defendant assumed to act as an agent of the corporation, and entered into the contract in its name without believing, in good faith, that he had authority to do so, thereby rendering him liable to the plaintiff, as a principal, for his acts in connection with the transaction. Plaintiff recovered judgment, and the defendant appeals.

The plaintiff is a realty broker, and the defendant is the secretary and general manager of the J. D. Barnes Company, Incorporated, a corporation. Purporting to act in such capacity, the defendant as such secretary, in the name of the corporation, executed and delivered to the plaintiff a written agreement, authorizing and employing the plaintiff to sell certain real property belonging to the corporation, for the sum of $90,000, subject to a commission of 5 per cent. Relying upon the representations of the defendant that he had authority to make the agreement, plaintiff found a purchaser ready, able, and willing to buy the land of the corporation, at the price designated in the contract. Plaintiff received from him a written offer to make such purchase and a deposit of $500, both of which he tendered to the defendant and the corporation. No objection of any kind was made. The defendant accepted the offer as full performance, by plaintiff, of his contract, and assured the plaintiff that he had earned, and would be paid, the commission of $4,500. He promised to at once call a meeting of the stockholders of the corporation and have the sale ratified. The defendant had no authority to enter into the contract, and the corporation disavowed and repudiated the transaction and refused to be bound by the agreement. The court found that the defendant entered into, and induced the plaintiff to enter into the contract, without believing in good faith, at any time, that he had authority from the corporation to make the agreement, and knowing that the corporation had not authorized its execution. Judgment was entered in plaintiff's favor for the sum of $4,500, the full amount of the specified commission.

[1] The appellant contended in the lower court, and with equal energy urges here, that the action, as tried, is one to recover real estate commissions alleged to be due from the defendant, J. J. Barnes, and that no cause of action was stated, or proved, for the reason that the contract does not contain apt words to charge him personally. Appellant has mistaken the nature of plaintiff's cause of action. The complaint was in three counts. At the trial the plaintiff waived the second and third causes of action, and we are only concerned with the averments in the first count, and the findings made in response to the issues thereby created. In addition to setting forth the facts, which we have only briefly summarized, it is alleged, and the lower court found, that in all matters connected with the carrying out of the said contract, the defendant assumed, stated, represented, and warranted to plaintiff that he had authority, as agent of the corporation, J. D. Barnes Company, Incorporated, to act for it, and by such assumption, warranty, and statements led the plaintiff to, and he did, carry out the terms of the contract. It is further alleged and found that the defendant negotiated the contract, and induced the plaintiff to enter into it, without believing in good faith that he had authority from the corporation to do so. The prayer of the complaint is to recover the sum of $4,500, the amount of the commission which would have been earned by the plaintiff had the sale been consummated, and which is averred to be the reasonable value of the expense necessarily incurred, and the reasonable value of the time and effort expended by plaintiff in carrying out the contract.

Appellant's position finds apparent support in a number of cases cited by him. The Legislature of this state, however, upon the adoption of the Codes, which took effect January 1, 1873, held to an entirely different view. It is now the statutory law of this jurisdiction that "one who assumes to act as an agent thereby warrants, to all who deal with him in that capacity, that he has the authority which he assumes" (Civ. Code, § 2342), and is responsible to third persons, as a principal, for his acts in the course of his agency, when he enters into a written contract in the name of his principal, without believing, in good faith, that he has authority to do so (Civ. Code, § 2343). The detriment, caused by the breach of such warranty, is deemed to be the amount which could have been recovered, and collected from the principal, if the warranty had been complied with, and the reasonable expenses of legal proceedings taken, in good faith, to enforce the act of the agent against the principal. Civ. Code, § 3318. The cases relied upon by the appellant as holding to a contrary doctrine, to that established by the Code sections, must be viewed in the light of the foregoing provisions, and in some instances may be distinguished on the facts.

Hall v. Crandall, 29 Cal. 568, 89 Am. Dec. 64, was decided in 1866. It merely adhered to the rule that at common law the officers of a corporation are not personally liable on a promissory note of the corporation, made by them as such officers, in which the promise to pay is made by the corporation, and not by the officers personally. In its discussion the court said:

"Upon the question whether the plaintiff can make a case which will charge the defendants at common law, we intimate no opinion. The law as to when an agent who acts without authority renders himself personally liable is not in all respects fully settled, as will be seen by a reference to the authorities cited above; and it would be but idle speculation to discuss a case of which the special facts are not before us. We merely hold that they are not liable at common law upon the note as contracting parties, which is the attitude in which they are now before us."

Lander v. Castro, 43 Cal. 497, was also decided before the Code sections took effect. The court there held that an attorney in fact, who executed a note binding his principal to pay money, was not liable on the note, if he had no authority from the pretended principal, but said that "if liable at all for the money mentioned in the note, his liability depends upon other grounds." These two cases were followed in Wallace v. Bentley, 77 Cal. 19, 18 Pac. 788, 11 Am. St. Rep. 231, and Senter v. Monroe, 77 Cal. 347, 19 Pac. 580, and were referred to in Melone v. Ruffino, 129 Cal. 523, 62 Pac. 93, 79 Am. St. Rep. 127, all decided after the enactment of the Code sections. In each of the decisions cited from 77 California, wherein it was held that the defendants were not liable because the contracts did not contain apt words to charge them personally, it was distinctly stated that the plaintiff's remedy in such cases is an action to recover the money paid, on the value of the work, or labor, if any, performed for the defendant under the supposed contract, or special damages resulting to the plaintiff by reason of the defendant's wrong in undertaking to act for another without authority. In Melone v. Ruffino, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127, it was held that the plaintiff might recover a deposit, on sale of real estate, from an administrator of an estate who made himself personally liable for its return.

However unsettled the law, as to when an agent, who acts without authority, renders himself personally liable, may have been when Hall v. Crandall and Lander v. Castro were decided, it became settled law in this state when the Legislature enacted the Civil Code. In fact, it seems to have been the intention of the framers of the sections in question to set the matter at rest in this jurisdiction. That such was the objective of the

code commissioners seems apparent from their comment on the section, as has been pointed out by the authors of the notes to the same section in Deering's and in Pomeroy's Annotated Civil Code of California. In enacting the sections the code commissioners and the Legislature adopted the rule of liability enumerated in the early New York decisions, which was later embodied in the form of a proposed statute by the Field code commission of that state. The identical statute was enacted, and is in force in North Dakota. It was decided by the Supreme Court of that state that, under the statute, it does not admit of doubt that a party in the position of the plaintiff here has a cause of action against the defendant, upon the contract as a principal, for the section quoted declares in express language that "one who enters into a written contract in the name of his principal without believing in good faith that he has the authority to do so"—and that is this case—"is responsible to third persons as a principal." Kennedy v. Stonehouse, 13 N. D. 232, 241, 100 N. W. 258, 260 (3 Ann. Cas. 217).

So far as we have been able to discover the above Code sections have been called to the attention of an appellate court of this state but once since their enactment, and that in a very recent case. Kohlberg v. Havens, 182 Pac. 467, 468. In that case the president of a corporation procured the services of the plaintiff in obtaining a satisfactory lease of a part of the corporation's realty. When the plaintiff sued the estate company for payment for his services, it denied the authority of the president to act as its agent in making the contract, and the plaintiff was nonsuited. He then brought an action against the president of the corporation, personally, for breach of warranty of authority. The contract of employment was not in writing, and the court held the action one properly founded upon section 2342, Civil Code, supra, the amount of the recovery being determined by section 3318 of the same Code, supra. In the present case the defendant assumed to act for J. D. Barnes Company, Incorporated, in securing the services of the plaintiff, and that in itself constituted a warranty of his authority to act as such agent. Kohlberg v. Havens, supra. He went further, and entered into a written contract in the name of his principal, knowing he had no authority to do so, which rendered him responsible to the plaintiff as a principal, for his acts in the course of his agency. Civ. Code, § 2343, supra; Kennedy v. Stonehouse, supra. Plaintiff therefore has the right to recover from the defendant the reasonable value of the services he performed under the contract, if otherwise entitled thereto, in the same manner as he could have done had the defendant been the real principal in the transaction.

[2] By the terms of the contract entered into by the defendant the plaintiff was authorized to sell certain "water front property bounded by Oakland Estuary on the north, by Clement street on the south, by Grand street on the west, and by Chestnut street on the east, and consisting of about eighteen (18) acres, located in Alameda, Alameda county, California," for $90,000, upon terms, with interest on the deferred payments. Thirty days was allowed for search of title, and for clearing the same of defects. The offer of plaintiff's purchaser is for property "bounded on the south by Clement street, on the west by Grand street, on the east by Chestnut street, and on the north by the United States bulkhead line, excepting the block, known as block 64, now used by the Pacific Gas & Electric Company, it being understood that said property to be purchased contains eighteen (18) acres, and that I shall receive from the present owner all his right, title, and interest, if any, to property lying between the United States bulkhead line and the pierhead line in Oakland Estuary," upon the terms and conditions specified in the purported authorization of sale, with the proviso that "in the event that said title be found, within said time, not to be merchantable, or if said property is found to be deficient in acreage, then I may, at my option, terminate this contract of purchase and all payments made hereunder shall be immediately returned to me."

Appellant's contention is that the plaintiff has not alleged and proved that he secured a purchaser ready and willing to enter into a binding contract on the terms and conditions authorized by his employment. We do not need to analyze the authorization, and the offer of acceptance, in order to ascertain if appellant's construction of the two instruments is sound. Assuming the fact to be as appellant contends, as a matter of abstract law his contention is so far correct; but the advantage thus gained by him was lost when he failed to make any objection to the offer, on the part of the purchaser, at the time it was presented by the plaintiff. It was pleaded, and the lower court found, that the plaintiff produced a purchaser ready, able, and willing to purchase the land at the price set forth in the contract. This finding appears unchallenged.

Assuming, therefore, that the defendant, as the secretary and manager of the corporation, in the first instance, had the authority to enter into the contract with the plaintiff for the payment of the commission upon effecting a sale of the corporation's property, it may also be assumed that he would have the authority to accept or reject the offer of the intending purchaser when it was presented by the plaintiff. The offer being presented, a cause of action would at once arise in favor of the plaintiff and against the corporation for the amount of his agreed compensation. Consequently, when neither the corporation,

nor the defendant, rejected the offer for the purchase of the property, upon the ground that it was not in accordance with the original contract for making the sale, it became a binding obligation upon the corporation, and it could not defend against plaintiff's claim upon the ground that he had not produced a purchaser ready and willing to enter into a binding contract on the terms and conditions authorized by his employment. Where property is sold by a broker "to a purchaser able, ready, and willing to take and pay for the property, and any of the terms of the contract as to payment, abstract or deed are unsatisfactory to the intending vendor, the latter should object to them on that ground and not refuse absolutely to sell; and * * * where he fails to make such objection under such circumstances, he will be held liable to the broker negotiating the sale of his commissions if he refuses to accept the purchaser." California Land Security Co. v. Ritchie et al., 180 Pac. 625, 628; Fiske v. Soule, 87 Cal. 313, 321, 25 Pac. 430; Smiley v. Read, 163 Cal. 644, 647, 126 Pac. 486.

The defendant in this case is in no better position than is the purported principal. Consequently, when the cause of action arose in plaintiff's favor against him, by reason of his deceit in securing plaintiff to enter into the contract, he is as much estopped in the premises as his principal would have been. He did not refuse to consummate the sale upon the ground that some of the terms of the offer were unsatisfactory. On the contrary, he made no objection to it, and accepted the offer from the plaintiff as full performance of his part of the contract. His explanation of his attitude in that regard is that he did not learn until some time later that the offer did not measure up to the contract he had entered into, in the name of the company, with plaintiff. Even if that be so, he did not then communicate any objection to plaintiff or to the purchaser. The offer was finally rejected upon the ground that the Barnes Company declined to consider it. This being the case, defendant should not be allowed to offer as an excuse for not complying with his contract, and as a defense to this action, the alleged unsatisfactory terms of the offer to purchase, accepted from the plaintiff. Where a party gives a reason for his conduct as to anything involved in a controversy, he cannot, after litigation has been begun, change his ground and put his conduct upon another and different consideration. Fiske v. Soule, supra; Montgomery v. De Picot, 153 Cal. 509, 515, 96 Pac. 305, 126 Am. St. Rep. 84.

The judgment is affirmed.

We concur: RICHARDS, J.; WELCH, Judge pro tem.

48 Cal. App. 363

PEAKE v. HARRIS et al.
(Civ. 2153; Sac. 2957.)

(District Court of Appeal, Third District, California. June 29, 1920. Opinion of Supreme Court in Bank, Denying Hearing, Aug. 27, 1920.)

1. Pleading ⟸122, 345(2)—Denials on information and belief disregarded, where party should have actual knowledge.

Denials in an answer on information and belief, with knowledge or means of knowledge of the truth or falsity of the allegations, whether affirmative or negative in form, may be disregarded, and where the answer fails otherwise to join issue with the material allegations of the complaint, judgment may and should be, on motion duly presented, rendered and entered on the pleadings.

2. Pleading ⟸345(2)—Insufficient allegation on information held immaterial, and not ground for judgment on pleadings.

In an action involving water rights, where the answer otherwise specifically denied the allegations of the complaint and averred that defendants claimed adversely to plaintiff as to a part of the waters, and that plaintiff was not entitled to more than 100 inches, *held*, that an allegation on information and belief that plaintiff had never used more than 100 inches of the water during certain seasons was immaterial, and it was not error to deny a motion for judgment on the pleadings, in that defendants should not have made such allegation on information and belief.

3. Waters and water courses ⟸152(10)—Intermediate order preserving opportunity for securing evidence from practical test, may be proper.

In an action involving water rights, the court had authority to make an intermediate order giving the parties an opportunity for the securing and presenting of evidence based on or growing out of a practical test of the use of the water by rotation, provided for in the order, which would enable the court to so frame its final decree on the findings made, or which it declared must be made on the evidence then before it, as to give to the parties the benefit, as far as the circumstances would permit, of their respective appropriations.

4. Evidence ⟸5(2) — Judicial knowledge of fact that 300 inches is too much water for 30 acres.

The court may almost take judicial knowledge that it is not a reasonable use of water to put 300 inches on 30 acres of alfalfa.

5. Waters and water courses ⟸152(11) — Award of use of water by rotation permissible.

In an action between appropriators of water involving relative rights, an award of the use of the waters by rotation is permissible, where there is not enough water for the concurrent use of it by all the parties.

6. Judgment ⟸252(1)—Award of use of water by rotation permissible under pleadings, though not expressly asked.

Where under the pleadings the important issue made was as to how much of the water of a creek, if any, each of the parties was entitled to take and use, the court could award the use of the waters by rotation, although the pleadings did not directly ask that an alternate use of the water be adjudged; it being within the power and discretion of the court to award to either all or less than their pleadings asked for.

7. Costs ⟸17—Action as to water rights involved title to land, entitling prevailing party to costs.

An action involving conflicting claims to water rights involved title to real estate, and, under Code Civ. Proc. § 1022, subd. 5, the prevailing party was entitled to costs as a matter of course.

8. Costs ⟸61—Both plaintiff and defendant held entitled to costs in action involving title to real estate.

In an action involving title to water rights, where both plaintiff and defendant asked for affirmative relief, and each secured in part by the decree some of the relief for which he respectively asked, they were both entitled to costs under Code Civ. Proc. § 1022, subd. 5.

On Hearing in Supreme Court.

9. Waters and water courses ⟸40, 48—Riparian owners acquire or lose no rights by use or disuse of water.

A riparian owner has the right to the reasonable use of the stream on his own land, and this right is neither gained by use nor lost by disuse, but constitutes a part and parcel of the land and of the ownership thereof.

10. Waters and water courses ⟸42, 49, 130—Lower riparian owner cannot complain, except for unreasonable use by upper riparian owner.

A lower riparian owner cannot complain of the use of a stream by an upper riparian owner, except to show that the upper owner uses an unreasonable quantity of the stream, having regard to the needs of the lower owner, and consequently the lower owner cannot enjoin use by an upper owner, unless he alleges unreasonable use to his injury, and the lower owner can acquire no rights as against the upper owner, simply by using a certain amount of the water through a term of years.

11. Appeal and error ⟸1033(8)—No complaint of favorable judgment.

A party on appeal cannot complain of a judgment giving him a larger amount of water than he is entitled to.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Asa Peake, executor of the last will and testament of George M. Lowrey, deceased, against Margaret Harris and Walter Harris. From a judgment granting a part of the relief prayed for, plaintiff appeals. Reversed in part, and affirmed in part in the District Court of Appeal, and hearing denied in Supreme Court.

H. D. Jerrett and James T. Matlock, both of Red Bluff, for appellant.

W. P. Johnson and W. A. Fish, both of Red Bluff, for respondents.

HART, J. The plaintiff seeks injunctive relief and damages against the defendants for the alleged wrongful interference with a water right to which plaintiff claims to be entitled and for damage already sustained by the plaintiff by reason of such interference.

The dispute between the parties arises over the right to use of the waters of North Elder creek, in Tehama county. Said creek has its source in township 25 north, range 8 west, M. D. B. and M., and flows across defendants' land in section 21 to the lands of plaintiff in section 20. Plaintiff claims through an appropriation, made by one of his testator's predecessors in interest, in 1860, of 300 inches of water measured under a 4-inch pressure. Defendants' claim is based upon the fact that, in 1876, their ancestor, O. W. Harris, a homestead entryman, appropriated water from said creek for use on the lands now owned by defendants which are riparian to said stream, and that since that time he and they have made beneficial use to the water "to the extent of one-half of said creek during the summer months when the water is low, and at other times not less than 100 miner's inches of water."

The court found that ever since the year 1860 George M. Lowrey, his grantors and predecessors, have owned and claimed, and his estate does now own and claim, by right of appropriation and use, all the waters of North Elder creek as hereinafter stated and defined; that said North Elder creek has its source in the Yollo Bolly range of mountains, and has a natural course easterly to the low arid lands, and emptying into the Sacramento river, all in said county of Tehama, in the state of California, and said North Elder creek in its natural course flows through, over, and upon said tract of land of plaintiff, thereby causing said tract of land to be riparian to and irrigable therefrom, and making said tract of land fit for cultivation and for all other purposes for which an owner of land bordering on a running stream has a right to use the waters thereof; that George M. Lowrey, his grantors and predecessors, have constructed and maintained, at all times since said year 1860, dams, ditches, and other head works for controlling, regulating, conveying, and utilizing said water flow in said creek, to the extent of the appropriation to and upon said tract of land of plaintiff, and for the general distribution of the same over and upon said tract of land, and said works

have been, and are now, except as and until interrupted and prevented by said defendants, as hereinafter stated, being used to divert, convey, distribute, and utilize the said waters of said creek, to the extent of George M. Lowrey's appropriation for the purpose of irrigating said lands, for watering cattle and stock, and for household and domestic purposes, thereon, and making said lands of beneficial use to the plaintiff; that during the summer months plaintiff's appropriation and needs exceed the natural flow of water in said creek, and that at the time of the filing of the complaint in this action there were but 30 inches of water measured under a 4-inch pressure flowing in said North Elder creek above plaintiff's point of diversion; that for two years last past the defendants have at times wrongfully and without right, by means of two ditches and a dam erected across said North Elder creek about one-half mile above plaintiff's head works and point of diversion, diverted said waters away from the natural bed of said creek and away from the plaintiff, and conducted the same by means of said ditch to and upon the land of defendants; that said water so diverted does not return to the said creek whence it is diverted by said defendants, but finds its way into the natural channel of a stream known as and called Middle Elder creek, and the said water now being conveyed by the said defendants' ditches to their said land at times comprises the entire flow of said creek, and leaves the plaintiff without water for the necessary irrigation of his land, and the purposes aforesaid; that the defendants are the owners of and entitled to divert a portion of the waters of said North Elder creek at the place of diversion, and have so used the waters upon the lands described in the answer, said creek in its natural course flowing through and upon the said last-mentioned land, and said land being riparian to said stream and irrigable therefrom; that in or about the year 1876 said O. W. Harris, the predecessor in interest in the land described in the complaint, constructed a dam in said creek and ditch leading therefrom at a place in the southeast quarter of the northwest quarter of said section 20, said ditch being 3 feet wide and 1½ feet deep, and conducted water from said creek to and upon the land of said defendants; that said O. W. Harris and the defendants have used continuously each year since the construction of said dam and ditch the waters from said stream for household and domestic purposes, for watering stock and for irrigating said portion of said land, as aforesaid.

The court further found:

Finding XIII: "That during the times when there was plenty of water in said creek sufficient for the use of both George M. Lowrey and defendants, said O. W. Harris, in his lifetime, and since his death the said defendants, diverted the waters of said stream to the capacity of their said ditch, or thereabouts, and in sufficient quantity for use upon their said lands for the purposes above set forth, except in the summer in times of low water, and at such times they have not diverted any of the waters of said stream, except as herein stated."

Finding XIV: "That there is now planted and growing on said premises about 15 acres of alfalfa, and about 2 acres of orchard and garden; that defendants have upon said premises 6 horses, 45 head of cattle, 16 hogs, and about 7 dozen poultry."

Finding XV: "That said water to the extent that it has been used is necessary for the purpose of irrigating said land, and for watering stock, and for household purposes; that the well from which the defendants obtain their supply of water for household purposes is supplied from water in said creek, and if the water is shut off or does not flow in said ditch, said well will not furnish a sufficient amount of water for household purposes."

Finding XVI: "That in times of low water the amount diverted by defendants has not been sufficient for their needs, but they claim the right to divert at said times one-half of the waters flowing in said creek, which claim, as hereinafter stated, is without right."

Finding XVII: "As to the respective appropriations of waters of said creek by the plaintiff and the defendants, the court finds that the plaintiff's appropriation of the waters of said creek for irrigation and domestic purposes is prior in point of time and superior in right to the appropiation made by the defendants and to their rights to the waters of said creek; that at all times since the appropriation of said waters made by the plaintiff, as aforesaid, the plaintiff has only used the waters of said creek for irrigation for a part of the time and when needed, and his use of the waters for irrigation has been intermittent; that from the 1st of October to the 1st of May in ordinary seasons there has been plenty of water in said creek so that each could use one-half thereof without interfering or lessening the necessary use of the other; that during the period from May 1st to October 1st, during the dry season of the year, the plaintiff at times has required and used all of the waters of said creek for the irrigation of his crops, and then has ceased using it until the ground again became dry; that such use by the plaintiff for the irrigation of his lands of the waters of said creek during the dry, or summer season of the year, has not exceeded in point of time more than two-thirds of the days in a month at the outside, and when irrigating has needed and used all the waters flowing in said creek for the purpose of irrigation, and the use thereof made was reasonable and the amount used was necessary for the irrigation of his crops and orchard."

Finding XVIII: "That at all times since defendants' ancestor settled upon the lands above described he and the defendants and the plaintiff in this action have used the waters of said creek for the irrigation of their lands, and their said irrigation has been intermittent and alternating, the plaintiff using it when needed a part of the time, and the defendants using it a part of the time, but the plaintiff has at

all times claimed, and has had in his ditch, even when not irrigating his land, water sufficient for the watering of his stock and for domestic purposes."

Finding XIX: "The court finds that the plaintiff, by prior appropriation and use, has the right, and has acquired the right, in the waters of said creek, as follows: The right to have flow down the creek and taken into his ditch from the 1st day of October to the 1st day of May in each year one-half of the natural flow of said stream. At all times he has the right to have flow down the stream and in his ditch, and this right is prior to any rights of the defendants, sufficient water for the watering of his stock and for household and domestic purposes, which the court finds is 15 inches continuous flow, measured under a 4-inch pressure. And the court finds that the defendants have the right and have acquired the right to the waters of said creek, as follows, to wit: The right to take out of said creek and use for irrigation and domestic purposes at all times between the 1st day of October and the 1st day of May in each year one-half the natural flow of said stream."

Finding XX: "The court finds that without detriment to the plaintiff's right or to the defendants' that a decree may be entered permitting the plaintiff to use the waters of said stream part of the time, and permitting the defendants to use the waters of said stream part of the time, reserving always to the plaintiff the right to enough water for stock and domestic purposes."

Finding XXI: "The court finds that the plaintiff's rights in and to said creek and the waters thereof from the 1st day of May each year to the 1st day of October each year are as follows, to wit: He has the right and is entitled to have sufficient water flow down the creek to fill his present ditch, even if it takes all the water in the creek to fill it, for the period of 8 days, beginning with the 1st day of May of each year, and not exceeding 200 inches at the point near his residence. At the end of 8 days the defendants have the right and are entitled to turn into their ditch enough water to fill it for 4 days; the plaintiff and the defendants to have the right to use it alternately thereafter 8 days and 4 days, respectively: Provided, however, that the defendants shall at all times permit as much as 15 inches of water flow down the creek past their dam and the intake of their ditch to furnish water to the plaintiff for stock and domestic purposes."

Judgment was rendered as follows: That plaintiff and defendants are each entitled to one-half the natural flow of said stream from the 1st day of October to the 1st day of May; that the plaintiff is entitled at all times to 15 inches continuous flow for household and domestic purposes; that between the 1st day of May and the 1st day of October of each year plaintiff has "the right to have sufficient water flow down the creek to fill the present ditch, even if it takes all the waters of the creek to fill it, for the period of 8 days, beginning the 1st day of May of each year, and not exceeding 200 inches at the point near the Lowrey residence, measured under a 4-inch pressure; that defendants have the right and are entitled to turn into their ditch enough water to fill it for 4 days thereafter," plaintiff "and the defendants to have the right to use it alternately thereafter 8 days and 4 days respectively, until the 1st day of October of each year." Judgment was also awarded plaintiff in the sum of $100 damages for the diversion of the waters of said creek. The appeal is by plaintiff from said judgment.

[1] It is first contended by appellant that the court erred in denying his motion for judgment on the pleadings. The motion was based upon the following allegation in the answer:

"Allege on information and belief that plaintiff and his predecessors in interest have never used on said land, through their said ditch or otherwise, more than 100 inches of the water from said creek measured under a 4-inch pressure for the irrigation of said land, or for any other purpose, and allege that during the summer months they have never used on said land more than one-half of the waters flowing in said creek at the place of diversion by the ditch of defendants as hereinafter set forth."

The position of the plaintiff is that allegations or denials made in a pleading on information and belief, where it is plain that there is knowledge or means of knowledge as to the truth or falsity of such allegations or denials, do not state issuable facts or tender an issue upon a material fact. The case of Le Breton v. Stanley Contracting Co., 15 Cal. App. 429, 114 Pac. 1028, is cited as in support of that proposition. The rule referred to is well settled and understood, and is that denials in an answer on information and belief, with knowledge or means of knowledge of the truth or falsity of the allegations, whether affirmative or negative in form, may be disregarded by the court (Mullally v. Townsend, 119 Cal. 52, 50 Pac. 1066), and where in such case the answer fails otherwise to join issue on the material allegations of the complaint, judgment may and should be, on motion duly presented, rendered and entered on the pleadings. Doll v. Good, 38 Cal. 287. That rule, however, cannot be given application in this instance. It is, indeed, very doubtful whether it applies at all to a matter such as that to which the criticized allegation of the answer relates, for it is hardly to be supposed that such a matter is within the knowledge of the defendant, or that he has the means of acquiring knowledge of the fact. Unless a person be an expert measurer of flowing waters, it is not likely that he would know or could learn, unaided by an expert, how much water is flowing in a creek or a ditch, or the quantity of water which has customarily flowed in such creek or ditch for an extended period of years. But we think the allegation is, in

view of the real issues made by the pleadings, wholly unnecessary and immaterial.

The complaint alleges that, ever since the year 1860, plaintiff, his grantors, and predecessors have owned and claimed, and that he "does now own and claim, by right of appropriation, 300 inches, measured under a 4-inch pressure, of the natural flow of that certain stream of water having its source in the Yollo Bolly range of mountains, known as and called North Elder creek," etc., and that said defendants claim adversely to the plaintiff "that they have the right to divert and use, above the point of plaintiff's diversion, the water of said North Elder creek to the extent of the whole flow thereof, during the summer months, when the water is low, and at the time that this plaintiff has need of the water of said creek, to the extent of his said appropriation, for the purpose for which this plaintiff is entitled to use the same, and claims, adversely to this plaintiff, that said right belongs to said defendants; that all of said claims of defendants are without right," etc.

[2] The answer specifically denies the foregoing allegations of the complaint, and avers that the defendants "have never claimed adversely, or at any time, the whole of the waters of the said creek, but allege that they claim, adversely to plaintiff, that they have the right to divert and use above the point of plaintiff's diversion the waters of said * * * creek to the extent of one-half of the flow thereof during the summer months, when the water is low, and at other times not less than 100 miner's inches of water." It is further alleged in the answer that the defendants have continuously appropriated and used for a beneficial purpose for over five years immediately preceding the commencement of this action one-half of the flow of the waters of said creek in the manner and at the times above indicated.

Thus it will be seen that the answer admits that the plaintiff is entitled to the use of a certain designated quantity of the waters flowing in said creek, but directly denies the allegation of the complaint that the plaintiff is entitled to the quantity of water claimed by him in his complaint and then sets up a claim and right of defendants to use one-half of the water of said creek, and thus it is clear that the issue as to the respective rights of the parties in the waters of said creek is squarely and directly made and tendered. Therefore, if the allegation in the answer, founded upon information and belief, that the plaintiff and his predecessors, etc., have never used on said (plaintiff's) land more than 100 inches of the waters of said creek, measured under a 4-inch pressure, for the irrigation of his land, were entirely eliminated from the complaint, there would still remain the principal or all-important issue, directly raised by the pleadings, to wit: The question as to the respective rights of the parties, as to quantity, to the waters flowing in said creek. It follows that the denial of the plaintiff's motion for judgment on the pleadings was proper.

The next assignment involves the action of the court in making what appears to be an intermediate order whereby it awarded to each of the parties the right to use the waters of the creek at different times during the summer months immediately following the making of said order. The opinion of the court, which embraced the order referred to, is in part, as follows:

"The evidence in this case shows that, for many years, both the plaintiff and the defendant have been using the waters of North Elder creek for purposes of irrigation. At low stages of the creek they have used the waters thereof alternatively, one party using all of it for a time, and then the other all of it for a time. * * * The case in its final decision must be controlled by the principles announced in such cases as Hufford v. Dye, 162 Cal. 147 [121 Pac. 400]. And on the facts of this case I am satisfied, following the principles announced by the Supreme Court, I have the power and should during the times of low water permit a use of the entire flow of the stream first by one party and then by the other. A use of the water in this manner during the present summer will throw light on the wisdom of the order I shall make, and if it is found not to work well in practice it can be changed on a final decision of the case. The case will be continued for a further hearing until after the summer months have passed, at which time evidence may be introduced showing how the order of the court has worked as to the use of the waters of the stream, and also as to how many inches of water properly and economically used is reasonably necessary for the irrigation of the lands of the respective parties, and evidence may be introduced on other features of the case."

[3] The contention of the appellant is that the court was without authority or jurisdiction to make an intermediate order such as the above. It may be conceded that the decision of the controversy could not be made to depend or rest alone upon the question whether the temporary order designating or specifying the respective rights of the parties in the waters in question would so operate in its practical application as to give to each of the parties an opportunity for using so much of said waters as might be necessary for the purposes of each; but it appears that, before making the order, the court had in effect found that the plaintiff and the defendants were each entitled to the use of said waters in certain indicated quantities, the former having a prior or superior right thereto by reason of his prior appropriation of the waters of said stream. Such a finding is implied from the statement embraced in the order that—

"The case in its final decision must be controlled by the principles announced in such cases as Hufford v. Dye, 162 Cal. 147 [121 Pac. 400]."

In that case it is said:

(1) "That one making an appropriation of the waters of a stream acquires no title to the waters but only a right to their beneficial use and only to the extent that they are employed for that purpose." (2) That where there are two or more appropriators of the waters the same stream and it is found, as here, that there is not water enough to permit a diversion of the stream and a simultaneous use of part by both or all the parties without injury, "the court may by its decree fix the times when, by rotation, the whole may be used by each at different times in proportion to their respective rights."

It was therefore proper for the court to postpone the further hearing of the case for the purpose, as was the express object of the order complained of, of facilitating the procurement of further and perhaps more satisfactory evidence upon that question than was before it up to the time that said order was made, as to how the waters of the creek could be so used by the parties as to preserve to them their respective rights thereto, as already found by the court. In other words, it was proper for the court to give to the parties an opportunity for securing and presenting evidence, based upon or growing out of a practical test of the matter, which would enable the court to so frame its decree upon the findings made or which it declared must be made upon the evidence then before it as to give to the parties the benefit, as far as the circumstances would permit, of their respective appropriations, keeping in view, of course, the prior and superior rights of the plaintiff. But even if the court was without authority to make so much of the order as authorized a practical test of how or in what way the waters might be used by both parties without injury to the rights of either, it certainly had the right to postpone the further hearing of the case for the purpose of securing additional evidence on "other features of the case" which were material and necessary for a proper decision of the controversy, and it may be added that, as to the practical test, the order in that respect is now, and was at the time of the final decision, functus officio, and is now without prejudice to the plaintiff so far as a decision on the merits is concerned, except perhaps as to any damage which he might have suffered to his rights from such test, which proposition could, if properly presented, have been considered by the court in its award of damages in the final decision.

It is next claimed that the evidence was insufficient to justify findings Nos. 19, 20, 21, 22 and a certain portion of finding No. 17. The portion of the last-mentioned finding which it is urged was not so notified is to the effect that plaintiff has used only a portion of the waters of said creek for irrigation for a part of the time; that at times he has required the use of all the waters of the creek, but that in the dry season such use has not exceeded more than two-thirds of the days in a month.

We shall not attempt, nor is it deemed necessary, to reproduce herein the testimony, or even an extended résumé thereof, to show that the attack upon the findings above mentioned is without a substantial foundation for its support. The findings are given above. These facts are not disputed: That the land of the plaintiff and that of the defendants are riparian to and irrigable from North Elder creek; that the plaintiff and the defendants, through their respective grantors and predecessors in interest, each acquired by appropriation, the right to the use of the waters of the creek in question in the years 1860 and 1876 or 1877, respectively; that the plaintiff, in the year first named, appropriated 300 inches of the waters of said creek, measured under a 4-inch pressure, it being claimed by the defendants, however, that the plaintiff never used or had use for more than 100 inches of said waters until after they (the defendants) had made and recorded their appropriation; that O. W. Harris filed with the county recorder of Tehama county, on the 20th day of March, 1877, a "notice of water right," reciting that he had appropriated "the water of North Elder creek * * * and diverted the same at a point on the S. E. quarter of the N. E. quarter of the N. W. quarter of Sec. 20, Tp. 25 N., R. 6 W., by means of a dam at said point where this notice is posted and ditch 3 feet wide and 1½ feet deep, conducting said water to the extent of 300 inches measured under a 4-inch pressure, to and upon" the land above described, and "claims the water of said * * * creek by right of appropriation and continued annual use from 1876 to the present time and to the extent" above specified, "and he intends to claim and continue the use thereof and to divert the same at a point aforesaid for said purposes"—that is, for agricultural purposes; that said notice was duly signed and dated by said O. W. Harris, the predecessors of the defendants, and was recorded in the office of the county recorder of Tehama county at the request of G. M. Lowrey, plaintiff's intestate.

[4] As to whether the court was justified from the evidence in apportioning the use of the waters of the creek between the contending parties in the manner indicated by its findings, and in ordering by its decree the use of the waters by the parties alternately—that is, in fixing the times when, by rotation, the

waters flowing in the creek may be used by each at different times in proportion to their respective rights—it is sufficient to say: That we have carefully gone over and examined all the evidence, and that from such investigation it is clear that, in the low-water seasons, there is not a sufficient quantity or flow of water in the creek "to permit a diversion of the stream and a simultaneous use of part by both parties without injury," and that, since it is further clear from the evidence that both parties are entitled to the use of the waters of the creek, the plaintiff's rights being prior and superior to those of the defendants, the court was justified in finding that each was entitled to the use of the waters, in proportion to their rights, at different times, and was further justified by the evidence and the findings in that particular in fixing the times when and the periods during which the parties should each have the exclusive right to use said waters. It is made clearly to appear that the plaintiff's intestate, during his lifetime, not only never objected to the use of the waters of the creek by the defendants, so long as such use did not impair or materially interfere with his rights, but recognized the validity of the claim of the defendants to the right, by appropriation, to the use of the waters of the creek, by requesting the recordation of or causing to be recorded in the office of the county recorder of Tehama county the notice of the defendants or their immediate predecessor of their appropriation of a specified quantity of the waters flowing in said creek. Indeed, there is evidence which shows, as the court found, that the parties for many years have used the waters of the creek alternately or at different times, and thus in such manner that neither was injured, but obtained as much of the waters as were flowing in the creek during the irrigating seasons. The evidence further shows that the lands of the plaintiff requiring irrigation never exceeded in quantity over 30 acres, and, as the trial court declared in its written opinion, which is incorporated into the record here:

"The court might almost take judicial knowledge of the fact that it is not a reasonable use of water to put 300 inches on 30 acres of alfalfa, and no one can acquire title to 300 inches by so doing."

It may further be added that the evidence shows that no trouble or dispute ever arose between the parties or their respective predecessors in interest concerning the use of the waters of the creek until a few weeks prior to the date of the commencement of this action, when, it appears, one of the Lowreys went to the defendants and ordered them to desist in further diverting the waters into their ditches, said Lowrey claiming that there was not enough water for the concurrent use of it by both parties, but the defendants refused to comply with Lowrey's request, and some one within a few days thereafter destroyed the dam of the defendants.

But we need not further advert herein to the evidence. Our conclusion is that the findings and the decree most equitably adjust the rights of the parties upon the evidence disclosing the situation. It will be observed that the court not only finds and decrees that from the 1st day of May to the 1st day of October of each year the plaintiff shall be entitled to have sufficient water flow down the creek "to fill his present ditch, even if it shall require all the water in the creek to fill it for the period of eight days, beginning with the 1st day of May of each year," etc., but that defendants, who are found to be entitled to turn enough water into their ditch at the end of 8 days, covering plaintiff's right to fill said ditch, for 4 days, shall at all times permit as much as 15 inches of water to flow down the creek past their dam and the intake of their ditch to furnish water to the plaintiff for stock and domestic purposes. In other words, while the finding and the decree authorize an alternate use of the water by plaintiff and defendants for a period of 8 and 4 days, respectively, from the 1st of May to the 1st of October of each year, they also require the defendants, during their 4-day use of the water, to allow at the same time 15 inches of water to pass on beyond their dam and the intake of their ditch to the plaintiff for the latter's stock and domestic uses and purposes. The rights of the plaintiff appear thus to be fully preserved. Indeed, he could not have been awarded more than he has received without denying to the defendants any right to the waters of the stream whatsoever, and this the court could not have done without repudiating the evidence disclosing that for years each of the parties had been using the waters intermittently and alternately—one taking the exclusive use during the irrigating seasons for a certain few days and the other following with a like use.

[5] That such an adjustment of the rights of parties to the waters of a creek under such a situation as is presented here—that is, an award of the use of waters by rotation—is permissible as well between claimants of water by appropriation as between riparian proprietors, is established in this state by the case of Hufford v. Dye, supra, 162 Cal. 147, 160, 161, 121 Pac. 400.

[6] But it is argued by plaintiff that, since the complaint and answer do not directly ask that the alternate use of the water be adjudged, nor the complaint ask that the plaintiff be awarded 15 inches of water for domestic purposes during the periods when the waters are being used by the defendants, the findings and the judgment in those particu-

lars are not within the issues made by the pleadings. We cannot agree to this view. The important issue made by the pleadings is as to how much of the water of the creek, if any, each of the parties is entitled to take and use; the plaintiff alleging and claiming that he is entitled under his appropriation to the use of 300 inches, measured under a 4-inch pressure, and the defendants alleging and claiming that they are entitled to the use of one-half of the water flowing in the creek. The evidence was addressed to the question of how much of the waters, if any, the plaintiff was entitled to use, and whether he had a prior or superior right thereto, and the further question of how much, if any, the defendants were entitled to use, and no one will question the proposition that it was within the power or discretion of the court to award to either all or less than their pleadings claimed and asked for, according as the evidence warranted, and this practically is all that the court by its findings and decree has done. The adoption of the remedy or method of rotation was, according to the findings, the only way in which the parties could obtain what the court found that each was entitled to under the evidence. In other words, that course was the only one whereby the court's decree admeasuring to the parties the quantity of water to which they were entitled could be given practical enforcement or operation in view of the situation with respect to the quantity of water ordinarily flowing in the creek in low-water seasons, and therefore it was within the power of the court under the issues as well as necessary under the evidence to adopt that course.

The contention that the finding (No. 22) that the plaintiff is entitled to $100 only as damages for the wrongful diversion of the water by the defendants is not supported, since, as is the claim, the evidence shows that the damage sustained by plaintiff because of the said wrongful acts of defendants was greater than that allowed by the court is without merit. We shall not attempt to detail herein the evidence as to this. It is sufficient to say that our examination of the evidence has convinced us that it failed to disclose and very serious injury to the plaintiff as the result of the said acts of defendants, and we conclude, from an examination of the record, that the sum of $100 represents reasonably fair compensation for the detriment ensuing to the plaintiff from the wrongful diversion of the water by defendants.

[7, 8] It is lastly contended that the judgment, in so far as it adjudged that neither the plaintiff nor defendants should recover costs, is erroneous; it being the position of the plaintiff that, inasmuch as he was granted some relief, he should be allowed his costs. The specific contention is that the action, while in form for an injunction, is in fact and effect one for the determination of adverse or conflicting claims to water rights, and therefore involves the title to real estate, as to which character of actions our Code provides that costs are allowed of course to the plaintiff upon a judgment in his favor. Code Civ. Proc. § 1022, subd. 5. We think that the contention is sound, and must be sustained.

The action here involves the title to a water right which is an appurtenance to the lands described in the pleadings, and it has been held that such an action comes within the description of the actions mentioned in subdivision 5 of section 1022 of the Code of Civil Procedure. Hoyt v. Hart, 149 Cal. 722, 730, 731, 87 Pac. 569; Northern Cal. Power Co. v. Waller, 174 Cal. 377, 388, 163 Pac. 214, and cases therein cited. Both the plaintiff and the defendants, the latter having asked for affirmative relief in their answer, each secured in part by the decree some of the relief for which they respectively asked. The plaintiff, as well as the defendants, was therefore entitled to costs as a matter of right. F. A. Hihn Co. v. City of Santa Cruz, 24 Cal. App. 365, 141 Pac. 391; Schmidt v. Klotz, 130 Cal. 223, 62 Pac. 470; Hoyt v. Hart, supra.

The judgment, in so far as it adjudged that "each party to this action shall pay his own costs and expenses hereof," is reversed, with directions to the court below to allow costs to each of the parties. The remaining portion of the judgment—that is, the portion other than the portion relating to costs—is affirmed.

We concur: NICOL, Presiding Judge pro tem.; BURNETT, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition for rehearing in this court is denied. But in denying the same we think it is necessary to make a statement of the reasons therefor. The plaintiff's predecessors and the defendants' predecessors in interest each owned a quarter section of land having a common north and south boundary; plaintiff's lying east and defendants' west of the common line. The stream in controversy ran through both tracts from the west toward the east, first entering the defendants' land and then through the plaintiff's land. The result is that the plaintiff is the lower riparian proprietor and the defendants the upper riparian proprietors.

It appears from the findings that the plaintiff and his predecessors have diverted water from the stream and used it on said quarter section of land ever since the year 1860, claiming the right under an alleged appropriation and use, and that the defendants and their predecessors in interest have used the

waters of the stream on their western quarter section ever since the year 1876. The court below found that by virtue of such use on the lower riparian tract the plaintiff had acquired a right thereto as against the claims of the defendants as owner of the upper tract to the extent of the plaintiff's continuous use; that this use did not include the entire time; that the stream was so small that a division of the rights could better be made by rotation of the use than by a division of the volume of the waters. Thereupon the court found, among other things, that from October 1 to May 1 of each year plaintiff and defendants were each entitled to one-half the natural flow of the stream, but that from May 1 to October 1 of each year the plaintiff was entitled to have the entire flow for 8 days and the defendants the entire flow for the next 4 days, and so on alternately during said irrigating season. In effect this was a finding that the plaintiff by his adverse use on the lower riparian tract had acquired, as against the defendants owning the upper riparian tract, the right to two-thirds of the waters of the stream.

[9, 10] There is nothing in the findings or in the complaint to show that the plaintiff or his predecessors in interest had ever actually claimed that their use was adverse to the riparian rights of the defendants' predecessors on the upper tract, or that such use by the plaintiff on the tract below in any way interfered with the use of the waters of the stream on the tract above, or that the natural conditions entitled plaintiff to more than his proportion measured by the area of his tract. The court below and the District Court of Appeal, as well as the respective parties, appear to have misapprehended the law with respect to the reciprocal rights of upper and lower riparian owners in the waters of a common stream. The decisions are unanimous to the effect that each of such owners has the right to the reasonable use of the stream on his own land and that this right is neither gained by use nor lost by disuse, but constitutes a part and parcel of the land and of the ownership thereof. Hargrave v. Cook, 108 Cal. 77, 41 Pac. 18, 30 L. R. A. 390; Duckworth v. Watsonville, etc., Co., 150 Cal. 520, 89 Pac. 338; Anaheim Union Water Co. v. Fuller, 150 Cal. 334, 88 Pac. 978, 11 L. R. A. (N. S.) 1062; Huffner v. Sawday, 153 Cal. 91, 94 Pac. 424. It is also settled that the lower riparian owner, the plaintiff being such owner, cannot complain of the use by an upper riparian owner except by showing that the upper owner uses an unreasonable quantity of the stream, having regard to the needs of the lower owner, and, consequently, that the lower owner cannot enjoin the use by an upper owner unless he alleges such unreasonable use to his injury. Swift v. Goodrich, 70 Cal. 195, 11 Pac. 561; Hargrave v. Cook, supra; Heilbron v. Land, etc., Co., 80 Cal. 193, 22 Pac. 62; Anaheim W. Co. v. Semi-Tropic Co., 64 Cal. 192, 30 Pac. 623. It follows from these principles that the lower owner gained nothing as against the upper owner by the mere use of the water upon his own land, since, as the above decisions hold, the upper owner was not concerned with the use made of the water after it passed beyond his boundaries. The plaintiff and his predecessors in interest could not gain any right against the defendants by the long-continued use of the water upon the lower tract of land.

[11] If the defendants were complaining of the judgment, we would be bound to hold that it was erroneous against them, so far as the findings purport to uphold it. But in this case the defendants are not appealing. The plaintiff contends that he has the right to more waters of the stream than is given him by the judgment and upon that ground he took the appeal. The District Court, having affirmed the judgment, he now asks for a rehearing at the hands of this court. From what we have said, it will be seen that the plaintiff has already secured a judgment for a larger amount than he is entitled to; consequently he is not entitled to another hearing of this case.

SHAW, OLNEY, WILBUR, LENNON, and LAWLOR, JJ., concur.

49 Cal. App. 12

PEOPLE v. CARSON. (Cr. 733.)

(District Court of Appeal, Second District, Division 1, California. August 2, 1920.)

1. Homicide ⟸253(1)—Evidence sufficient to sustain conviction of murder.

In a prosecution for murder of a street car motorman by defendant and another, after being ejected from the car, evidence *held* sufficient to sustain defendant's conviction of murder in the first degree.

2. Criminal law ⟸939(2) — Showing of diligence to produce witnesses insufficient.

In a prosecution for murder of a street car motorman by defendant and another, previously ejected from the car, showing of diligence in an effort to produce at the trial witnesses on account of whose newly discovered evidence new trial was asked *held* insufficient.

3. Criminal law ⟸404(4)—Objection to clothing found in defendant's home, because of remote discovery, went merely to weight.

In a prosecution for murder, objections to the use as evidence of exhibits consisting of certain clothing found at defendant's home five days after his arrest, on the ground that the time of discovery was too remote from the date of the crime, that defendant, at the time of

discovery was not in control of the premises, etc., went merely to the weight of the evidence, and did not affect its admissibility.

4. Criminal law ⊂⊃775(6)—Instruction on alibi held not improper.

In a prosecution for murder of a street car motorman by defendant and another, previously ejected from the car, instruction that, while the jury were not to hesitate at giving the defense of alibi the full weight to which it was justly entitled, when established, still they were to scrutinize the testimony offered in its support with care, was not objectionable as unwarrantably diminishing the weight of such testimony, etc.

5. Criminal law ⊂⊃927(2)—Necessary separation of jury insufficient ground for new trial.

Where, when the jury deliberating on a murder case were taken out to dinner, the first automobile was insufficient to carry them all, so that 11 jurors, with the deputy sheriff, occupied the first automobile, and the remaining juror, together with the clerk of court, sworn as an additional officer, occupied the second car, such separation of the jury was insufficient ground for new trial.

6. Criminal law ⊂⊃388—District attorney's removal of exhibit for experimentation affected only weight of testimony.

The conduct of the district attorney in taking away a revolver, an exhibit in the case, without leave of court, to experiment with ammunition before giving his testimony on second trial, affected only the weight, and not the admissibility, of his testimony.

7. Criminal law ⊂⊃1037(2)—Reversal will not be had for improper argument, in absence of objection and request for correction.

If no assignment of error is made when objectionable statements are made in argument by the district attorney, and no request is made that the court instruct the jury to disregard such language, reversal will not be had for such misconduct.

8. Criminal law ⊂⊃1158(3)—Decision concerning district attorney's conversations with jurors will not be disturbed.

Where affidavits in support of charges as to the district attorney's improper conversations with members of the jury trying a murder case were submitted on behalf of defendant, but they were directly denied by counter affidavits, the decision of the trial court concerning the matter on such conflicting evidence will not be disturbed on appeal.

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Ernest Carson was convicted of murder in the first degree, and from the judgment, and order denying his motion for new trial, he appeals. Judgment and order affirmed.

E. Burton Ceruti, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and Thomas A. Wood, of Los Angeles, for the People.

CONREY, P. J. The defendant, having been convicted of the crime of murder of the first degree and sentenced to imprisonment for life, appeals from the judgment, and from an order denying his motion for a new trial.

At about 10 o'clock on the night of September 25, 1919, two men entered a street car, which was approaching the city of Los Angeles on its way from the city of Redondo. A controversy arose between these men and the motorman and conductor of the car, which resulted in the ejection of the strangers from the car. As the motorman was about to start the car these men, armed with revolvers, fired several shots, and as a result thereof the motorman, George E. Sleeper, was killed. The defendant and another man, who appears to have been the defendant's twin brother, were accused of this crime, and were tried separately. Counsel for appellant, in stating the questions presented on this appeal, admits that the circumstances of the killing were not in dispute, that no mitigating circumstances were offered, and that—

"There was but one issue of fact, capable of the following legal distinction: (1) Identification of the defendant. (2) Alibi."

[1] Several witnesses identified the defendant, and testified that he was one of the two men on the car who were implicated in the above-mentioned transactions. The record leaves no doubt that their testimony is sufficient to justify the verdict, so far as the same depends upon the identification of the defendant. The testimony of other witnesses produced by the defendant, and tending to show that defendant was present at a dance held in another section of the city at the very time when Sleeper was killed, has no other effect than to produce a conflict in the evidence which identified the defendant as one of the men present at the time and place of the murder. It therefore must be held that the evidence is altogether sufficient to sustain the verdict.

[2] Appellant contends that the court erred in denying his motion for a new trial on account of newly discovered evidence. The nature of this evidence is shown by the affidavits of Abraham Gipson and F. A. Lorentz, each of which states facts asserted to be known to the witness, which facts are in aid of the defendant's defense of alibi. From the affidavit of the defendant's attorney it appears that, prior to the trial, he had information that Gipson was on the Long Beach car which defendant claims brought him and other witnesses to the city that night; nevertheless Gipson was not subpœnaed by the defendant to testify in the case. The fact that defendant's attorney "learned that the said Abraham Gipson had been subpœnaed on the part of the prosecution," and that the

prosecution failed to call for the testimony of that witness, furnishes no excuse for the defendant's failure to use the witness, if he desired to have his testimony in the case. There is not, with respect to either of these witnesses, any sufficient showing of diligence in an effort to produce them at the trial.

[3] Next it is contended that the court erred in overruling the defendant's objections to the admission in evidence of certain exhibits, consisting of a straw hat and the trousers of a black and white check suit, offered by the prosecution. These clothes, according to the testimony of witnesses, were discovered on the premises at defendant's home on the 22d day of October, 1919, five days after defendant's arrest. There is testimony tending to show that a hat and suit of clothes of similar description to these exhibits were worn by the defendant at the time and place of the killing of Sleeper. The objections to the use of these exhibits as evidence, such as that the time of their discovery was too remote from the date of the crime, and that the defendant was not in control of the premises at the time of their discovery, and that there was a possibility of other unknown persons having visited the defendant's home in the meantime, etc., all go to the question of the weight of the evidence and do not affect its admissibility.

[4] Appellant complains of that portion of the instructions concerning the effect of an alibi, wherein the jury were instructed that, while they were not to hesitate at giving to such defense the full weight to which when established it is justly entitled, "still you are to scrutinize the testimony offered in the support of an alibi with care." Exception is taken on the grounds that the language quoted unwarrantably diminished the weight of the testimony given for the defendant and interfered with the functions of the jury; that it was manifestly unfair and prejudicial to the defendant, whose sole defense rested upon an alibi; that it disturbed and modified the rule of evidence which requires that the defendant's guilt shall be established beyond a reasonable doubt. We think that the instruction is not fairly subject to these objections; in fact, it has been definitely approved by the Supreme Court. People v. Lee Gam, 69 Cal. 552, 11 Pac. 183.

[5] It is next suggested that appellant is entitled to a new trial because, as appears by affidavits filed on the motion for new trial, the jury was allowed to separate after the cause had been submitted and before the rendition of their verdict. It appears that after the cause had been submitted to the jury, and while they were still deliberating, they were taken out to dinner; that they were taken from the courthouse to the hotel in automobiles; that the first automobile was insufficient in size to carry all the members of the jury; that thereupon 11 of the jurors, together with the deputy sheriff sworn to take charge of the jury, occupied the first automobile, and the remaining juror, together with the clerk of the court (also sworn as an additional officer to assist in conducting the jury to and from said hotel), occupied another automobile, making the same trip. The uncontradicted affidavits of the clerk and of the juror are to the effect that while being so conveyed the said juror was at all times in the presence of the clerk of the court; that the juror at no time conversed with any person on any subject connected with the cause. It thus appears that there was affirmative proof on behalf of the people explaining the separation of the jury and showing that the defendant was not prejudiced thereby. This being the case, the separation of the jury under the circumstances is not a sufficient ground for demanding a new trial. People v. Cord, 157 Cal. 567, 571, 108 Pac. 511.

[6] Appellant complains of alleged misconduct of Deputy District Attorney Fricke in obtaining possession of a certain Smith & Wesson revolver (which was an exhibit in the case), without leave of court, and without the knowledge or consent of the defendant, and making certain experiments with ammunition. As a result of those experiments Fricke gave testimony different from that which he had given at a former trial of this case. Appellant further charges the district attorney with misconduct in making certain statements to the jury in the course of his argument. As to the conduct of Fricke in taking away the revolver for the purpose of experiment prior to giving his testimony at the second trial, its only effect would have relation to the weight to be accorded to his testimony.

[7] As to the second matter, it is well settled that if no assignment of error is made at the time when objectionable statements are made in argument, and no request is made that the court instruct the jury to disregard the language of the prosecutor, a reversal will not be had for such misconduct. People v. Warr, 22 Cal. App. 663, 136 Pac. 304.

[8] It is claimed also that the district attorney was guilty of misconduct in that, during the trial, the deputy district attorney held improper conversations with members of the jury; and particularly that on one occasion, while the jurors were in the corridor of the courthouse, he said to one of the jurors:

"It is very funny. People tell us one thing outside, and get in here and tell us a different thing."

Affidavits in support of these charges were submitted on behalf of the defendant. These were directly denied by counter affidavits. Under such conflicting evidence, the decision of the trial court concerning the matter will not be disturbed on appeal.

The judgment and order are affirmed.

We concur: SHAW, J.; JAMES, J.

48 Cal. App. 776

PEOPLE v. SMITH. (Cr. 897.)

(District Court of Appeal, First District, Division 2, California. July 30, 1920.)

Homicide ⊂⊃329—Defendant held to have had opportunity to prove decedent's quarrelsome character.

In a prosecution for manslaughter, self-defense being set up, where the district attorney let down the bar as to evidence of decedent's character, defendant cannot be heard to complain that he was not given full opportunity to present his defense by offering evidence as to the bad reputation of deceased, justifying defendant in thinking at the time of the quarrel between them that deceased was going to attack him.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

John H. Smith was convicted of manslaughter, and he appeals. Affirmed.

Kenneth M. Green, of San Francisco, and Harold C. Daulker, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

NOURSE, J. The defendant was prosecuted for murder, convicted of manslaughter and sentenced to imprisonment in the state prison. Upon the trial the killing was admitted, but defendant attempted to justify it on the ground of self-defense. The only ground for reversal presented by defendant on appeal is that the court committed prejudicial error in excluding certain testimony relative to the bad reputation of decedent, his reputation of carrying a gun, and defendant's knowledge thereof. This evidence was offered by defendant for the purpose of showing the state of mind of defendant at the time he shot decedent, and that he was justified in believing that he was in imminent danger from a criminal assault by decedent.

Defendant shot and killed James Branum, following a brief altercation over the amount of money won by decedent in a card game which the two were playing. The evidence is that decedent met defendant and one Brooks, a mutual acquaintance, in a saloon and invited them to his house to play cards. Defendant had known decedent about three months. At the time of the shooting, defendant and decedent were playing and Brooks was watching the game. Defendant testified that the first difference occurred between himself and decedent, when he discovered the latter cheating in dealing the cards, but no quarrel ensued; that they later got into a dispute over the amount of money which decedent had won; that they became excited, and both together rose to their feet; that decedent started to reach with his left hand for the money in dispute (which was lying on the table in front of defendant); that with that hand he grabbed defendant, at the same time reaching for his right hip pocket with his right hand; that defendant thought decedent was going to shoot him or cut him with something, because he had heard he had that reputation, and he pulled a gun which he had in his right hip pocket and shot Branum twice. Decedent did not, in fact, have any weapon in his possession.

Brooks, who was watching the game, was the only eyewitness to the affair, other than defendant. He testified that the shooting occurred about three-quarters of an hour after they arrived at decedent's house; that before the quarrel arose as to the amount of the bet the three were perfectly friendly. His version of the affair was as follows:

"Branum bet $1.50 on the card game, and he won, and Smith said: 'You only bet 50 cents.' Smith said, 'I will pay you 50 cents.' Branum said, 'You pay me a dollar, or you owe me nothing.' Smith had $2 or $3 in front of him, and he said, 'If I owe you a dollar, take it;' and Branum reached over to get his dollar; and when Branum reached to get his dollar Smith got up and said, 'Give me my dollar; give me my dollar.' Then Branum said, 'Didn't I win?' And he said, 'Give me my dollar,' and then he shot him."

Brooks further testified that both decedent's hands were on the table when he reached for the dollar; that decedent made no threat, neither did he see decedent make any motion or reach into any pocket before the shot was fired, although he was sitting with the two men at the table, facing them and watching the game; that when the shot was fired decedent was reaching towards Smith as if to get his hand on defendant's gun.

Appellant's whole case is based upon the proposition that "in cases of homicide, where the plea of self-defense is interposed, and the evidence before the jury leaves it in doubt whether the deceased was the aggressor, or where the circumstances attending the homicide render it doubtful or equivocal whether the defendant was justified in believing himself in imminent danger at the hands of deceased," an exception is made to the general rule and evidence as to the bad reputation of the deceased is admissible. People v. Lamar, 148 Cal. 564, 83 Pac. 993. His complaint is that he was not given an opportunity to present this evidence in his defense. The record does not support this argument made in his behalf.

In his effort to justify the homicide, appellant testified that he thought decedent "was going to shoot me or cut me with something—he had that reputation—the men had around him." After this testimony was offered, appellant's counsel stated:

"He now testifies that he heard that Branum was a dangerous man. That goes to the crux

of the whole matter, and if I can substantiate that by creditable witnesses, which I will try to do, but, if I can't prove it, his statement will go out as self-serving."

Then the same witness was asked:

"Why did you think, when he made a motion of that kind, that he was liable to draw a deadly weapon?"

To which he gave answer:

"Well, by hearing that man was a bad man, that he would do anything but the right thing. * * *"

The only "corroboration" offered by appellant was the testimony of Lieutenant Goff, of the police department, to the effect that he believed the decedent was "a fighter and scrapper," because he fought the officer in July, 1918, when he arrested him for either keeping or visiting a house of ill fame. No other corroboration of the testimony of appellant relative to the general reputation of decedent was attempted. This was not because of any objection on the part of the district attorney, but apparently because such testimony was not available. This is indicated by the remarks of appellant's counsel when offering in evidence the record of the conviction of decedent in 1912 for an entirely unrelated offense:

"Since Mr. Berry [deputy district attorney] has let down the bar, I may as well offer the record of James Branum."

The bar having been let down, appellant cannot now be heard to complain that he was not given a full and fair opportunity of presenting his defense. An examination of the entire record shows that he was fairly tried and convicted, and that no error complained of resulted in a miscarriage of justice.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

48 Cal. App. 718

ARCHIBALD v. ARCHIBALD. (Civ. 2752.)

(District Court of Appeal, Second District, Division 1, California. July 28, 1920.)

Divorce ⊂=165(3)—Denying without prejudice does not require reopening case.

Where the court at the trial of a divorce action found that plaintiff's testimony was not corroborated, and denied the divorce, his statement that the decree would be without prejudice, and that, if plaintiff enlisted and thereafter brought in corroborating testimony, the court would hear him, does not establish an abuse of the court's discretion in refusing to set aside the decree entered for hearing further testimony under Code Civ. Proc. § 473.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Arthur E. Archibald against Elizabeth M. Archibald for divorce. From an order denying plaintiff's motion to set aside a judgment refusing him a divorce, plaintiff appeals. Affirmed.

H. H. Heath, of Los Angeles, for appellant.

JAMES, J. Plaintiff brought this suit for the purpose of securing a divorce. Service of summons was had by publication thereof, and the default of the defendant was duly entered. The case came on for hearing and the plaintiff failed to produce sufficient evidence corroborating his testimony, and the court made findings and judgment denying the decree sought. Several months thereafter plaintiff appeared and moved to set aside the judgment under the provisions of section 473, Code of Civil Procedure, on the ground that, as stated in his notice of motion, "said judgment was taken against the plaintiff to his surprise." At the time of the hearing of this motion the plaintiff offered in evidence the deposition of a witness taken subsequently to the first hearing had in the case, which deposition contained sufficient testimony to afford corroboration of the facts testified to by the plaintiff.

The contention made by plaintiff's counsel at the hearing of the motion, and as expressed in the affidavit submitted, was that he had understood the trial judge at the hearing to say that he would allow the case to remain open for the introduction of further testimony. Upon the record presented we cannot conclude that the court abused its discretion in denying the motion. It appears that at the first hearing, after the plaintiff had introduced testimony on his part, the court called attention to the fact that corroborative evidence was lacking, and proceeded to announce what his findings would be, stating the terms of the same, and ending with the statement:

"From the foregoing findings the court concludes that plaintiff is not entitled to a decree of divorce. Let judgment be entered accordingly."

These declarations of the court were undoubtedly for the purpose of furnishing the reporter with the substance of findings to be prepared in the case, and in fact formal judgment was immediately entered denying a decree to the plaintiff. The statement of the court from which plaintiff's counsel derived his understanding that a continuance was to be allowed, appears in the record immediately following the point where the court dictated its findings, the statement being as follows:

"Now, I will say this to you: If the plaintiff enlists in either the Canadian or American army, and is able to make proper proof by testimony of persons other than the parties, in corroboration of the allegation of the plaintiff as to desertion, I will entertain his action, and this action will be without prejudice to the commencement of such case. If, as I say, he enlists and goes into the army. If he actually enlists, and shows that, and then if he can, by deposition or otherwise, prove his case, I will be glad to hear it and advance it."

At the hearing of the motion from the order denying which this appeal is taken, the judge explained his position, and further interpreted the language he had used at the former hearing in the following way:

"The court did not state that any other evidence could be taken in the cause which has been decided, but only if the man enlisted, this action will be without prejudice to the commencement of another one and the court will hear this other evidence in that case. That is all."

Quite plainly, on the record so made, no abuse of discretion is shown, and when that is said the function of this court on appeal ends.

The order is affirmed.

We concur: CONREY, P. J.; SHAW, J.

48 Cal. App. 761

HAMILTON v. SAN FRANCISCO, N. & C. RY. et al. (Civ. 3444.)

(District Court of Appeal, First District, Division 2, California. July 29, 1920.)

1. Appeal and error ⊂=901—Appellant must show error.

Appellant must show error in the action of the court in sustaining general demurrer to the complaint without leave to amend.

2. Railroads ⊂=344(5)—Pleading must allege special facts showing why high speed was negligent.

Where it is alleged that defendant's train was negligently operated at an excessive rate of speed, special facts must also be alleged to show why the high speed was negligent in the particular case.

3. Negligence ⊂=111(1)—Pleaded in general terms.

Negligence may be pleaded in general terms, without stating the facts constituting it.

4. Railroads ⊂=344(5)—Pleading held to raise issue of negligence on part of train crew.

In an action for death of plaintiff's wife, a passenger in a taxicab stalled on railroad's tracks, allegation that the train which struck the taxicab was negligently operated, so that those charged with its management did not see the taxicab, *held* sufficient to raise the issue of fact whether or not there was negligence on the part of the train crew.

5. Negligence ⊂=111(3)—Pleading must show cause of injury.

It must be alleged that the negligence averred was the cause of the injury of which complaint is made.

6. Railroads ⊂=344(7)—Pleading negligence causing injury held sufficient to support judgment.

Allegation of complaint that, by reason of accident due to negligence and carelessness of defendant railway and defendant taxicab operator, plaintiff's wife was struck by a train, etc., as against general demurrer, *held* to contain sufficient facts to support judgment for plaintiff.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by J. B. Hamilton against the San Francisco, Napa & Calistoga Railway and Eugene Petit, doing business under the name and style of the California Taxi Service. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Hankins & Hankins and James A. Himmel, all of San Francisco (Peter L. O'Keefe, of San Francisco, of counsel), for appellant.

John T. York, of Napa, for respondent San Francisco N. & C. Ry.

L. G. Harrier, of Vallejo, for respondent Petit.

BRITTAIN, J. The plaintiff appeals from a judgment entered upon an order sustaining, without leave to amend, a general demurrer to the second amended complaint for damages for the alleged negligence of the defendants as joint tort-feasors, which resulted in the death of the plaintiff's wife. The complaint was in two counts. On January 7, 1918, at about 3 o'clock in the afternoon, Mrs. Hamilton was a passenger for hire in an automobile operated by the defendant Petit, doing business and sued herein as California Taxi Service. In taking her to her destination the machine was driven along a driveway which crossed the tracks of the electric railway operated by the other defendant. The rails of the track were some 6 inches above the roadway of the crossing. The automobile was driven onto the tracks, and, striking the raised rails, was stalled on the track. An electric train, running at the speed of about 35 miles an hour, struck the automobile and dragged it about 300 feet. The gasoline and oil in the machine were ignited, and Mrs. Hamilton was severely burned. She died as a result of her injuries. It was alleged that the automobile was negligently driven upon the track, that the track was maintained with the raised rails above the crossing in a neg-

ligent manner, and that the train was operated negligently, both in regard to its speed and in approaching the crossing without sounding any whistle or bell, as well as in such a manner that those charged with its operation kept no lookout for obstructions upon the track.

[1] Upon such an appeal this court is practically in the position of the trial court. While it is the rule that the appellant must show error, where a general demurrer has been sustained without leave to amend, the brief of the respondent in support of the ruling is really an argument intended to sustain the demurrer.

[2, 3] The brief of the respondent railway rests on certain propositions of law. It is contended that, because in the absence of a statute limiting the rate of speed of trains, rapidity of movement is not negligence as a matter of law. Larrabee v. Western Pacific, 173 Cal. 743, 161 Pac. 750. Where it is alleged that a train was negligently operated at an excessive rate of speed, special facts must also be alleged to show why the high speed was negligent in the particular case. It is alleged that the injuries to Mrs. Hamilton were caused by the negligently excessive speed, coupled with the other acts alleged to have been done. Negligence may be pleaded in "general terms, without stating the facts constituting such negligence." Stephenson v. Southern Pacific, 102 Cal. 147, 34 Pac. 619; Fisher v. Western Fuse Co., 12 Cal. App. 740, 108 Pac. 659, and cases therein cited.

The respondent next contends that the plaintiff's wife and the defendant Petit at the time of the collision were mere licensees in the use of the driveway, and that the railway company could be held liable only under a showing of wanton or willful injury, under the rule that a licensee takes subject to ordinary perils. Means v. Southern California Ry. Co., 144 Cal. 473, 77 Pac. 1001, 1 Ann. Cas. 206. There is nothing in the complaint from which it may be determined as a matter of law or of fact that the driveway was not a public highway, or that the plaintiff's wife was a mere licensee.

[4] It is further contended that the doctrine of last clear chance does not apply, because it is not alleged that the respondent's employés saw the automobile on the tracks. There is nothing in the complaint to indicate that the plaintiff relies on the doctrine in question. It is alleged that the train was negligently operated in such a manner that those charged with its management did not see the automobile. The issuable matter of fact was presented as to whether or not this allegation was true. If it should be shown on the trial, for instance, that the motorman had left his station at the front of the train for some purpose of his own, meanwhile permitting the train to run at a high rate of speed, without regard to the safety of any one on the track or in the train, the negligence of the act could not be doubted. There may be other facts which support a verdict based on negligence in the operation of the train at high speed without keeping such a lookout as ordinary prudence would suggest. Whether there was negligence in this respect or not can only be determined from the evidence. The allegation of negligence was sufficient to raise the issue of fact.

[5, 6] It is true it must be alleged that the negligence was the cause of the injury of which complaint is made. Smith v. Buttner, 90 Cal. 95, 27 Pac. 29. In each count it is alleged that "by reason of the accident, due to the negligence and carelessness of the defendants herein as aforesaid, the said Isabella H. Hamilton was struck by said train," etc. As against general demurrer, this allegation contains sufficient facts to support a judgment. The demurrer should have been overruled. Schaake v. Eagle Can Co., 135 Cal. 472, 63 Pac. 1025; 67 Pac. 759; Groom v. Bangs, 153 Cal. 457, 96 Pac. 503; House v. Meyer, 100 Cal. 592, 35 Pac. 308; Bergen v. Tulare Power Co., 173 Cal. 714, 161 Pac. 269.

The judgment is reversed, and the cause remanded for further proceedings.

I concur: LANGDON, P. J.

48 Cal. App. 787

EDWARDS v. GUARANTY TRUST & SAVINGS BANK. (Civ. 3209.)

(District Court of Appeal, Second District, Division 2, California. July 30, 1920.)

1. Banks and banking ⇐140(1)—Refusal to cash check gives payee no cause of action against bank.

A bank occupies the position of debtor to its depositors, and a check drawn against an account is only a direction to pay the amount to the payee; no contractual relation with him or legal obligation to him being created by signing of the check, and a refusal to cash not giving him a cause of action.

2. Gifts ⇐18(1)—Transfer of personalty effective only on delivery.

Under Civ. Code, § 1147, a gift is a voluntary transfer, without consideration, of personal property, and becomes effective only on delivery.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gift.]

3. Banks and banking ⇐140(1)—Bank, which refuses to cash gift check, not liable to payee.

Where a check was drawn as a gift, and the payee presented it to the drawee bank the day before the drawer's death, and the drawee

bank refused payment, it was not liable to the payee, who suffered no loss of "property" by its action in refusing to cash the check.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by W. S. Edwards against the Guaranty Trust & Savings Bank. From a judgment for defendant, plaintiff appeals. Affirmed.

See, also, 190 Pac. 57.

F. A. Knight, of Long Beach, for appellant.

Lewis Cruickshank and Vincent B. Vaughan, both of Los Angeles, for respondent.

WELLER, J. This appeal from a judgment in favor of the defendant is taken on the judgment roll. The basis of the action was a check for $4,000, drawn on the defendant bank by one B. L. Liveson on February 28, 1917, payable to the plaintiff, and intended as a gift to him of the amount mentioned. On March 2, 1917, plaintiff deposited this check in his bank at Long Beach, and on the following day it was presented to the defendant bank for payment, which was refused. Liveson died on March 4, 1917, and the check was never honored by the bank.

The complaint, as originally framed, contained three counts: (1) Based upon the alleged refusal of defendant to pay the check without any cause or reason; (2) alleging that the defendant, for the purpose of defeating the gift and maliciously preventing the said B. L. Liveson from accomplishing his desire to give the money to plaintiff, and for the purpose of keeping the amount in the estate of Liveson in order that the defendant, as executor of his will, might receive larger fees for administering the estate, refused to pay the check, to the damage of plaintiff in the sum of $4,000; and (3) for money had and received from B. L. Liveson for the use and benefit of the plaintiff. The complaint also contains an allegation that the three causes of action arise out of the same transaction, and are connected with the same subject-matter. A demurrer was interposed to each cause of action set forth, and sustained as to the first two counts without leave to amend. Issue was joined on the third count, and, after trial, the facts were found in favor of the defendant, and judgment entered accordingly.

The sole contention of appellant is that the court erred in sustaining the demurrer to the second cause of action on the theory that, because the defendant maliciously prevented him from receiving the gift, plaintiff is entitled to recover the amount of the attempted donation from the defendant as damages. In the case of Edwards v. Guaranty Trust & Savings Bank, 190 Pac. 57, we held that, as the check involved in this controversy was not cashed prior to the death of Liveson, the attempted gift was not completed by delivery, and that therefore the payee could not recover the amount from the estate of the donor.

[1] A bank occupies the position of debtor to its depositors, and a check drawn against an account is only a direction to pay the amount thereof to the payee. No contractual relation with the payee, or legal obligation to him, is created by the signing of the check, and refusal to cash the check does not give rise to a cause of action in favor of the person to whom it is made payable. Pullen v. Placer County Bank, 138 Cal. 169, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19.

[2] A gift is a voluntary transfer, without consideration, of personal property, and becomes effective only on delivery. Section 1147, Civ. Code. Until the purpose of the donor is carried into execution by a delivery of the subject of the gift, no interest vests in the donee. Knight v. Tripp, 121 Cal. 674, 54 Pac. 267. The mere privilege to be the recipient of a gift is common to all, and cannot be possessed or used to the exclusion of others; hence, it does not constitute property capable of ownership.

[3] Before the plaintiff can recover damages herein, he must allege and prove that the defendant has committed some unlawful act which has resulted in injury to the person or property of the plaintiff. The only allegation in the count under consideration is to the effect that defendant prevented plaintiff from becoming the beneficiary of Liveson's bounty; and it is thus made to appear that plaintiff suffered no loss of property by defendant's action in refusing to cash the check. The demurrer was therefore properly sustained.

Judgment affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

48 Cal. App. 790

PEOPLE v. McCADDON et al. (Civ. 3223.)

(District Court of Appeal, Second District, Division 2, California. July 30, 1920.)

1. Nuisance ⊂=84—Complaint under Red Light Abatement Act sufficient.

Complaint to abate nuisance under the Red Light Abatement Act, alleging that one defendant was the owner of certain hotel premises, that another defendant was in possession, and that divers acts of lewdness and prostitution had occurred and were occurring there, etc., *held* not vulnerable to the demurrer interposed.

2. Nuisance ⊂=65—Under Red Light Abatement Act, knowledge of owner is unnecessary.

A judgment for abatement under the Red Light Abatement Act, supported on findings that a nuisance, consisting of a place of assignation and prostitution, was conducted and maintained on the premises in question, regardless of the knowledge of the owner, is sufficient.

3. Jury ⟸14(12)—No right to trial by, in red light abatement action.

In an action for injunction to abate a nuisance under the Red Light Abatement Act, neither the Constitution nor the statute requires the submission of the issues to a jury; it not being error to deny a jury where the right was not granted at common law.

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

Action by the People of the State of California against Mrs. F. McCaddon and others. From judgment for plaintiff, defendants appeal. Affirmed.

A. S. Maloney, of San Bernardino, for appellants.

T. W. Duckworth, of San Bernardino, and M. O. Hert, of Colton, for the People.

THOMAS, J. This is an action brought to abate a nuisance under the Red Light Abatement Act (St. 1913, p. 20). It is alleged in the complaint that defendant Joseph Ingersoll was the owner, and the reputed owner, of the premises known and described as the Chambers Hotel, in the city and county of San Bernardino; that the defendant Mrs. F. McCaddon "was and now is" in possession of the said premises; that divers acts of lewdness, assignation, and prostitution "now occur and continuously since the 27th day of September, 1917, have occurred, and now are and during all of said times have been committed, in said building * * * by divers persons unknown to plaintiff"; that said premises were by the defendant Mrs. F. McCaddon used "for the purpose of lewdness, assignation and prostitution"; that the defendant Joseph Ingersoll had the means of knowing the alleged acts occurring and permitted in said building; and that the acts alleged constitute and are a nuisance, because whereof the said building—Chambers Hotel —"is a nuisance, being knowingly maintained as such." It further appears from the complaint that certain furniture and fixtures owned by the defendant Jane Doe Cassidy were, during all of the times mentioned therein, used by the defendant McCaddon in aiding and abetting said alleged nuisance.

Demurrers were interposed by the defendants Ingersoll and McCaddon, both of which were overruled. The defendant Ingersoll answered admitting that he was the owner of the building in question, but denying all other material allegations of the complaint. The other defendants did not answer. Defendant McCaddon claims error in the court's action in overruling her demurrer. The facts in reference thereto are as follows:

Mrs. McCaddon was served with summons and complaint on October 27, 1917, and filed her demurrer thereto on February 23, 1918, copy of which demurrer, however, was never served on plaintiff's counsel, the district attorney. The demurrer having been filed after the time allowed by law, and without leave of court, she was required by the court to argue her demurrer at the trial, which she refused to do, whereupon the court overruled the same and ordered that she answer the complaint forthwith, which action she likewise refused to take. The complaint was not vulnerable to the demurrer interposed. There was no error in any of the rulings referred to.

There was conflict in the evidence as to every material allegation with reference to the alleged nuisance, which conflict the court resolved in favor of the plaintiff; and, judgment being entered in favor of the plaintiff, defendants appeal therefrom.

Four points are urged by appellants for a reversal of the judgment: (1) Error of the court in overruling defendants' demurrers; (2) that the findings do not support the judgment, particularly as to the defendant Ingersoll; (3) that the court erred in denying defendants a jury trial; and (4) insufficiency of the evidence to sustain the findings and judgment.

We consider each point to be without merit.

[1] As to the first point urged, we think the complaint not vulnerable to the demurrers interposed; hence the rulings thereon were correct.

[2] Points 2 and 4 need no discussion. The fact that the court did not find that Ingersoll had knowledge, etc., that such nuisance was being conducted on his premises, we think is immaterial. A judgment supported on findings that such nuisance was conducted and maintained on the premises in question, regardless of the knowledge of the owner thereof, is sufficient. Such knowledge on the part of the owner, under the act, is unnecessary. People v. Barbiere, 33 Cal. App. 770, 166 Pac. 812; People v. Casa Co., 35 Cal. App. 194, 169 Pac. 454; People v. Bayside Land Co., 191 Pac. 994; People v. Smith, 191 Pac. 996.

[3] As to the third point, the rule is too well established to need discussion here. This being an action for an injunction, neither the Constitution nor the statute requires the submission of the issues to a jury. It is not error to deny a jury in any case where such right was not granted at common law. Cassidy v. Sullivan, 64 Cal. 266, 28 Pac. 234; Woods v. Varnum, 85 Cal. 639, 24 Pac. 843; People v. Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75; Wheelock v. Godfrey, 100 Cal. 578, 35 Pac. 317; Santa Cruz Co. v. Bowie, 104 Cal. 286, 37 Pac. 934.

Judgment affirmed.

We concur: FINLAYSON, P. J.; WELLER, J.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

48 Cal. App. 693

PEOPLE v. RUIZ. (Cr. 730.)

(District Court of Appeal, Second District, Division 1, California. July 28, 1920.)

1. Rape ⊂⊃35(2)—Prosecution must prove alleged force where age is not alleged.

In a prosecution for assault with intent to rape, where the district attorney elected to rely upon the charge of a forcible attack without alleging the age of prosecutrix, he must prove the element of force, though prosecutrix was under the age of consent.

2. Criminal law ⊂⊃678(1)—Prosecutor must elect as to assault on which he relies.

In a prosecution for assault with intent to rape, where the evidence showed three separate acts by accused on the same day which would answer the charge in the indictment, it was error to refuse defendant's request to require the district attorney to elect the particular act upon which he would rely for conviction.

3. Criminal law ⊂⊃1168(2) — Failure to require election held prejudicial.

The failure to require the district attorney to elect the act on which he would rely for conviction was substantial error, depriving defendant of a fair trial, where the only instruction as to evidence of other offenses limited such evidence to proof of intent, and the jury were not even told that they must all agree upon one particular act before they could convict.

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Anastacio Ruiz was convicted of assault with intent to rape, and he appeals from the judgment and from an order denying his motion for a new trial. Judgment and order reversed.

W. T. Kendrick, Jr., and V. H. Kendrick, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and Thomas A. Wood, of Los Angeles, for the People.

JAMES, J. Defendant was convicted of the crime of assault with intent to commit rape, and appeals from the judgment of imprisonment entered against him, and from an order denying his motion for a new trial.

[1] The information charged an attempt by force to commit the crime against a female person not the wife of the defendant. The evidence showed that the prosecutrix was a child of the age of 11 years, but as the district attorney elected to rely upon the charge of a forcible attempt, without alleging the age of the prosecutrix, the element of force was a material ingredient to be established by the evidence. Leaving out of consideration the substantial error which was committed to the defendant's prejudice in the course of the trial, it might be said that the evidence was sufficient to sustain a conviction.

[2] The error to which we refer is illustrated by the fact that the district attorney was permitted to prove several distinct and separate acts of the defendant committed on the same day, either one of which might have been included within the charge made by the indictment. After the first alleged act was shown, defendant demanded that the district attorney select the particular act upon which he relied, which the district attorney did not do, and the court failed in its instructions to point out the particular act of the three shown as being the one at which the charge in the indictment was directed. The testimony of the prosecutrix was that she, at the invitation of defendant and with the consent of her father, accompanied defendant on a ride in his buggy; that her young brother also made one of the party; that defendant required the young brother to get out of the buggy, and drove some distance away; that he observed that the brother was looking after the buggy, and continued to drive for five or ten minutes, when he stopped, took the prosecutrix in his arms from the buggy, placed her upon the ground and unfastened her clothing; that the young brother then approached and announced that he was going to tell the father of the prosecutrix, upon which the defendant got up, took the prosecutrix with him and drove five or ten minutes further; that he then stopped and took the prosecutrix out of the buggy and placed her on the ground again. It was at this point in the narrative of the occurrences that the defendant objected to the proof of any further occurrences, and asked that the district attorney be required to elect as to which attempt he relied upon under the charge made. After some discussion, at the end of which the district attorney declined to make an election other than to say that he did not rely upon the particular occurrence then being shown and to insist that he had the right to prove all of the occurrences as part of the "res gestae," the prosecutrix was then allowed to proceed with her testimony, which was to the effect that substantially the same acts were repeated by the defendant as had been committed at the prior occurrence. The prosecutrix proceeded to testify that the two again got into the buggy and drove for another space of five or ten minutes, and that the defendant again took her out of the buggy and placed her upon the ground, lifting her clothing, which acts were all that she remembered that he performed upon this last occasion.

[3] The court gave only one instruction touching the matter of the proof of other acts than that intended to be charged, telling the jury that evidence of other assaults or

efforts to have sexual intercourse on the part of the defendant and of improper familiarity was receivable to prove the adulterous disposition of the defendant, etc., and as having a tendency to render it more probable "that the assault with intent to commit rape, charged and relied on in the information, was committed at the time and place charged * * * and for no other purpose." The several and distinct acts of the defendant were all committed on the same day and might each have referred to the charge contained in the indictment. The instruction of the court was valueless as indicating to the jury which particular attempt it was required to determine had been sufficiently made out. What is said in People v. Williams, 133 Cal. 165, 65 Pac. 323, is particularly applicable here. The court declares:

"Each of these acts was a separate offense, and the defendant could be tried for either, and separately for each of them. The jury were not even told that they must all agree that some specifically described act had been performed. A verdict of guilty could have been rendered under such an instruction, although no two jurors were convinced beyond a reasonable doubt, or at all, of the truth of the charge, as to any one of these separate offenses."

In People v. Castro, in the same reports and volume (133 Cal.) at page 11, 65 Pac. 13, the court was considering the matter of the requirement that prosecuting officers shall elect which of several acts they propose to rely upon, and said:

"And even conceding that the failure to make such election at that time did not constitute error because of the want of demand upon the part of the defendant to make the election, still, when the case went to the jury, the court, in some form, should have directed their minds to the particular act of intercourse which it was incumbent upon the state to establish by the evidence, before a verdict of guilty could be returned against the defendant."

There is nothing in the decision in the case of People v. Simon, 21 Cal. App. 88, 131 Pac. 102, which at all aids the case of the respondent here upon this point, for that was a case where the different acts were all a part of one main transaction which eventuated in the accomplishment of the single crime charged.

Other errors assigned by appellant do not call for extended discussion. It was sufficiently shown by the evidence that the acts alleged to have been committed were so committed in the county of Los Angeles, and it was fairly shown by the circumstances in evidence that, even though there was no express assertion to that effect given by any witness, the prosecutrix was not the wife of the defendant. The error which we have first given attention to, however, was substantial; it must be said that because of it the defendant was deprived of a fair trial, and that its effect in this case is to produce a miscarriage of justice.

The judgment and order are reversed.

We concur: CONREY, P. J.; SHAW, J.

48 Cal. App. 706

CREAMERY PACKAGE MFG. CO. v. BENNETT. (Civ. 3459.)

(District Court of Appeal, First District, Division 2, California. July 28, 1920.)

1. Contracts ⟸198(1)—Items for cheese vats furnished for creamery held proper charges under contract.

Under a contract for the purchase of creamery machinery and its installation, with such new materials and apparatus as might be necessary to complete the plant, to be furnished on a cost plus 10 per cent. basis, special items sought to be recovered by the contractor on account of cheese vats invoiced at $210, and labor for installing them, *held* proper charges.

2. Contracts ⟸74—Defendant liable for machinery ordered for creamery, irrespective of ownership.

Defendant, who ordered machinery for a creamery from plaintiff, was liable for the price, irrespective of who actually owned the controlling interest in the creamery, whether defendant or others; consideration for a contract being valuable, whether it move to the other party bound or to a third party.

3. Contracts ⟸171(3) — Contractor entitled to sue for certain items in single action despite form of contract.

Where defendant ordered certain machinery for a creamery, specifying the items, with what new materials and apparatus might be necessary to complete the plant, though in the contract the signatures of the parties appeared before the contractor's offer to furnish such additional supplies, the contractor could sue for the price of the specified machinery and the additional items in one action, not being required to bring a separate suit for the additional items and the cost of labor in installing them.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by the Creamery Package Manufacturing Company against R. F. Bennett. From a judgment for plaintiff, defendant appeals. Affirmed.

Ford & Bodkin, of Los Angeles, for appellant.

Adams, Adams & Binford, of Los Angeles, and Henry A. Jacobs and G. B. Blanckenburg, both of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment against him in

an action for the agreed price of certain machinery and labor to install the same. The action is based upon a written contract which is set out in the complaint. This contract calls for goods to be shipped to Chowchilla Creamery, Chowchilla, Cal., at a price of $1,775. It also contains an agreement to pay—

"$6 per day and traveling, hotel and other reasonable expenses, for an expert machinist to superintend and to assist in the setting of said machinery," etc.

This contract is signed by plaintiff, by its agent, and by the defendant. The contract is in a form that opens like a book, and consists of two sheets, or four pages. The first two pages contain the stipulations above set out, and the agreement is signed upon printed lines for the signatures appearing about the middle of page 2. Upon the third page, which, as stated, is formed merely by folding over in book form a single sheet of paper upon which the first two pages appear, there is a specification of the articles ordered, together with the prices of each. These items appear in a column headed:

"Complete List of Articles Covered by Attached Contract; Catalogue Price List; Net Selling Price."

The total of the sums charged for the respective articles is $1,775, corresponding to the amount called for by the body of the contract. The items over which the dispute arises were furnished under the following paragraphs, which appear upon this third page directly under the enumeration of the articles purchased:

"The company will furnish an experienced ice machine and creamery erecting engineer to install the above machinery and to overhaul and rebuild the complete creamery equipment, using as much of the old equipment as is possible, at the rate of $6.00 (six dollars) per day with traveling and living expenses extra.

"The company will furnish such new materials and apparatus as are necessary to complete the plant and not specified above on the basis of cost plus 10% (ten per cent.).

"The company will furnish plans and specifications for the purchaser to work from in building cold storage room."

The defendant admits liability for $1,775, the agreed price of the specific machinery mentioned in the contract, together with the charge for labor in installing said machinery. The dispute is over additional items admittedly furnished by the plaintiff and installed upon the orders of Mr. Bennett, personally, or the manager of the Creamery Company, as a part of the equipment of the plant. Mr. Bennett was in touch with the entire time of the construction of the plant, and does not contend that he was not aware at all times of the items of material and labor which entered into the construction of the plant, or that he made any objection thereto.

[1] The special items with reference to which a modification of the judgment is urged are cheese vats, invoiced at $210, and labor for installing the same. The argument of appellant with reference to these items is that the defendant intended merely to contract to rebuild the plant in the same manner in which it had been equipped before the fire which destroyed it, that cheese vats were not a part of the equipment of the old plant, and that therefore Bennett never contemplated becoming liable for such items. The record does not show the exact amount that was charged for labor in installing these cheese vats, as the labor charges were made by the day, and no record was kept of the precise time consumed with each part of the work. However, it is our opinion that under the facts in evidence here, this item is a proper one under the omnibus clause above set out, under which the plaintiff agreed to furnish additional materials, and apparatus necessary to complete the plant on a basis of cost plus 10 per cent. There was no limitation restricting the items to such as had been in the plant previously. The exhibits used in the trial are not included in the record presented to us. From the testimony, however, concerning these exhibits, it appears that these special items were ordered by the defendant himself and the order was introduced in evidence in the trial court. The situation is the very simple one of an offer by the plaintiff, accepted by the defendant in placing his order.

[2] The question of whether the goods were for the Chowchilla Creamery Company, or for Mr. Bennett personally, is not material. The contract calls for goods to be delivered to the Chowchilla Creamery Company, for which Mr. Bennett agrees to pay. The offer to furnish additional items is made with reference to this contract; it is added upon the same paper therewith, and the orders were given by Mr. Bennett, personally, in many instances under this offer. It is quite immaterial under such circumstances whether Mr. Bennett desired these goods for himself personally, or for his friends or for strangers, and it is of no importance, therefore, who actually owned the controlling interest in the Chowchilla Company. The ruling of the court, therefore, refusing to admit evidence concerning these matters, was proper. A consideration for a contract is equally valuable, whether it move to the other party bound or to a third party.

The only other contention made by the appellant is that, although the defendant may have been liable for these additional items ordered and received by him upon an implied promise to pay, yet such liability arises from a new and different transaction than the one embraced in the written contract, because in the contract the signatures appear before this offer to furnish additional supplies, and the signatures conclude the contract; that therefore the matters appearing

after the signature are no part of said contract. The precise point urged in relation to this is that the present suit is upon a written contract; that the transactions between the parties other than for the machinery at $1,775 and the price of labor for installing the same cannot be sued upon in this action, but a separate action must be brought to recover for such items.

[3] We cannot agree with the appellant in this contention. Defendant does not maintain that the contract admitted into evidence has been changed since he signed the same. It is clear that the entire writing was considered by the parties as one contract, and that they intended to append their signatures to the contract as an entirety. The third page is made a part of the document contained on the first and second page, by reference thereto in the words: "Complete list of articles covered by attached contract." The entire writing is upon but one sheet of paper, folded over to form the two pages. In so far as the contract merely contains an offer by the plaintiff to furnish certain items, it is to be construed in connection with the written orders given from time to time in acceptance of this offer, which, together with the document before us, constitute the written contract. These orders are not before us, but from the testimony appearing in the record they were before the trial court, and they were signed either by the defendant personally or by Mr. Prince, as manager of the Chowchilla Creamery.

The record shows that Mr. Bennett was personally aware of all materials that went into the plant, and was personally familiar with the work of reconstruction as it proceeded. He permitted the plaintiff to furnish the various articles upon orders signed by Mr. Prince without protest, and he cannot now deny the authority of the manager to attend to some of the minor details of the ordering for him. If, as appellant contends, there was no actual agency upon the part of the manager of the company to give orders for Mr. Bennett in connection with this contract, nevertheless, as to this plaintiff, there was an ostensible agency by which defendant is bound. The record contains the testimony of the agent of the plaintiff company that the defendant told him:

"Mr. Prince was the manager of the creamery company and that any changes that he suggested in restoring the plant to accede to his wishes."

He also testified that Mr. Prince was constantly at the plant of the creamery company and apparently in charge of the same and of the construction work.

There are no other matters argued by appellant which require discussion.

The judgment is affirmed.

I concur: BRITTAIN, J.

48 Cal. App. 728

PEOPLE v. SILVA. (Cr. 526.)

(District Court of Appeal, Third District, California. July 28, 1920.)

1. Larceny ⇐55 — Circumstantial evidence held insufficient to sustain conviction.

Circumstantial evidence, which merely established defendant's opportunity to steal a purse, and the possibility, though not probability, of his placing it where it was found, *held* insufficient to sustain a conviction for grand larceny.

2. Criminal law ⇐562—Opportunity insufficient to convict, unless opportunity by others is excluded.

Evidence that defendant had an opportunity to commit the crime is insufficient to sustain a conviction, unless it also excludes the opportunity of any other person.

3. Criminal law ⇐1159(3)—On appeal conflicting evidence must be considered most favorably to verdict.

On review of verdict rendered, where the evidence was conflicting, the evidence must be considered most favorably in support of the verdict.

4. Criminal law ⇐552(2)—Circumstantial evidence must exclude innocence.

Circumstantial evidence to justify conviction for a crime must not only be consistent with the hypothesis that accused is guilty, but must also be inconsistent with the hypothesis that he is innocent.

5. Criminal law ⇐792(2) — Instructions on guilt of accomplice held not supported by evidence.

Where the evidence showed that another person besides defendant and prosecuting witness was present when a pocketbook was stolen, but had no tendency to establish joint action by defendant and such other person, it was error to instruct the jury in the language of Pen. Code, § 31, as to guilt as principals of persons present and aiding and abetting the commission of the offense.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Louis Silva was convicted of grand larceny, and he appeals from the judgment, and from the order denying his motion for a new trial. Reversed.

S. Luke Howe and R. B. Hibbitt, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was by information charged with, and by the jury convicted of the crime of, grand larceny in the superior court of Sacramento county, and appeals from the judgment and the order denying him a new trial.

The specific charge stated in the information is that the defendant stole the sum of

$480 from one John Glavich, in the city of Sacramento, on the 29th day of December, 1919.

[1] The principal point upon which the defendant relies for a reversal is that the evidence does not support the verdict, and in the outset it is just as well to announce our conclusion to be, after a careful examination and study of the evidence, that the contention of the defendant that there was not legal justification for his conviction is well taken. The consideration of this point will require rather an extended review herein of the evidence. In doing this we shall, except in a few instances, narratively state the facts as they were shown by the evidence.

One Lena Casella, a female, was, in the month of December, 1919, the owner of and conducted a lodging house at 1017½ Second street, in the city of Sacramento. On the 24th day of December of said year, said John Glavich, a resident of Sutter City, in Sutter county, went to Sacramento, and on that day hired a room in the lodging house of Mrs. Casella. Glavich, when he hired the room in said house, had in his possession approximately the sum of $600, in currency, which he carried in a leather wallet or purse in the hip pocket of his pantaloons. During the four or five days immediately preceding the 29th day of December, 1919, the time at which the defendant appeared upon the scene, Glavich had remained in his room almost constantly, and on all those days he and Mrs. Casella diverted themselves by drinking more or less intoxicating liquors; the latter furnishing the liquors and the former paying for the same. While to a greater or less extent Glavich was, during all this time, under the influence of intoxicants, he was at no time or on no occasion in such a condition of inebriety as to render him insensible to what was going on or what he did. Up to the time that the defendant had found his way to the Casella lodging house, Glavich had expended about $100 of the sum of which he was possessed when he first appeared at and secured lodgings in the Casella apartments.

On the 29th day of December, 1919, about the hour of 6 o'clock p. m., or a trifle later, the defendant, as already stated, went to the Casella lodging apartments. Here it is to be said that there is no testimony in the record, other than that of the defendant himself, showing the circumstances under which or the reason for which the defendant visited said lodging house on the occasion mentioned, and we must therefore rely solely upon his testimony for information as to those matters.

The defendant, whose home was in Sonoma county, was, at the time of the alleged larceny here complained of, and had been for some time previously, employed at the Sisters' Hospital, in the city of Sacramento. He testified that, on the day and at the hour above stated, he left said hospital for the purpose of calling on an acquaintance by the name of Jack Mosher, who, on a previous occasion, had told him that he (Mosher) was rooming at the Casella place, and who had invited the defendant to come to the said lodging house and pay him a visit. The defendant had never been in Mrs. Casella's apartments prior to the evening on which the alleged larceny was committed, and had never previously met Mrs. Casella. On arriving at the lodging house on the evening referred to, he entered the apartments, and met Mrs. Casella, and inquired for Mosher. Mrs. Casella informed him that, although Mosher had a room in her house, he was not at that time in his room or about the place. The defendant was then invited by Mrs. Casella to accompany her to her kitchen and there have a "drink" with her. He accepted, and, going in to the kitchen, he there met Glavich for the first time; the latter then being a stranger to him. The defendant remained at Casella's for some time, and with the landlady and Glavich had a number of drinks of intoxicating liquors.

We return now to the testimony presented by the people. Glavich testified that, just before the defendant appeared at the lodging house, he took the pocketbook containing his money from his pocket in the presence of Mrs. Casella. He further testified that he did not exhibit the pocketbook after the defendant went into the kitchen, nor at any time while the defendant was present did he take the purse from his pocket. He also stated that he did not know whether or not the defendant knew that he had any money on his person. The witness said that neither he nor Mrs. Casella or Silva left the room after Silva entered it. At some point of time between the hours of 8 and 10 o'clock, Glavich continued, he placed his hand in the pocket in which he had always carried the pocketbook, and then discovered that it was missing, and thereupon, addressing Mrs. Casella, asked her to return to him the pocketbook. She denied having it, or knowing anything of its whereabouts. He then asked the defendant if he had his money, to which the latter answered in the negative. He thereupon said to both Mrs. Casella and the defendant that he intended going after an officer for the purpose of having the defendant arrested, and, suiting his actions to his words, left the lodging house and soon returned with two police officers, who asked both Mrs. Casella and the defendant if either had the money of Glavich or knew where it was, and they replied that they neither had his money nor knew anything about it or its whereabouts.

The complaining witness was asked if he did not testify at the preliminary hearing of the charge that the last time he saw his pocketbook was about 5 o'clock of the day on which the defendant appeared at the lodging house, and he replied that, while he had no recollection of so testifying on the occasion named, he might have done so, and that if he

did it was the truth, as (he continued) the circumstances occurring on the day he lost his purse were fresher in his mind when the preliminary hearing was held than they were at the time of the trial.

F. W. Cameron, one of the police officers to whom Glavich made the complaint of having been despoiled of his money, and who accompanied Glavich to the lodging house to investigate the complaint, testified in substance as follows: That he and another officer went to the lodging house to investigate the complaint made by Glavich, and found Mrs. Casella and the defendant in the kitchen. Glavich, he said, at that time accused Mrs. Casella of having taken his money. He did not then charge the defendant with taking the money, or of knowing anything about it. The officer asked both Mrs. Casella and the defendant if they or either of them had taken the money, and each strenuously denied having done so, or having any knowledge of where his money was. The two officers thereupon searched every room in the place, and then Officer Cameron, with a flashlight, went to the toilet, accompanied by the defendant, and "searched around" in there, but found no trace of the pocketbook or the money. The defendant remained outside, but near the toilet, while the officer was in there making the search; but, immediately upon the officer leaving the toilet, the defendant entered it, leaving the door open, so that the officer could see him or his form sufficiently to enable him (the officer) to observe his movements while in there. After the officer and Silva returned to the kitchen, the former asked Glavich if he thought Silva had his money, to which question Glavich replied, "I don't know." The officer then asked Silva if he had any objection to being searched, to which the defendant answered, "Why no; search me" and the officer thereupon searched the accused, but did not find the pocketbook or money. Immediately thereafter the officer returned to the toilet, and finally found the purse in the bowl, "underneath the water. I had to look pretty close to see it," continued the officer. "It started to go down, in the flow that flushes off, and the water was dark, you know, and I had quite a time to see it." The purse contained four $20 bills. The officer, after finding the purse, immediately returned to the kitchen and exhibited the wallet to Glavich, who readily identified it as the purse he had lost and which had contained his money. The defendant, when the purse was shown to Glavich by the officer, addressed the latter, saying:

"You went with me to the toilet; you know I didn't throw anything in there."

The officer testified that the condition of the light about the toilet was such that, although he stood near the toilet and the door leading into it was open when the defendant was in there, he could not "detect any of his [defendant's] actions." The foregoing facts are taken from the testimony in chief of the officer. On cross-examination, he testified:

"Q. Mr. Cameron, when you went back up there, the first thing this man did was to accuse the woman of taking his money? A. Yes. Q. Said she was the one that robbed him? A. That is right. Q. And then you went out—you searched the premises, and you did not find anything? A. No. Q. Searched the kitchen and searched the bedroom, I suppose? A. Yes. Q. Did not find any money? A. None; none at all. Q. And later on you searched the defendant, and you did not find any money on him? A. No. Q. Of course, Mrs. Casella was a woman? A. Yes. Q. And you did not make the thorough search of her that you did of the defendant? A. No. Q. And she might have had the money on, and you not find it? A. Oh, I suppose it could have been concealed about her person. Q. Yes. Well, in other words, being a woman, you did not make the careful search of her that you did of the defendant? A. As a matter of fact, we did not search her. Q. Did not search her? A. No. Q. All right. Now, when you went back to the toilet with Mr. — Oh, by the way, the water in the bowl was muddy, was it not? A. Yes; it was slightly muddy, but the—but not more than that the bowl or that the porcelain bowl was discolored, was all dirty; it was hard to see. Q. It was difficult to see, because of the dirty bowl and the fact of the muddy water? A. The water, and the bowl— Q. (interrupting). The water and the bowl were somewhat the color of this, were they not (referring to the pocketbook in evidence)? A. Yes; something like that. Q. Yes. Now, you went with Mr. ———, the defendant, to the toilet? A. Yes. Q. When you found it, as I understand you to say in your testimony, that you had to look pretty close to find it, when you went back there? A. Yes. Q. You had to look pretty close into the bowl, and the flash of your light down there, before you found it? A. Yes. Q. Now, it was in the pipe part; that is, that leads from the bowl, was it not? A. Yes; Q. Covered by the water? A. It had started to go down. Q. Started to go down, covered by the water? A. Yes. Q. And you couldn't—by just flashing your light around casually, you couldn't see it, but you had to look very carefully? A. Yes; I got the light right down into it. Q. Now, when you went into the toilet first, Mr. Cameron, the defendant, was right there with you? A. Yes; he stood at the door. Q. And you simply went, by reason of the fact that he was standing there, and hurriedly looked around; you did not make as careful a search of the bowl at that time as you did later, when you found it? A. No; I didn't. Q. Yes. Now, when you found it, it had the appearance of having been flushed that far, did it not, as though the cord had been pulled; and the pocketbook had been forced down into the pipe? A. Yes. Q. And did you hear this defendant flush the toilet while he was in there? A. No; no; I didn't. Q. He did not flush the toilet? A. No. Q. For all you know, the pocketbook might have been in the water when you first examined the toilet? A. Well, it might have been. Q. All right. The defendant never at any time—I

mean the complaining witness never at any time accused the defendant of taking his money? A. No; he didn't."

Recross-examination:

"Q. You did not see Mr. Silva at any time lean over while he was in the toilet, as though he was pushing anything down in the toilet? A. No. Q. He stood up all the time, didn't he? A. Yes; he stood up."

It was stipulated that the transcript of the testimony presented before the committing magistrate at the preliminary examination of the charge showed that at said hearing Glavich testified that the last time he saw his purse on the 29th day of December was about 5 o'clock in the afternoon, and that he did so testify at that time. The defendant, testifying for himself, denied having taken Glavich's purse or money or both. He stated that in the time intervening between the departure of Glavich from the lodging house and his return with the officers, Mrs. Casella left the kitchen and went to some other part of the lodging house, returning, however, before Glavich returned. There is no contradiction of this latter statement.

There has now been given herein an epitomized, but a full and fair, statement of all the testimony which was presented to the jury in the case. No important fact or circumstance has been omitted therefrom, and from that statement it will readily be observed that there are but two circumstances from which any possible theory may be deduced that the defendant took the purse from Glavich, to wit: (1) The opportunity incident to his presence in the room with Glavich for some hours; (2) the visit by the accused to the toilet under the circumstances above indicated. Indeed, the testimony really furnishes but one consideration by which the verdict can be upheld, and that is the fact that there was available to him, the accused, some opportunity to commit the crime by reason of the fact that he was with Glavich in the room for several hours. As to the circumstance of opportunity, though, it is plain from the evidence that Mrs. Casella's opportunity for taking the money was infinitely superior to that of the accused. As against her, the evidence, it will be noted, shows these circumstances: That Glavich had been with her almost all the time for a period of five days; that he roomed at her house, drank with her, and paid for the drinks; that she had seen his pocketbook in his hand, and had seen him take some money therefrom. She, in short, knew that he was fairly well supplied with money.

Now, with respect to the circumstance of the defendant's visit to the toilet, in the absence of which circumstance it is probable he never would have been charged with the crime, these facts appear, having been testified to by the police officer: That the latter went to the toilet accompanied by Silva; that the officer first entered the toilet and made a superficial examination thereof, merely casting his eyes into the bowl; that it contained water having a muddy or murky appearance—of a color, indeed, similar to that of the missing pocketbook; that thereafter the defendant entered the toilet, the door thereof remaining open while he was in there, and the officer at the same time standing near the door, in a position from which he observed the form of the accused; that the latter did not, while in the toilet, stoop or pull the cord that would flush the bowl; that, in fact, the defendant did not flush the bowl; that he (the officer) subsequently returned to the toilet, and made a more thorough examination of the bowl, and therein, by the aid of his flashlight, and placing his hand in the bowl, found the purse underneath the water, and in the pipe at the joint where the pipe was connected with the bowl, said pipe serving as a conduit for carrying into a cesspool anything flushed into it from the bowl. The officer stated, as will be observed, that he looked "more closely" into the bowl the second time he was in the toilet than he did the first time he was in there. He further stated it as his opinion that the bowl must have been flushed to have put the purse in the position in the pipe in which he found it.

It seems very clear to our minds that the most that can reasonably be said of the testimony thus reviewed is that it is sufficient only to generate a mere suspicion that the defendant might have committed the crime of which he was convicted. There is no testimony that any one saw the defendant near enough to Glavich to enable him to have abstracted the purse from the pocket of the complaining witness. Indeed, there is no testimony that the defendant knew that Glavich had a considerable sum of money on his person, or that he had any money at all, or, if he did have money, where on his person he carried it. Moreover, when Glavich left the lodging house for the avowed purpose of securing an officer and having the matter of the loss of his money investigated by the officer, the defendant remained in the lodging house until Glavich returned with the officers, and in no manner acted like a man who had committed a wrong or a crime. Furthermore, it is a fact of some significance that Glavich, upon returning to the lodging house with the officers, accused Mrs. Casella of taking the purse and the money, but made no such accusation in the presence of the officers against the defendant; and parenthetically we may suggest that Glavich, knowing all the circumstances, occurrences and situations connected with the presence of himself, Mrs. Casella and the defendant in the kitchen preceding the time he missed his purse, his opinion then as to who took his money constituted a circumstance of no little force.

But, however that may be, it is to be noted

that the strongest circumstance against the defendant is the finding of the purse in the bowl of the toilet after he had been there; but that circumstance loses much, if not all, of its force as applied to the defendant when these facts are considered: (1) That the officer did not make a very thorough search when first he went into the toilet; (2) that the water in the bowl was of a dark or murky appearance—in fact, the color of the purse, the officer said—and it is very plain that the purse could not have been seen by a mere glance into the bowl, even if it were floating upon the surface of the water, and much less readily could that have been done with the purse underneath the water and partly in the pipe; (3) that the defendant, according to the positive testimony of the officer, neither flushed the bowl while in the toilet nor stooped, which would have been a necessary movement, and indeed the only way, other than by flushing the bowl, that he could have placed the purse in the position in which it was found by the officer.

But, as above stated, the whole case against the accused rests upon the mere fact that he had a possible opportunity for committing the crime—not, however, even the opportunity that was available to Mrs. Casella.

[2] In People v. Tarbox, 115 Cal. 57, 63, 46 Pac. 896, 897, the Supreme Court, after recounting certain circumstances which were proved, and which it was maintained by the people were of an incriminatory character of such force as to support the verdict, had this to say:

"If the evidence had stopped there, it is clear that there could have been no conviction; for the opportunity to commit an offense can have no weight, apart from other circumstances, unless it excludes all reasonable opportunity for its commission by another, and standing alone, is insufficient to sustain the conviction."

See, also, State v. Suitor, 43 Mont. 31, 114 Pac. 112, Ann. Cas. 1912C, 230.

[3] In considering the evidence, we have not been unmindful of the rule that, in all cases, the evidence, even though conflicting, must be considered and resolved favorably to the finding of the jury. Here, however, there is no conflict in the evidence, and, as stated, it tends only, so far as the accused is concerned, to show that there was available to him a possible opportunity for committing the crime.

[4] Where, as is certainly true here, all the circumstances proved, taken together, are as compatible with innocence as with guilt, a situation sufficient to raise a reasonable doubt of guilt arises. U. S. v. Hart (D. C.) 78 Fed. 868.

"In order to sustain a conviction on circumstantial evidence, all of the circumstances proved must not only be consistent with each other, but consistent with the hypothesis that the accused is guilty, and at the same time inconsistent with the hypothesis that he is innocent, and with every other rational hypothesis except that of guilt." 16 Corpus Juris, p. 763; People v. Nelson, 85 Cal. 421, 431, 24 Pac. 1006; People v. Ward, 105 Cal. 335, 341, 38 Pac. 945.

Of course, that rule has application to those facts only which are essential to a conviction, but in this case the facts or circumstances relied upon for a conviction and upon which, indeed, the verdict must rest, if it may stand at all, are not, as we have pointed out, incompatible with the hypothesis of the innocence of the accused.

Our conclusion is, as is manifest from the foregoing discussion, that the evidence upon its face is wholly insufficient to sustain the verdict. No man's liberty should be taken from him upon such a showing. It certainly cannot be said with justness that the evidence is such in probative power or persuasive force as to produce in any fair-minded person, who has not been confused by or has not misapprehended and misapplied the law as it was stated to the jury by the court, an "abiding conviction, to a moral certainty," of the truth of the charge as against the defendant.

[5] The complaint is made that the court erred to the prejudice of the defendant by giving to the jury the following instruction:

"All persons concerned in the commission of a crime, whether it be a felony or misdemeanor, or whether they directly commit the act constituting the offense or aid and abet in its commission, or not being present have advised and encouraged its commission, are principals in the crime so committed."

The instruction is in the language of section 31 of the Penal Code, and of course states the law correctly; but we do not think that it should have been read to the jury under the circumstances of this case. The necessary implication from the instruction, in the light of the situation as it was developed by the evidence, was that there was evidence tending to show that the taking of the purse and money of Glavich was the result of the joint acts of Mrs. Casella and the defendant. Save and except the bare fact that the defendant had been present in the kitchen with Mrs. Casella and Glavich, there is absolutely no evidence tending in the slightest degree to establish a confederation between Mrs. Casella and the defendant for the purpose of stealing the money of Glavich, and that fact alone could not justly be made the predicate for such a theory as the instruction exemplifies; and we doubt not that the instruction influenced the jury to a very great extent in reaching the conclusion evidenced by their verdict. We may add that Mrs. Casella was not a witness in this case, nor is there anything in the record indicating whether she was arrested on the charge or what became of her.

But, be that as it may, as has been de-

clared, the verdict, in our opinion, does not derive sufficient support from the evidence, and the judgment is, therefore, reversed.

We concur: NICOL, Presiding Judge pro tem.; BURNETT, J.

48 Cal. App. 742

LEWIS v. REED. (Civ. 3292.)

(District Court of Appeal, Second District, Division 1, California. July 29, 1920. Hearing Denied by Supreme Court Sept. 27, 1920.)

1. Insurance ⟸587—No change of beneficiary without required written assent of officer.

Beneficiary of life policy providing against any term or condition being varied, except by written agreement of president or secretary, cannot be changed by mere notice to change, at least where it does not appear that insurer had sufficient time after notice and unreasonably neglected to take the requisite action thereon.

2. Insurance ⟸207(2) — Condition of policy making it void, if assigned, waived by insurer paying insurance.

Condition of a life policy, that if it be assigned it shall be void, is waived by insurer, though refusing to pay to the assignee, paying the insurance to insured's administrator.

3. Insurance ⟸203 — Life policy can under statute be assigned, notwithstanding provision of policy.

Civ. Code, § 2764, declaring that life policy may pass by transfer, impresses a rule of public policy on that class of contracts, so that an assignment is valid, notwithstanding contrary provision of policy.

4. Witnesses ⟸133—Testimony of assignee of life policy, suing insured's administrator for the insurance, held competent.

The assignee of a life policy, suing insured's administrator, to whom insurer paid the insurance, as for money received into his hands without lawful right, and for which he should account to plaintiff, was entitled to show by his testimony all that he did under his contract with deceased, making payments to deceased, assuming obligations, and paying premiums, in order to sustain his assignment as valid and on sufficient consideration; it not being a case of seeking to enforce a claim against the estate, but to recover money not belonging to the estate and in which it had no interest.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

Action by Paul P. Lewis against Edwin Reed individually and as administrator. Judgment for defendant, and plaintiff appeals. Reversed.

M. M. Gordon, of San Diego, for appellant.

Hamilton & Lindley, of San Diego, for respondent.

JAMES, J. Appeal from a judgment entered in favor of defendant—respondent.

Respondent's intestate (one Smith) during his lifetime became the owner and possessed of three certain policies issued by a life insurance company. By the terms of these policies the insurer agreed to make certain endowment payments in the event the insured lived to a certain age, and, in the event of his death, contracted to pay a certain fixed sum of money. The aggregate amount payable under the three policies as a death claim is the sum of $790. The insured being in poor health, and the plaintiff being his friend and being willing to assist the former, who was without funds, in securing medical attention and in the discharge of other needful obligations, the insured delivered the policies to plaintiff and executed a note to the insuring company, directing that the plaintiff be named as the beneficiary under the policies, and later executed what we construed to be an assignment of death benefits under the insurance to the plaintiff. The notice to change beneficiaries was deposited with the local agent of the insurer, but at the home office no action was taken to make the substitution in the interest of the plaintiff. It does not appear as to how long prior to the death of the insured the notice to change beneficiaries was deposited as mentioned, and it does not appear that any notice was given of the written assignment made by the insured to the insurer. The insurer died in August, 1919, leaving no heirs. The insuring company refused to pay the amount of the policies to the plaintiff, but did pay the full amount thereof to the defendant, who had been appointed administrator of Smith's estate. The trial court determined that the substitution of the plaintiff as beneficiary under the policies had not been made, because the same had not been consented to by the insurer, and that the interest of the insured had not passed by assignment to the plaintiff.

[1] Upon the evidence which the record before us discloses, we agree that the first finding made by the court, to wit, that the action taken by the insured in attempting to have substituted the plaintiff as his beneficiary was not effectual. Our conclusion, however, based upon the evidence, is that the assignment as made was effectual, and that all of the death benefits passed to the plaintiff, notwithstanding that the insurer had no notice of such assignment until after the death of Smith. Each of the policies contained a term providing that no conditions or terms of the policy should be varied, "except by written agreement signed by the president or secretary of the company." Accompanying this condition was the further term that superintendents, their deputies, and assistants should have no power to "make, alter, or discharge contracts." To permit a substitution

of an individual in lieu of the executors or administrators of an insured's estate certainly would work a material change in the contract, and one which, under the terms of the policy, required the assent of the insurer in the manner prescribed before becoming effectual.

"The provisions of a life policy as to the manner of changing the beneficiary must be complied with, at least, substantially so, for in such case the change can be made effective only by following the policy provisions and by conforming to the manner or mode specified in the contract. So where a policy of life insurance provides that a change of beneficiary shall be made by indorsement in writing and shall not take effect until indorsed on the policy by the home office, no act of the insured can effect such a change in the absence of such indorsement." Joyce on Insurance (2d Ed.) vol. 2, § 740a, and cases cited by the author.

This is not a case, as shown by the record, where, after notice to change a beneficiary has been given in sufficient form, the insurer neglects unreasonably to take the requisite action upon the request. It cannot be told from the record before us as to when the notice to change the beneficiary was deposited with the local agent; hence it may well have been that sufficient time had not elapsed within which to transmit such notice to the home office and obtain the necessary indorsement by the required officials before the death of the insured occurred. The trial judge was correct in holding that the attempted change of beneficiary was without effect in accomplishing that result.

[2, 3] Now, as to the matter of the assignment made: Two of the policies contained this term:

"If this policy be assigned or otherwise parted with, * * * or if any premium shall not be paid when due, this policy shall be void."

The third policy, in its terms relating to the assignment thereof, contained the following condition:

"Any assignment or pledge of this policy, or of any of the benefits thereunder, shall be void and of no effect."

Looking first to the term quoted as contained in policies which we shall call Nos. 1 and 2 for convenience (the provision being the same in each), it is noted that the penalty provided for assignment is that the policy shall be void—in other words, that all rights of the insured or the beneficiaries thereunder shall lapse. There are two answers to be made to the contention that by reason of this condition in the policy the plaintiff acquired no right to the money collected thereunder:

The first answer is that the company waived that condition by not insisting upon the penalty; the money was paid and the insurer thereby affirmed the contract as one which still retained its binding force as to it. The second answer, and the one which applies with conclusive force to the third policy as well, is that under the statute of this state the right is preserved to the insured to assign his policy of insurance, and that right cannot be taken away by a term of the contract which attempts so to do. Generally speaking, it may be stated as a well-recognized rule that a person may waive the conditions of a statute designed solely to secure to him a personal privilege where no question of public policy enters into consideration.

Section 2764, Civil Code, provides that—

"A policy of insurance upon life or health may pass by transfer, will, or succession to any person, whether he has an insurable interest or not, and such person may recover upon it whatever the insured might have recovered."

The section following provides that no notice of transfer is necessary to preserve the validity of a policy upon life or health, unless expressly required thereby. No one of the policies here considered contained any requirement that notice should be given of assignment of it. The question as to whether an insured under a life policy, which was made payable in case of death to his estate, could legally assign his interest, and especially to one not having an insurable interest in his life, has been the subject of some debate. Irrespective of statutory conditions, however, it has latterly become well settled that such an assignment may be made. In Grigsby v. Russell et al., 222 U. S. 149, 32 Sup. Ct. 58, 56 L. Ed. 133, 36 L. R. A. (N. S.) 642, Ann. Cas. 1913B, 863 (a case similar to this one in a part of its facts), the Supreme Court of the United States, by Justice Holmes, said:

"So far as reasonable safety permits, it is desirable to give to life policies the ordinary characteristics of property. * * * To deny the right to sell except to persons having such an interest is to diminish appreciably the value of the contract in the owner's hands."

It would seem that the statute of this state was designedly adopted to set at rest any question as to the assignability of a life insurance policy and also to affirm the right to make such assignment to a person having no insurable interest in the life of the insured. We think that by the statute a rule of public policy is impressed upon the character of contracts treated of, and that allowing terms of an insurance contract to contradict the right so given may not be permitted.

"Statutes are often passed to protect persons against the effects of certain types of contract. The purpose of such statutes would be defeated if their effect could be avoided by contract; and accordingly it is held that if such is the legislative intent, covenants attempting to avoid the provisions of such statutes are void." Page on Contracts, vol. 1, § 355.

The last-named author, in the paragraph cited, has enumerated many cases illustrating his text and cites the cases in his footnote. See, also, Griffith v. Life Insurance Co., 101 Cal. 627, 36 Pac. 113, 40 Am. St. Rep. 96, and, as to assignability under the statute, Gilman v. Curtis, 66 Cal. 116, 4 Pac. 1091; McEwen v. New York Life Ins. Co., 183 Pac. 373.

[4] From the evidence presented to the trial judge it appears that it was the intention of the insured that plaintiff, under his assignment, should collect and have the full amounts mentioned in the policies in the event of the insured's death. Plaintiff testified as to payments made by him pursuant to his agreement and as to obligations assumed, also as to payment of premiums on the policies. Portions of this testimony were stricken out by the court. The ruling of the court in this regard was erroneous. Plaintiff was entitled to show all that he did under the contract in order to sustain his assignment as valid and upon sufficient consideration. The case presented was not one where the plaintiff was seeking to enforce a claim against the estate of Smith, but rather to recover money which did not belong to the estate and in which the estate had no interest. As declared by the complaint, defendant Reed received into his possession the money without lawful right, and should account to the plaintiff therefor.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

48 Cal. App. 697

WISNOM v. McCARTHY et al. (Civ. 3088.)

(District Court of Appeal, First District, Division 2, California. July 28, 1920.)

1. Dismissal and nonsuit ⊂=60(1) — Courts may dismiss for failure to prosecute diligently.

It is an inherent right of courts to dismiss a suit for failure to prosecute it with due diligence.

2. Dismissal and nonsuit ⊂=63—Dismissal as to a defendant for failure to prosecute diligently held proper.

Dismissal of suit by a domestic engaged by a doctor and his wife as to the doctor for plaintiff domestic's failure to prosecute it against him with due diligence, when he might have been easily found in his office at all times, *held* not an abuse of the trial court's discretion.

3. Husband and wife ⊂=19(4)—Husband liable for expenses of household prior to and after desertion of wife.

Where services rendered a doctor and his wife were necessaries of life for persons in their economic and social position, and such services were partly rendered while they were living togther, and partly after the doctor had deserted his wife without cause, and was not furnishing such necessaries for her, the doctor was liable for such services as expenses of the household.

4. Husband and wife ⊂=151(5)—Wife liable for necessaries furnished while she and husband were living together.

Under Civ. Code, § 171, wife of doctor who deserted her *held* liable for at least the price of necessaries of life, including a domestic's services, furnished while husband and wife were living together.

5. Husband and wife ⊂=238(6) — Judgment against married woman for necessaries must be measured by statute.

The liability of a married woman, under Civ. Code, § 171, for necessaries furnished the household while she was living with her husband, being measured and fixed by the statute, it must necessarily be so measured and fixed by any judgment against her.

6. Husband and wife ⊂=239 — Dismissal of servant's action for wages as to husband did not affect wife's obligation.

Under Code Civ. Proc. § 414, dismissal as to defendant husband of a domestic servant's action for wages against husband and wife, she having worked for the couple prior to and after their separation, did not affect the obligation of the wife, under Civ. Code, § 171, to pay for necessaries furnished herself and husband while living together, she and her husband being jointly liable, so that the servant might have sued either, or, having sued both, might dismiss as to either.

7. Husband and wife ⊂=232(3) — Evidence held to show personal contract of employment of servant by wife.

Evidence *held* to show a personal contract on the part of defendant wife to pay a domestic servant in the household her wages after the separation of husband and wife, and a liability on the wife irrespective of the limited one possible under Civ. Code, § 171.

8. Limitation of actions ⊂=148(6)—Document signed by defendant wife in servant's action for wages admissible as statement of account.

In an action against husband and wife for wages due a domestic servant, the wife being jointly liable for the debt, incurred partly before and partly after separation from her husband, claimed account stated, prepared by plaintiff servant at the wife's direction and signed by the wife, *held* admissible against her as a statement of account, taking the claim out of the operation of the statute of limitation.

Appeal from Superior Court, San Mateo County, George H. Buck, Judge.

Action by Minnie Wisnom against M. McCarthy, also known as Mrs. C. F. McCarthy, and Charles F. McCarthy, her husband.

From an order sustaining the demurrer of defendant Mrs. McCarthy to certain causes of action, and from an order granting her motion for nonsuit, and from an order of dismissal as to defendant husband, plaintiff appeals. Order of dismissal as to defendant husband affirmed, judgment as to defendant Mrs. McCarthy reversed, and order granting nonsuit as to her vacated, with instructions to permit her to state whatever defense she may have.

Wm. T. Eckhoff, of San Francisco, for appellant.

Mrs. M. McCarthy, in pro. per.

Archer Kincaid, of Redwood City, for respondent Charles F. McCarthy.

LANGDON, P. J. This is an appeal from an order sustaining the demurrer of the defendant Mrs. C. F. McCarthy to the third, fourth, fifth, and sixth causes of action set up in the second amended complaint, and from an order granting her motion for a nonsuit, and from an order of dismissal as to the defendant C. F. McCarthy, her husband.

The action was one to recover for domestic services rendered in the household of the defendants. The first count alleges that the defendants were, at all times mentioned therein, husband and wife; that the plaintiff performed work and labor for them in their household at the special instance and request of said defendants, and each of them, from March 1, 1910, to November 30, 1915, at an agreed rate of $35 per month; that the services were necessaries of life to persons in the situation of the defendants; that, thereafter, on January 26, 1916, plaintiff and defendants, desiring to state an account of their aforesaid transactions, agreed that the defendants were indebted to the plaintiff in the sum of $1,135, and that an account showing such indebtedness was signed and delivered by defendant Mrs. McCarthy as her own act and as agent for her husband.

The second count states generally the same matters with reference to the defendants' employment of the plaintiff, and asks for $560, balance due for the reasonable value of services from May 1, 1914, to November 31, 1916. The general demurrer of Mrs. McCarthy was sustained as to this count.

The third count is for the agreed price of the services set out in the second count, and for the same amount—the only difference between the two counts being that one is for reasonable value and the other for the agreed price. The demurrer of defendant Mrs. McCarthy to this count was upon the ground that the cause was barred by the statute of limitations. The demurrer was sustained.

The fourth, fifth, and sixth counts were based upon the same services, rendered from March 1, 1910, to July 31, 1914, recovery was sought under the theory of reasonable value and the theory of agreed price. The account stated was pleaded to avoid the bar of the statute. At the close of plaintiff's evidence upon the motion of defendant Mrs. McCarthy, a nonsuit was granted against the plaintiff as to the counts which had not been stricken out upon demurrer.

[1, 2] Before considering the correctness of this ruling upon the motion for nonsuit, we shall first dispose of the appellant's objection that the motion of the defendant Dr. C. F. McCarthy to dismiss the action as to him was improperly granted. Said defendant filed his said motion on the ground of lack of diligence and long and unnecessary delay in serving summons upon him, and because of laches, lack of diligence, and want of prosecution. In support of this motion he filed his affidavit, which stands uncontradicted in the record, to the effect that the action was commenced on August 24, 1916, and summons duly issued on said date; that summons was served upon defendant Mrs. McCarthy, who appeared and answered, and said action was set for trial and the trial was continued from time to time, and thereafter, on January 22, 1919, the action was tried and submitted to the court for consideration and decision; that summons in said action was never served upon defendant C. F. McCarthy until January 31, 1919; that the said C. F. McCarthy has been for many years a practicing physician, as was well known to plaintiff, and has been practicing his profession since March 23, 1916, in the Shreve building in the city and county of San Francisco, all of which facts were well known to plaintiff; that his name and office hours at all times appeared conspicuously on his office door; that affiant has been constantly in attendance at his said office on each day from 2 to 4 o'clock in the afternoon, except for a period of about seven days during the summer of 1918, and at all of said times could have been found at his said office and could have been served with summons; that his name and address at all said times appeared in the telephone directory, and that plaintiff and her attorney at all times have known his address, and that he could have been served with summons during his office hours on any day, except Sunday, during all of said time; that no effort was made to serve him with summons until after the trial, and that plaintiff has been guilty of inexcusable and unnecessary delay in serving said summons, and neither plaintiff nor her attorney has exercised reasonable diligence. There is no attempt made by plaintiff to controvert these allegations in the affidavit of C. F. McCarthy upon the motion to dismiss as to him. It is an inherent right of the courts to dismiss a suit for failure to prosecute it with due diligence. 9 R. C. L. 206; Witter v. Phelps, 163 Cal. 655, 126 Pac. 593. Under the uncontradicted facts, it would appear

that the court has not abused its discretion in the present instance. Such action by the trial court under similar circumstances has been repeatedly upheld upon appeal. Grigsby v. Napa County, 36 Cal. 585, 95 Am. Dec. 213; Eldridge v. Kay, 45 Cal. 49; Lander v. Flemming, 47 Cal. 614; Linden Gravel Mining Co. v. Sheplar, 53 Cal. 245; Kreiss v. Hotaling, 99 Cal. 383, 33 Pac. 1125; Stanley v. Gillen, 119 Cal. 176, 51 Pac. 183.

[3] We shall revert now to the correctness of the ruling upon the motion for nonsuit, made by the other defendant, Mrs. McCarthy. After her demurrer to the first count had been overruled she filed an answer, denying that an account had ever been stated by her, either for herself or as agent for the defendant C. F. McCarthy; also setting up the defense of another action pending in San Mateo county, and that the present action was barred by the statute of limitations. The plaintiff pleaded and proved that the services were necessaries of life for persons in the economic and social position of the defendants; that they were partly rendered while the husband and wife were living together, and partly after he had deserted her without cause and was not furnishing such necessaries for her. Under such facts the husband would be liable for the expenses of his household. Title Ins. Co. v. Ingersoll, 158 Cal. 474, 492, 493, 111 Pac. 360.

[4] Also the wife would be liable for at least the price of the necessities thus furnished while the husband and wife were living together under the provisions of section 171, Civil Code. The scope and operation of this section has been carefully and thoroughly considered in the case of Evans v. Noonan, 20 Cal. App. 288, 128 Pac. 794. In that case the action was brought to recover for medical services furnished to the children of the defendants, who were husband and wife, and, upon appeal from the judgment, the liability of the wife was considered under section 171. Facts were stipulated in that case which are analogous to the facts in the present case. There the defendants were husband and wife, living together at the time of the rendition of the services. The medical services were necessaries for the minor children of defendants. They were furnished at the request of the husband and not at the request of the wife. The court held, in discussing section 171, Civil Code (20 Cal. App. at page 294, 128 Pac. 796):

"But whatever might have been the legislative motive prompting the enactment of the amendment, it is plainly manifest that the intention was thus to make the wife jointly liable with her husband for the payment of debts contracted by either or both for necessaries furnished to either or both while they are living together, restricting, however, the wife's liability by limiting the right to take her separate property in execution of a judgment for a debt so contracted to such of her separate property only as she may have acquired after marriage otherwise than by devise or succession. That the liability imposed upon the wife by the amendment was intended to be for debts which might be contracted by the husband alone for necessaries furnished to herself or her husband, or both, while they are living together, seems clear, not only from the language itself of the amendment, but also from the fact that the section before amended expressly foreclosed any right to take any of her separate property for the extinguishment of her husband's debts. The purpose of the amendment, in other words, seems to have been to authorize the doing of a certain thing to a limited extent which was theretofore altogether expressly forbidden."

[5] It is, of course, true that as the liability of a married woman, under section 171, Civil Code, is measured and fixed by the statute, it must necessarily be so measured and fixed by any judgment against her. Evans v. Noonan, supra, 20 Cal. App. 297, 128 Pac. 794. The procedure to be followed is discussed in said last-mentioned case, and it is said that, in any case where it is claimed that property levied upon is exempt from execution, the question whether the wife's separate property levied upon in execution of a judgment obtained against her for necessaries is or is not exempt under the section may be tried and decided in some appropriate proceeding after execution. This would necessarily be so because the issue could not arise except upon the taking of the property after execution.

[6] The dismissal in the present action, as to the husband, did not affect the obligation of the wife. Under the holding in Evans v. Noonan, supra, the defendants were jointly liable. Plaintiff might therefore have sued either, or, having sued both, she might have dismissed her action as to either. These rules regarding joint and several liability have always been recognized in California. Stearns v. Aguirre, 6 Cal. 176; Code Civ. Proc. § 414; Callahan v. Danziger, 32 Cal. App. 405, 163 Pac. 65.

We, therefore, reach a point where we must hold that a judgment under section 171, Civil Code, against Mrs. McCarthy would have been proper under the pleadings and proof, and the judgment of nonsuit as to her must be reversed.

As it is uncertain, from the facts before us, whether or not a judgment restricted in its application to conform to the limitations of section 171, Civil Code, would afford the plaintiff relief in the present action, it is appropriate for us to consider the evidence and admissions in the light of appellant's contention that the defendant Mrs. McCarthy should be charged for these services upon her own contract and irrespective of her husband's liability and irrespective of section 171, Civil Code. Section 158, Civil Code, permits a married woman to enter into contracts with

third persons. The plaintiff entered the employ of the defendants in 1908. The contract of employment was made between her and Mrs. McCarthy. She was a housemaid, engaged in doing every branch of the domestic work. She was first paid $30 a month. In 1910 Mrs. McCarthy increased her wages to $35 a month, of which Dr. McCarthy paid $25 and his wife for a short time paid $10. Dr. McCarthy left his home in 1914, and there was a subsequent divorce. On leaving he sent his check to the plaintiff for $25, bearing the notation that it was for payment in full, and his messenger and attorney in fact then told the plaintiff that she was discharged. Mrs McCarthy told the plaintiff not to accept the check, and she immediately re-employed her. The plaintiff refused the check, and remained in the employment of Mrs. McCarthy until December 1, 1915. On January 26, 1916, Mrs. McCarthy approved a document hereinbefore referred to and relied upon by plaintiff to remove the bar of the statute of limitations.

Under section 158 of the Civil Code, Mrs. McCarthy had power to contract to pay for what she received, whether necessaries or not. As to the additional $10 a month over what Dr. McCarthy paid the plaintiff prior to the separation, which makes up $470 of the claim, Mrs. McCarthy undertook to pay this amount. When, at the time of the separation, Dr. McCarthy discharged the plaintiff, Mrs. McCarthy herself immediately re-employed her. The balance of the account is for wages earned after that event. In the cross-examination of the plaintiff, counsel for Mrs. McCarthy caused to be introduced as an exhibit on behalf of the defendant a letter from the plaintiff to Mrs. McCarthy, reading as follows:

"17 Ranelegh Bld.
18 Aug
—— 17.

"Dear Mrs. McCarthy: I would like very much if you could let me have all or part of the bill you owe me. I feel quite sure you must know how foolish it is to talk of making the Dr pay it. I couldent there is no case against him besides the bill is between you and I—I done without my salary to suit you not the Dr you know all about the bill just as well as I do. I done everything I could do gave my time and strength to help you it was for your convenience the bill it owe I needed the money very much many times but never so much as now Ive been sick more or less ever since I had Francis at the ranch I would never have been there only to help you out some time ago I met a friend of yours and she said you told her you were very much put out at my taking Francis to the ranch as you had plenty of money you had a monthly income from your uncle besides making 60 dollars per month by writing I never could forgive you for holding back my salary and allowing me to fret and worry all those years trying to help you out besides fretting about my own bill when you had plenty and could have paid me well It is over now and done with now and I will try to forget whether you were ever in need or not I dont know I do know I am the Dr says I have got to give up work entirely for from three to six months have a complete rest and treatment I am in a very serious condition it was no news to me I felt it coming but just fought against it always hoping things would be straightened out and my bill would be paid so I could take a month or two and rest. You know the bill has been running over seven years besides I spent 1 hundred twenty dollars trying to find out if the Dr could be made to pay it besides 4 per cent interest all those years the amount in case you have forgotten is twelve hundred forty dollars including three months we were at the ranch. Mrs. Ridges has got to be paid for Francis board I will be willing to do that out of my salary whatever is over wont be any too much for taking care of his throat poor little Francis I don't grudge anything I ever done for him but you people can afford to pay the little I am asking and understood I was to get.

"Now Mrs. McCarthy I am not asking too much of you to see after the bill I am very anxious to follow the Drs advice when one has no home or friends they cant afford to be sick for very long unless they go to the poor farm and I do pray that after all I have gone through that humiliation is not in store for me it is impossible for me to stop work until I fall down unless the bill is paid it means a lot to me who never could afford a second pair shoes always trying to save something for just such a time as this and now have to beg for what worked faithfully for. Annie."

[7] These facts, we think, show a personal contract on the part of Mrs. McCarthy, and a liability irrespective of the limited one possible under the provisions of section 171, Civil Code.

Before the enabling sections of the Code, liability for necessaries was enforced in equity against the separate estate of a married woman. Miller v. Newton et al., 23 Cal. 554. Our Code provisions now give statutory authority for this wholesome doctrine.

[8] The document introduced into evidence and relied upon as a statement of account, so as to take the claim out of the operation of the statute of limitation, was adressed to Dr. C. F. McCarthy and Mrs. C. F. McCarthy. It contained a statement of the amounts due for the various years, credits, etc., showing a total of $1,135. At the bottom of the page was written:

"The above prepared by my direction is O. K. Mrs. C. F. McCarthy, January 26, 1916."

The trial court held, upon Mrs. McCarthy's motion for a nonsuit, that this document did not constitute an account stated as to her upon the ground that she was not originally liable, and could not enlarge her obligation by stating that this account was correct in its amounts; that it was at all times only an obligation as to her husband, and her admis-

sion as to its correctness could not change this. In the light of the views herein expressed as to her joint liability for the debt, the document would be admissible against her as a statement of account.

The judgment as to defendant Mrs. McCarthy is reversed. The order granting the nonsuit is vacated, with instructions to the trial court to permit the defendant Mrs. McCarthy to state whatever defense she may have to the plaintiff's suit. If necessary, leave should be granted to the plaintiff to amend her complaint to correspond with the proof.

I concur: BRITTAIN, J.

48 Cal. App. 747

UNITED CANNERIES CO. OF CALIFORNIA v. SEELYE. (Civ. 3219.)

(District Court of Appeal, Second District, Division 2, California. July 29, 1920.)

1. Sales ⟸82(2)—Payment should be made on delivery, where contract specifies no time.

Where a contract for the sale of fruit was silent as to the time of payment, the buyer must, under Civ. Code. § 1657, pay at the time of delivery; and this is particularly true, where the seller demanded that there be stricken from the contract provisions for payment after delivery.

2. Sales ⟸99—Refusal to pay on delivery warrants rescission; "fault."

Where the buyer of fruit failed to pay on delivery, as required and demanded, such failure constituted a "fault," within Civ. Code, § 1689, subd. 2, and justified the seller's rescission or abandonment, which was made with the promptness required by section 1691.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series. Fault.]

3. Sales ⟸174, 343, 344—Failure of buyer to make payment held to warrant seller in refusing to make further deliveries; after rescission by seller, he might recover value of goods delivered.

Though a contract for the sale of a fruit crop was not formally rescinded, the failure of the buyer to make payment on delivery, which was demanded in accordance with the terms of the contract, warranted the seller in refusing to make further deliveries unless payment was made, and in attempting, as he did by counterclaim, to recover for fruit already delivered.

4. Sales ⟸174—Seller not liable for buyer's loss.

Where buyer refused to make payment at time of delivery as required by the contract, and the seller thereafter offered to carry out the contract under those conditions, the buyer cannot under any theory, equitable or legal, recover for damages sustained; the buyer alone being at fault, and equity following the law.

5. Appeal and error ⟸1052(8)—Admission of evidence harmless.

In an action for breach of contract to deliver a fruit crop, where plaintiff was under no theory entitled to recover, the admission of evidence of previous litigation between the parties, if erroneous, was harmless.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by the Southern California Canning Company against O. L. Seelye, in which the United Canneries Company of California was substituted as plaintiff. From a judgment for defendant, plaintiff appeals. Affirmed.

See, also, 183 Pac. 667.

Henry Goodcell, of San Bernardino, for appellant.

E. H. Jolliffe and Archie D. Mitchell, both of Ontario, for respondent.

THOMAS, J. This is an action to recover damages for an alleged breach of contract to deliver fruit. The case was tried without a jury, findings and judgment went for defendant, and plaintiff appeals.

The action was originally commenced by the Southern California Canning Company, for which corporation plaintiff here was, by proper order, substituted; the former's rights having passed to the latter. The present plaintiff had nothing whatever to do with the making of the contract in question, or with any of the acts or transactions here involved. For convenience, therefore, the designation "plaintiff," as here used, will refer to the original plaintiff in the action.

From the record it appears that in the spring of 1914 plaintiff and this defendant entered into a contract whereby the former agreed to purchase, and the latter agreed to sell, defendant's yearly crop of peaches for a period of five years—1914 to 1918, both years inclusive. The contract says nothing as to the time when payment should be made. Defendant delivered the crops of 1914 and 1915 under this agreement. The fruit delivered in 1914 was paid for, but for that delivered during the year 1915 defendant received nothing. Plaintiff claims that there was some disagreement as to the amount due defendant under the contract for fruit delivered during that year. At the close of the season plaintiff tendered to defendant a given sum, which it claimed to be the full amount due for the 1915 crop; but defendant refused to accept the same, claiming, on the other hand, that a much larger amount was due. Thereafter defendant instituted an action against this plaintiff upon the contract in question for the sum claimed by the former to be due, upon the trial whereof defendant here recovered a

judgment for practically the full amount claimed.

Having had this experience, and notwithstanding the same, it appears that defendant respected his agreement, and proceeded to act thereunder for the year 1916. At the time of the delivery to the plaintiff of the first load of fruit for that year, defendant also delivered to plaintiff a letter, which in words and figures, is as follows:

"July 25, 1916. The Southern California Canning Company, W. H. Braun, A. C. Harvey, Ontario, California—Gentlemen: Delivery is herewith offered you of the fruit covered by that certain contract entered into between you and the undersigned on the 30th day of April, 1914. You are hereby notified that demand is herewith made for payment for said fruit at the price mentioned in said contract. Payment is hereby demanded for the fruit delivered and for each load as it shall be delivered at your cannery as per said contract. Full payment for each load will be expected as it is delivered. Yours truly, O. L. Seelye."

The buyer of the fruit, after receiving this letter, paid for the fruit, at the close of each day's delivery, until the 28th day of July, 1916, upon which date it refused to pay as delivered. Thereupon this defendant, as was his legal right so to do, refused to make further deliveries, and the present action ensued.

[1] Before the execution of the contract referred to, it contained a clause reading as follows:

"Payments in settlement of this contract to be made one-third in 30 days, one-third in 60 days, one-third in 90 days, after completion of deliveries."

This clause was stricken from the contract for the reason that defendant told plaintiff's representatives that he would not sign any contract of that nature—that he would have to have his money in order to carry on his business—to which suggestion plaintiff, through its agent, Mr. Harvey, answered:

"You can have your money any time you want it, as the fruit is delivered. We have got lots of money to pay with, and you don't have to wait for your money."

The contract being thus silent on the matter of payment, regardless of the evidence referred to, the time of payment is, as a matter of law, fixed as at the time of delivery (Civ. Code, § 1657; Cole v. Swanston, 1 Cal. 51, 52 Am. Dec. 288; Veerkamp v. Hulburd, etc., Co., 58 Cal. 229, 41 Am. Dec. 265; J. K. Armsby Co. v. Blum, 137 Cal. 552, 70 Pac. 669; Gilfallan v. Gilfallan, 168 Cal. 23, 141 Pac. 623, Ann. Cas. 1915D, 784), and with such evidence explaining, not modifying, the contract, there can be no doubt with reference thereto. Confronted with this fact, we do not think the letter of July 25, 1916, adds to or detracts from the contract under consideration; it certainly is not a modification or variation thereof in any way. Under these circumstances we think the buyer of the fruit was legally bound to pay for the same at the time of delivery, in the absence of an agreement to the contrary.

[2] The refusal on the part of plaintiff to pay for the fruit as delivered, we think, constitutes the "fault" referred to in subdivision 2 of section 1689 of the Civil Code, which furnishes the basis of rescission (Lake Shore, etc., Co. v. Richards, 30 L. R. A. 33, and cases there cited in an elaborate note on the "Right to Rescind or Abandon Contract Because of Other Party's Default") that was promptly taken advantage of, as provided by the terms of section 1691, Civil Code, by this defendant. Indeed, in our opinion the existence of this fact alone is sufficient to support the judgment before us.

[3, 4] On the other hand, if we hold that the court erred in finding that the contract was rescinded, the facts in this case, as shown by the evidence, disclose such a breach of the contract as entitled defendant to treat the same as rescinded; and by so doing defendant might have brought suit, on the implied promise to pay, for the value of the peaches so delivered to and not paid for by plaintiff. Cox v. McLaughlin, 54 Cal. 605; Id., 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164; Porter v. Arrowhead Co., 100 Cal. 500, 35 Pac. 146; Golden Gate L. Co. v. Sahrbacker, 105 Cal. 114, 38 Pac. 635; San Francisco Bridge Co. v. Dumbarton Co., 119 Cal. 272, 51 Pac. 335. In legal contemplation this is what the defendant here has sought to do by his counterclaim for the value of peaches so delivered, which position the court found to be supported by the evidence. Was the defendant entitled to his pay for the peaches so delivered under the contract? He was. There is no doubt about it. Hence, regardless of whether the court erred in finding that the contract was rescinded, plaintiff's conduct was such that it could not assert its alleged rights under the contract in question, while the defendant was legally justified in acting as he did.

The fact that the fruit was delivered without pay "when each load was delivered," or "at the end of each day's delivery," during the years 1914 and 1915, is immaterial. This was not by virtue of any provision in the contract, but by sufferance of the defendant; for, as we have seen, under the contract he was entitled to his pay upon delivery. With the experience of the former year, and notwithstanding the contract and the fact that a controversy had arisen during the pendency of which, among other things, there was an attack upon the person of defendant by one of the executive officers of the plaintiff corporation, it would have been strange indeed, not to say imprudent, had

defendant acted otherwise than as he did. His action is worthy of universal imitation. It needs no argument, certainly, to convince one that the plaintiff cannot stand on the contract and at the same time repudiate a portion thereof. Having violated the portion which implies payment for goods delivered, as above set forth, it had no standing in the trial court. Notwithstanding this fact, this defendant, under date of August 2, 1916, wrote, and on August 3, 1916, mailed by registered mail, addressed to plaintiff, a letter, which, omitting the formal parts, is in words and figures as follows:

"You are hereby notified that the undersigned will continue to deliver the fruit from his ranch to you only while you pay for the same in accordance with the procedure outlined in my letter of the 25th ult., and the practice adopted by you in this regard immediately after delivery of the first and second day's delivery, to wit: Payment for all fruit delivered each day, upon delivery of the last load each day. As a matter of business you know that we cannot harvest and deliver the crop without money, and as yet we have received nothing for our last year's crop. Business prudence prompts our action in this matter."

This, we think, was but an offer to revive the rescinded contract, if it be so regarded. It was never accepted.

Having arrived at the foregoing conclusion, it is immaterial whether plaintiff was damaged in any sum, or at all. It certainly cannot be permitted to profit by its own shortcomings. It came short of its own legal obligation when it refused to abide by the terms of its own agreement. Equity follows the law, and hence is deaf to such a claim as plaintiff attempts to assert here. The record justifies us in holding that, as a matter of law, conceding a loss to have been suffered by plaintiff, it was not occasioned by any act or omission of this defendant. Notwithstanding the abandonment of the contract by plaintiff, defendant's letter of August 2, 1916, made it possible for plaintiff to avoid any loss if it had availed itself of the offer therein made. It cannot now be heard to complain.

[5] The next point urged is that the court committed certain errors of law, which, for our present purpose, may be considered together under one designation; i. e., the reception in evidence, over plaintiff's objection, of the judgment rule in an action brought the preceding year by this defendant against the plaintiff here for payment for the fruit delivered during that year under this same contract. Under the circumstances of the case at bar, we think the question raised immaterial. Even if such ruling be conceded to be erroneous, it is without prejudice, as must now be obvious.

It is also urged by appellant that the issues as framed do not present a case of rescission. In other words, it is claimed that rescission is not pleaded, and hence not in issue here. From what we have said, however, and in view of the conclusion reached, we do not think this point need be considered.

Judgment affirmed.

We concur: FINLAYSON, P. J.; WELLER, J.

48 Cal. App. 688

PEOPLE v. REYNOLDS. (Cr. 707.)

(District Court of Appeal, Second District, Division 1, California. July 28, 1920.)

1. Criminal law ⟹814(17)—Refusal of request not supported by evidence is not prejudicial.

In a prosecution for statutory rape, accused was not prejudiced by the refusal of his request for an instruction that, if other persons were present at the time and heard no outcry, that circumstance could be considered in his favor, where there was no evidence that any other person was present.

2. Rape ⟹49(1)—Failure to make outcry not material where offense is statutory.

In a prosecution for a statutory rape, where the element of force is not involved, the fact that prosecutrix made no outcry is not material in defendant's favor.

3. Criminal law ⟹772(4) — Instruction authorizing conviction for act on any date within limitations proper.

Where there was no attempt to establish the offense by accused on any date other than that specified by prosecuting witness, though she did testify generally to other similar acts with accused, it was not error to instruct the jury that the date of the act was immaterial if it occurred within 3 years before the filing of the information.

4. Criminal law ⟹1137(3) — Accused cannot complain of instruction given at his request.

Accused cannot on appeal complain of an instruction designated in the record as defendant's instruction, from which the appellate court infers it was requested by him.

5. Criminal law ⟹1120(3)—Error in excluding impeaching question to one's own witness held not shown.

Where the trial court sustained an objection to a question asked by defendant of his own witness as to the witness' testimony at the preliminary examination, but there was no showing that such prior testimony was contrary to his testimony at the trial, error in sustaining the objection was not shown.

6. Witnesses ⟹388(7, 10)—Circumstances attending contradictory statement must be given to witness.

Under Code Civ. Proc. § 2049, authorizing a party to impeach his own witness by inconsist-

ent statements, the impeachment cannot be made unless the statements are related to the witness with the circumstances of time, places, and persons present and he be given an opportunity to explain them, and if the statements are in writing they must be shown to the witness before any question is put to him concerning them.

7. Witnesses ⟸380(5)—Right to impeach own witness depends on surprise.

The right of a party to impeach his own witness by contradictory statements appears to be confined to cases where he is taken by surprise as to the witness' testimony.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

James Reynolds was convicted of rape, and he appeals from the judgment and from the order denying his motion for a new trial. Affirmed.

W. W. Judd, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and Thomas A. Wood, of Los Angeles, for the People.

SHAW, J. Defendant was convicted, as charged, of the crime of rape, alleged to have been committed about August 13, 1919, upon a girl of the age of 13 years. He appeals from the judgment and an order denying his motion for a new trial.

While defendant raises no question as to the sufficiency of the evidence produced in support of the verdict, he insists that the judgment should be reversed on account of alleged errors committed by the court in the course of the trial.

[1] Error is predicated upon the refusal of the court to instruct the jury, at the request of defendant, as follows:

"You are instructed that, if you believe from the evidence that at the time of the alleged rape other people were at the same time in the same house who might easily have heard her had she made an outcry and that she in fact made no outcry at the time the defendant was attempting to have connection with her, the failure on her part to make outcry might be considered with all the other evidence in determining the credibility of such witness and whether rape was in fact committed or not."

As appears from the testimony, the alleged rape was committed in July, 1919, the prosecutrix being unable to fix the day of the month, and we find no evidence that any person other than defendant and the prosecutrix was in the house at the time; on the contrary, the evidence of the latter negatives such fact. Therefore, since there was no evidence tending to prove the facts on which the instruction was based, defendant could not have been prejudiced by the refusal of the court to give the same.

[2] Conceding, however, that other persons were in the house and could have heard an outcry made by the prosecutrix, and that she made none, such fact could not affect the question of defendant's guilt, since by reason of her age it is immaterial whether she consented to the act or was forced to submit thereto. People v. Totman, 135 Cal. 133, 67 Pac. 51. The refusal to give an instruction to like effect in People v. Lee, 119 Cal. 84, 51 Pac. 22, was sustained by the court, which said there was no probative force in the fact that the prosecutrix made no outcry. In People v. Howard, 143 Cal. 316, 76 Pac. 1116, the trial court refused to instruct the jury as follows:

"If [you] believe from the evidence that at the time the offense is alleged to have been committed the prosecuting witness made no outcry and didn't immediately complain to others, but concealed it for several months and then only told it by reason of threats and promises, then the jury should take this circumstance into consideration with all the other evidence in determining the credibility of such witness and whether a rape was in fact committed or not."

While not discussed in the main opinion, Chief Justice Beatty and Justice Shaw in concurring, upheld the refusal to give the instruction because it included the proposition first quoted therein, which, said the Chief Justice, "has no application to the statutory offense—concealment by a consenting female being a circumstance wholly lacking in the significance of the same fact in the common-law offense of rape."

Since the guilt of defendant could not be affected by the consent or nonconsent of the prosecutrix, we are unable to perceive how the question as to whether or not the prosecutrix made an outcry could be considered in determining her credibility, "and whether rape was in fact committed or not."

[3] Another error is based upon the fact that the court instructed the jury as follows:

"The date alleged in the information in this case is on or about August 13, 1919, and the prosecutrix fixes the date of the act testified by her as the ——— day of July, 1919. * * * The date of such act is immaterial if it occurred at any time within 3 years before the filing of the information"

—and further told the jury that if they were satisfied beyond a reasonable doubt that defendant committed an act of sexual intercourse upon the girl at any time within 3 years, they should find him guilty as charged. The instruction as given is identical with one considered in the like case of People v. Carmean, 23 Cal. App. 396, 138 Pac. 117, the giving of which was held to be proper. While an examination of the evidence shows that the prosecutrix testified that at other times during the year immediately preceding the act complained of she had had sexual inter-

course with defendant, no attempt was made to establish the commission of the crime charged at any date other than in July, 1919. Indeed, the testimony was directed alone to the one act committed at the time fixed by the prosecutrix; and, as elsewhere instructed, the jury were told that evidence of like acts, other than that committed by defendant at the particular time fixed by the prosecutrix, was received and admitted for the purpose only of showing the disposition of defendant and as having a tendency to render it more probable that the act of sexual intercourse alleged in the information was committed at about the time alleged therein; and further told the jury:

"There is but one matter before this jury and the court, and that is whether the defendant had sexual intercourse with the girl * * * on or about the time alleged in the information."

[4] Not only, in our opinion, was the instruction, considered in the light of the evidence, not erroneous, but it is designated in the record as defendant's instruction, from which we infer that it was requested by the defendant, in which case, even if erroneous, he is in no position to complain.

[5] Appellant also complains of error predicated upon a ruling of the court in denying him the right to impeach a witness called on behalf of defendant. This is predicated upon the fact that after the witness had answered a question, defendant's counsel said, "I want to read you the following question, which was asked you and answered by you at that time," referring to the preliminary hearing, to which opposing counsel objected upon the ground that it was not proper cross-examination, and the court interposed with the statement, "You can't ask the witness if he didn't testify a certain thing at a certain time; that is impeachment." Presumably the answer to which defendant's counsel had reference was one given by the witness at the preliminary examination. The record, however, is silent as to what this answer was, and for aught that appears to the contrary, it might have been identical with the answer given to the question asked at the trial; hence, if error, there is no affirmative showing that defendant was prejudiced thereby.

[6] Moreover, while section 2049, Code of Civil Procedure, provides that a party calling a witness may impeach him by showing that he has theretofore made statements inconsistent with his present testimony (section 2052, Code Civ. Proc.), nevertheless, in order to do so, the statements must be related to him with the circumstances of time, places, and persons present, and he must be asked whether he made such statements, and, if so, permitted to explain them, and if the statements be in writing, as they were in this case, they must be shown to the witness before any question is put to him concerning them.

[7] Furthermore, such right appears to be confined to cases wherein a party is taken by surprise on account of the character of the testimony of the witness whom they have themselves called under an honest belief as to what his testimony would be. People v. Johnson, 131 Cal. 511, 63 Pac. 842. Since there is no disclosure in the record that the evidence was damaging to the defendant, or that he had theretofore given evidence or made statements contrary to his testimony, or that defendant was taken by surprise by the statements made, nothing appears upon which defendant could base a claim of right to impeach the witness in question. The record discloses no attempt made by defendant to impeach the testimony of the witness, and no ground for permitting such impeachment.

From all of which it follows there is no merit in the appeal.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

48 Cal. App. 779

ROBERTS et al. v. ABBOTT et al.
(Civ. 3222.)

(District Court of Appeal, Second District, Division 2, California. July 30, 1920.)

1. Deeds ⟸179 — Redelivery not reconveyance.

Redelivery of a deed does not amount to a reconveyance.

2. Deeds ⟸104 — Deed not conveyance of signers not mentioned as grantors.

A deed, signed and acknowledged by the persons named therein as grantors and by others as well, is not the deed of those not named as grantors, and their interest does not pass.

3. Deeds ⟸93—Intent must be ascertained from entire instrument.

Where there was a controversy whether an instrument was a present conveyance or an agreement to convey, the question must be determined by ascertaining the intention of the parties from the entire instrument.

4. Deeds ⟸28—Omissions of formal parts do not necessarily destroy validity.

The omission of any or all the formal parts of a deed does not destroy its validity, where enough appears on its face to show that those having an interest intend to convey it; it being sufficient if the matter written specifies the agreement and meaning of the parties.

5. Deeds ⟸6 — Instrument held a contract, and not a present conveyance.

An instrument, signed by persons not mentioned as grantors, reciting that the parties of the first part had bargained, sold, and delivered all the surface rights of a mining claim, was not a present conveyance, in view of the fact

that it was signed by the buyer, a wholly unnecessary thing, and that subsequent portions clearly showed that the parties contemplated the necessity of the execution of further instruments.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action to quiet title by E. S. Roberts and another against F. J. Abbott and others. From a judgment for plaintiffs, the named defendant appeals. Reversed as to the appellant.

D. M. McDonald, of Los Angeles, Benjamin K. Warmer, and McNabb & Hodge, of San Bernardino, for appellant.

J. P. Chandler, of Los Angeles, and Allison & Dickson, of San Bernardino, for respondents.

THOMAS, J. This is an action to quiet title (1) to a three-fourths interest in a certain mining claim alleged to be owned by the plaintiff E. S. Roberts; and (2) to all the "surface rights" of such mining claim, alleged to be owned by the plaintiff Jeal. The lower court found for the plaintiffs, and judgment was accordingly entered against all the defendants. From the judgment, defendant F. J. Abbott alone appeals.

It is conceded at the outset, by all parties to this suit, that the title is derived either directly or through mesne conveyances from the plaintiff E. S. Roberts. We think all the points raised by appellant may properly be considered under one assignment; i. e., that the evidence does not support the findings. The court found, among other things, as follows:

"That on or about the 29th day of April, 1916, the defendant J. M. Rice, and the plaintiffs E. S. Roberts and John L. Roberts, bargained and sold and delivered to H. B. Watson all of the surface rights of the Greenhorn mining claim, for the consideration therein named, and the said H. B. Watson thereby became the owner of said surface rights. That subsequently the said H. B. Watson transferred and conveyed to numerous parties, certain lots located by the plat on the surface of said mining claim, and sold the same to the said parties for a valuable consideration, and that there are now, upon said surface rights of the said mining claim, about twenty (20) houses, which are occupied as residences, stores, and for other purposes, and about fifty (50) people occupy the same. That the plaintiff J. W. Jeal is the owner of six (6) lots upon the surface of said mining claim. That he is the owner of several buildings upon said lots, and that he is the owner particularly of a hotel building upon one of said lots, which building is now used by the plaintiff J. W. Jeal. That the said J. W. Jeal is now, and for a long time prior to the filing of the complaint herein has been, the owner of a number of water tanks located upon a part of the surface of said mining claim, which tanks are used as a water system from which there is distributed water to the persons living upon said lots upon said mining claim, and other persons, and that the said J. W. Jeal is the owner of and entitled to the possession of all of the surface rights of the Greenhorn mining claim, by virtue of mesne conveyances from H. B. Watson, except the lots which have been sold, as hereinabove stated, and also excepting lots 9 and 10 in block 6 of Atolia town site, as reserved by H. B. Watson in the deed given by said Watson to said Jeal of said town site, and was such owner prior to the filing of the complaint in this action. That the said defendants J. M. Rice and Sarah Rice and F. J. Abbott have no right, title, interest, or claim whatsoever in and to the surface rights of said Greenhorn mining claim, which were sold by H. B. Watson, and subsequently acquired by J. W. Jeal, as hereinabove stated, either by virtue of the mining location called the 'Lucky Rice,' dated the 20th day of July, 1917, or otherwise."

The bone of contention, so far as this appeal is concerned, is whether the instrument —Plaintiffs' Exhibit 8—is a conveyance, or only an agreement to convey, respondents holding that it is the former, while appellant insists that it is the latter.

[1] In considering the chain of title here we shall assume, for our present purposes, that the instrument is a conveyance in præsenti. (It may also be stated, in passing, that we do not here consider, for any purpose, the so-called "Lucky Rice" location.) The chain of title is as follows: E. S. Roberts conveyed an undivided one-half interest to J. M. Rice and J. L. Roberts on December 26, 1915—to each of them an undivided one-fourth. (This deed, although delivered by E. S. Roberts to J. L. Roberts at that time, was never acknowledged or recorded, but, in the year 1917, was handed back by said J. L. Roberts to said E. S. Roberts—which redelivery, however, could not, and did not, amount to a reconveyance of title.) On March 4, 1916, J. L. Roberts conveyed an undivided one-fourth interest to J. M. Rice and John Hendricks. On April 29, 1916, E. S. Roberts, J. M. Rice and J. L. Roberts executed Plaintiffs' Exhibit No. 8, by the terms of which they conveyed "all the surface rights" to H. B. Watson. On July 20, 1916, John Hendricks conveyed to defendant J. M. Rice an undivided one-eighth interest "in said mining claim." On July 24, 1916, J. M. Rice conveyed to Sarah Rice an undivided one-half interest "in said claim." On August 8, 1916, H. B. Watson conveyed to Geo. E. Hart an undivided one-half interest "in the surface rights," etc., of the same property. On December 2, 1916, H. B. Watson conveyed to J. W. Jeal all his right, title, etc., in and to said property, except lots 9 and 10, block 6. On March 14, 1917, (Geo. E. Hart conveyed to J. W. Jeal an undivided one-half interest "in all the surface rights" to this property. On September 15, 1917, J. M. Rice and Sarah Rice conveyed to F. J.

Abbott an undivided one-fourth interest in "all rights in said claim." And, finally, on the same date, the same persons—the Rices—conveyed all "remaining interests" in the said claim to F. J. Abbott.

At this point, when we come to analyze the various transactions, we find that, even on the assumption that the above-mentioned instrument, Exhibit 8, is a conveyance and not merely a contract to convey the various interests in the claim in question are as follows: Mining and mineral rights: E. S. Roberts and F. J. Abbott, each an undivided one-half interest. "Surface rights": F. J. Abbott, an undivided one-eighth interest, and J. W. Jeal, an undivided seven-eighths interest, in all except an undivided one-half of lots 9 and 10 in block 6, the other undivided one-half of which belongs to H. B. Watson.

[2] We shall now consider whether Plaintiff's Exhibit 8 is a conveyance or an agreement to convey. Appellant concedes (although we do not join in such concession) that if the exhibit under consideration is a deed the finding of the court is correct. It reads as follows:

"This indenture, made this 29th day of April, A. D. 1916, by and between H. B. Watson, of the town of Atolia, San Bernardino county, the party of the first part, and J. M. Rice and E. S. Roberts, of the same place, parties of the second part, witnesseth: That for and in consideration of the sum of one thousand dollars, five hundred dollars ($500.00) of which is hereby acknowledged as having already been paid by H. B. Watson, party of the first part to the said parties of the second part, and the further payment of five hundred dollars ($500.00) additional on or before July 1, 1916, the said Rice and Roberts, parties of the second part, who are the mineral claimants and owners of that certain mining claim known and described in the county records of San Bernardino county and state of California, as the Greenhorn mining claim, and more particularly described in Book 40 of the Mining Records of San Bernardino county, and page 291, the same having been recorded by request of Clyde Darrow on February 6, 1905, have this day bargained, sold, and delivered to H. B. Watson, the party of the first part, all the surface rights and privileges as hereinafter mentioned and existing within the boundaries of said Greenhorn claim. For the purposes of organizing and completing a town site, known as Atolia town site.

"It is especially understood and agreed that this bargain and sale transfers only the surface rights within said area of the boundaries of said Greenhorn claim, which is to be utilized for laying out and surveying of a town site known and styled as the Atolia town site, which is to be subdivided into lots and blocks, for the erection of buildings, conduct of business, and all such public rights of way for electricity, car or buss lines, telephone, telegraph and water service corporations, etc., as may hereafter be entered into for city or town organization so as to engage in municipal, town or other corporate organization in keeping therewith.

"All mineral, mineral rights, and the privileges thereof beneath the surface, extracting and mining the same, are hereby reserved unto the parties of the second part, their heirs or assigns. Said mining operations are to be conducted with due regard to the surface owners and not to interfere with the possessory rights of residents who may purchase lots and engage in business thereon, buildings, street traffic, or maintenance of public thoroughfares, telegraph, telephone, sewers, or other public utilities.

"Upon final payment of the stipulated amount of five hundred ($500) dollars, on or before the 1st day of July, 1916, the undersigned mineral owners and claimants of the ground known as the Greenhorn mining claim hereby bind themselves to give a good and sufficient deed to all the surface space and rights appertaining thereto within the area and boundaries of said mining claim as originally located and described in said copies of record, to the said H. B. Watson, party of the first part, to have and to hold, his heirs and assigns, forever.

"A further covenant and agreement hereby made and understood is that said party of the first part hereby agrees to have said Greenhorn claim surveyed, platted, and to furnish the finances wherewith same shall be patented, so as to issue ultimate warranty deeds to purchasers of surface rights thereon. No liabilities shall be assumed by the parties of the second part in the establishment of said town site or any expense in connection therewith of any description whatsoever."

So far we have assumed the correctness of the conclusion of the learned trial judge in holding that this exhibit was a deed—a conveyance in præsenti. But under this assumption, as we have seen, "all the surface rights," etc., were not conveyed to H. B. Watson. It will be observed from the exhibit which we have just quoted that J. L. Roberts was not mentioned in the body of that instrument, but is one of those signing it.

"A deed signed and acknowledged by persons named therein as grantors, and by others as well, is not the deed of those not named in the body of the instrument as grantors." Cordano v. Wright, 159 Cal. 610, 115 Pac. 227, Ann. Cas. 1912C, 1044.

Indeed, the fact is that J. L. Roberts had previously conveyed whatever interest he had therein to John Hendricks, and Hendricks does not join in this instrument.

[3-5] To determine whether such an instrument is in itself a conveyance or an agreement to convey, we shall have to inquire for and ascertain, if we can, from the whole instrument, just what the intention of the parties was.

"In determining the intention, the first rule is to ascertain whether the language imports a present conveyance, or whether, collecting all its parts, it contemplates a further assur-

ance to pass the title." 8. R. C. L. § 8, p. 929.

Applying this rule, we are confronted first of all with language which appears to indicate a transfer in præsenti. However, we think, when the instrument is considered in its entirety, that this is more apparent than real.

Taking first the provision of the instrument under consideration by which the parties of the second part, after complying with certain prerequisites, "bind themselves to give a good and sufficient deed to all the surface space and rights appertaining thereto," etc.: To hold that the instrument itself is a deed conveying property to first party in præsenti renders the clause just quoted nugatory and of no force whatever; while to construe the exhibit as contended for by appellant is to give force to every part thereof. Secondly, we are confronted with the fact that the instrument not only contains the clause just referred to, but is signed by both parties. This is not only unusual in the case of a conveyance in præsenti, or a deed, but absolutely unnecessary. Notwithstanding the fact that "the omission of all or any of the formal parts of a deed does not destroy its validity, where enough appears on its face to show that those having an interest intend to convey it, and they join in selling the instrument, it being sufficient if the matter written is legally set forth in an orderly manner by words which clearly specify the agreement and meaning of the parties, and bind them" (8 R. C. L. 935), we are of the opinion that, taken as a whole, this instrument falls far short even of this condition. We hold, therefore, that Plaintiffs' Exhibit No. 8 is an agreement to convey, and not a conveyance in præsenti. Ellis v. Jeans, 7 Cal. 409; Estate of Goetz, 13 Cal. App. 198, 109 Pac. 145; Powell v. Hunter, 204 Mo. 393, 102 S. W. 1020.

After trial, but before the court made its findings, etc., leave was granted plaintiffs to amend the third cause of action set forth in their complaint, by striking out the following:

"That J. M. Rice, E. S. Roberts, and John L. Roberts entered into an agreement, whereby they agreed to sell all of the surface rights of the Greenhorn mining claim to H. B. Watson, for a consideration therein named, and plaintiffs allege that said agreement of sale is still in existence and is a valid and binding obligation"

—and inserting in the place and stead thereof the following:

"That J. M. Rice, E. S. Roberts, and John L. Roberts *bargained and sold and delivered* all of the surface rights of the Greenhorn mining claim to H. B. Watson for a good and valuable consideration, and that said H. B. Watson thereby became the owner of said surface rights." (Italics ours.)

This amendment was allowed on the theory that it was a compliance with the proof. The part italicized by us was found in Plaintiffs' Exhibit No. 8 itself. It is contended that the court erred in permitting this amendment to be made, with which contention we are inclined to agree, for the reason that, in the light of what has been said above, there was no legal evidence before that tribunal justifying the same. Though it be a fact that the words "bargained, sold and delivered" are present in the exhibit referred to, yet, when such instrument is taken as a whole, these words are not of such import, and cannot be construed in such a manner, that an agreement to convey can, by their presence alone, and irrespective of the remaining portions of the exhibit, be converted into a conveyance in præsenti.

As must now be obvious, the only persons interested in this appeal are the respondent Jeal and appellant Abbott. Nor are there any other rights or interests involved than the "surface rights," so called, in said property. As already seen, Jeal's claim of title to the surface rights is based solely upon the instruments executed by Watson to Hart, and by Hart to Jeal. It has already been shown that Watson held the property only under and by virtue of Plaintiffs' Exhibit No. 8, and that under that instrument he was not the owner and had no legal title to the property at the time such purported conveyances were executed by him—having only such rights as had been accorded him in the exhibit mentioned. Nor does the evidence disclose that he ever became the legal owner at any subsequent time. If plaintiff Jeal did not own the legal title to these "surface rights," etc., the question whether he has or has not paid all that was due under the contract becomes, we think, quite immaterial.

Taking either horn of the dilemma—construing the exhibit considered as a conveyance in præsenti or as an agreement to convey—the evidence, for reasons stated, does not support the finding.

The judgment, so far as appellant F. J. Abbott is concerned, is reversed.

We concur: FINLAYSON, P. J.; WELLER, J.

183 Cal. 657

SANTA BARBARA LUMBER CO. v. ROSS, Sheriff, et al. (L. A. 6103.)

(Supreme Court of California. Sept. 11, 1920.)

1. Homestead ⟹43—Statement in wife's declaration that husband has not "made a declaration," sufficient.

Civ. Code, § 1263, requiring a wife's declaration of homestead to contain a statement "showing that her husband has not made such declaration," the purpose thereof being to show that the right of the family to a homestead had not been previously effectively asserted by the husband, and that they are not claiming two homesteads, is satisfied by a statement that he has not made "a declaration of homestead."

2. Pleading ⟹121(4)—Matters of record, denied for want of information and belief, are admitted.

Foreclosure of mortgage and sale thereunder, alleged in the complaint, being facts of record, may not be denied for want of information and belief, and, being so denied, instead of directly, must be deemed admitted.

3. Homestead ⟹31—Claim not invalidated by intent to mortgage.

The law expressly permitting the mortgaging of a homestead, a homestead may be claimed in property on which the claimants live at the time and continue to live, though at the time of making claim they intend to mortgage the property; there being no fraud in this.

Department 2.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by the Santa Barbara Lumber Company against James Ross, Sheriff of Santa Barbara County, and another. Judgment for plaintiff, and defendants appeal. Affirmed.

R. W. Cantrell, of San Francisco, for appellants.

W. G. Griffith, of Santa Barbara, for respondent.

WILBUR, J. Defendants' appeal turns upon the exemption from execution of premises covered by a homestead declaration by Antonina Cicero, April 28, 1913, held valid by the trial court. By foreclosure of their deed, given as security, the plaintiff has succeeded to the rights of Carmelo Cicero and his wife, Antonina Cicero, in and to the premises claimed as a homestead. It is admitted by the pleadings that the husband and wife resided upon the premises, owned by them as tenants in common, at the time of the declaration of homestead by the wife, and up to the time of the trial had resided thereon continuously. Defendant Ott Hardware Company, having secured a judgment on April 9, 1915, against Carmelo Cicero for $1,031.25, claiming that the homestead declaration was fraudulent and void, directed the defendant sheriff to sell the premises in satisfaction of the judgment. He was proceeding to do so when this action was brought to enjoin the sale. Plaintiff's demurrers to defendants' answer and cross-complaint were sustained. The defendants declined to amend, and judgment was rendered in favor of the plaintiff upon proof of the allegations of its complaint. Defendants appeal.

[1] Preliminarily defendants claim that the declaration of homestead is insufficient in form, for the reason that it contains a statement that the husband "has not made *a* declaration of homestead," whereas the statute (Civ. Code, § 1263) requires that the wife's declaration of homestead must contain a statement "showing that her husband has not made *such* declaration." (Italics ours.) The purpose of this requirement is to show that the husband and wife are not, because of the wife's declaration, claiming two homesteads; that is, that the right of the family to a homestead has not been previously effectively asserted by the husband. The declaration was sufficient for that purpose and is admitted to be true.

[2, 3] The answer and cross-complaint admitted every requirement necessary to make the premises a homestead, excepting only that defendants alleged there was no *intention* on the part of the wife to claim the premises as a homestead. This allegation is supplemented by other affirmative allegations that the homestead was filed for a fraudulent purpose, namely, to prefer the plaintiff as a creditor over the defendant Ott Hardware Company, which on April 12, 1913, before the declaration of the homestead (April 28, 1913), had caused an attachment to be levied upon the property, and that the homestead was filed for the purpose of defeating this attachment. On May 12, 1913, the husband and wife made a deed to the plaintiff. Plaintiff alleges that this deed was in legal effect a mortgage to secure a claim owing by the husband and wife to it, and that subsequently this deed was foreclosed, and that the husband and wife still resided on the premises and had an equity of redemption therein. While the foreclosure and sale thereunder are denied for want of information and belief, the facts are of public record, and therefore must be deemed to be admitted by failure to directly deny the same. Mulcahy v.

Buckley, 100 Cal. 484, 487, 35 Pac. 144; Mullally v. Townsend, 119 Cal. 47, 53, 50 Pac. 1066.

The claim of the appellants, then amounts to this: That at the time the husband and wife claimed the property as a homestead they intended to execute a mortgage thereon in favor of a creditor and for the purpose of preferring that creditor over the defendant Ott Hardware Company's claim. The allegations of fraudulent purpose and conspiracy between the creditor and the homestead claimants amount to nothing. The purpose of the homestead law is to exempt the home from execution. The homestead claimants have a right to execute a mortgage upon the homestead, and, both joining therein, the mortgagor can on their default foreclose the mortgage and secure title thereto. The attempt to do these things could not constitute fraud, for they are expressly permitted by law. In its last analysis the claim of the appellants is that a homestead cannot be claimed, if at the time it is claimed the parties intend to execute a mortgage thereon. This intent is not inconsistent with a bona fide claim of a homestead.

In view of the admissions in the pleadings that the husband and wife resided in their dwelling house upon the property at the time of the declaration of the homestead, and continued to reside therein for at least two years thereafter, the allegation that they had no intention to claim said property as a homestead does not raise an issue for the admissions of the pleadings concerning the actual residence established the necessary intention. It is not necessary for us to decide what the result would have been if immediately upon the filing of the declaration of homestead the claimants had conveyed the property without consideration, or in consideration of an antecedent indebtedness, and had thereupon surrendered the possession of the premises, intending so to do at the time the declaration was made and recorded. No such question is involved.

Judgment affirmed.

We concur: LENNON, J.; SLOANE, J.

(183 Cal. 660)

BIGGART v. LEWIS, County Auditor, et al. (L. A. 5196.)

(Supreme Court of California. Sept. 11, 1920. Rehearing Denied Oct. 11, 1920.)

1. Waters and water courses ⟸224—Taxpayer can restrain illegal payment by county waterworks district.

A taxpayer and resident of a county waterworks district may sue to restrain an expenditure of the district funds which is not sanctioned by law.

2. Waters and water courses ⟸224—County waterworks district not liable for expenses of organization.

In the absence of a statute expressly authorizing such payment, a county waterworks district, organized under St. 1913, p. 785, is not liable for legal services rendered to procure its organization, whether it be considered a private or a municipal corporation, since neither of such corporations is liable for the acts of its organizers before it came into being.

3. Waters and water courses ⟸225 — Legal expenses for organization of district not "incidental" expenses.

The provision of the county irrigation district act that the petition for organization shall estimate the cost of the proposed improvements and of the incidental expenses in connection therewith does not authorize payment for legal services for organization, "incidental" referring to something which is subordinate to and dependent upon and follows the existence of another and principal thing, especially in view of other provisions of the act specifying the purposes for which funds can be applied which do not include organization expenses.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Incidental.]

4. Waters and water courses ⟸225—Irrigation district not authorized to pay legal expenses of organization.

A provision of the county irrigation district act requiring the petitioner to furnish a bond to pay the cost of forming the district in case its formation is not affected, was merely intended to protect the county against the expenses of one or more elections on the question of organizing such district and does not authorize the district after organization to pay the legal expenses incurred in its organization.

5. Waters and water courses ⟸224—Waterworks district cannot pay expenses of organization.

A county irrigation district cannot after its organization adopt the acts of its organizers and pay for legal services in connection with its organization, in view of the statute which specifies and limits the purposes for which the funds of the district may be expended, which do not include the organization expenses.

6. Waters and water courses ⟸224—Rules for claims against counties apply to county irrigation districts.

Since a county irrigation district is governed by the county supervisors and is to some extent a county affair, the general rules and regulations which govern the supervisors in acting upon claims against the county proper, including Pol. Code, § 4041, giving them jurisdiction to allow only accounts legally chargeable against the county, apply to claims against the district in the absence of a more specific provision in the district act.

7. Counties ⟸206(1) — Courts can examine whether claim allowed was a legal charge.

While the adjudication of the supervisors in allowing a claim against the county is con-

clusive if they had jurisdiction of such claim, the courts can examine whether a claim presented and allowed by the supervisors was a legal charge against the county, of which they alone had jurisdiction under Pol. Code, § 4041.

In Bank.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by R. P. Biggart against Walter A. Lewis, as County Auditor, and others, to restrain the payment of a claim. Judgment for defendants on sustaining demurrer to the complaint without leave to amend, and plaintiff appeals. Reversed.

Milton K. Young, of Los Angeles, Byron Coleman, of San Francisco, and Lyndol L. Young, of Los Angeles, for appellant.

W. C. Shelton, A. J. Hill, Co. Counsel, and Edward T. Bishop, Deputy Co. Counsel, all of Los Angeles, for respondents.

LENNON, J. The plaintiff in this action sought to restrain by injunction the defendants, Lewis and Hunt, respectively auditor and treasurer of the county of Los Angeles, from auditing and paying a demand purporting to have been allowed by the supervisors of said county in favor of the defendant Gibbon for services claimed to have been rendered by him in the promotion and organization of "Los Angeles County Waterworks District No. 3." Following an order sustaining a general demurrer to the plaintiff's complaint without leave to amend, judgment was rendered and entered for the defendants, from which the plaintiff has appealed.

Briefly stated, the pleaded effects of the plaintiff's case, in so far as they are pertinent to a discussion and decision of the points presented on the appeal, are these: Los Angeles County Waterworks District No. 3 was duly created by the board of supervisors of said county on November 16, 1914, and ever since has been in existence and operation under and by virtue of the provisions of an act entitled, "An act to provide for the formation, management and dissolution of county irrigation districts," etc. Stats. 1913, p. 785. The plaintiff was at all times involved in the subject-matter of the action a resident taxpayer within said waterworks district, and was the owner of certain designated property of the alleged value of $16,750, situated therein, which was subject, not only to the lien and incumbrance of the district's bonds, but also to the lien and incumbrance of any and all taxes and assessments which might, from time to time, be levied for the maintenance of the district. The defendant Thomas E. Gibbon, an attorney at law, presented, on or about the 6th day of June, 1916, to the board of supervisors of the county of Los Angeles, a demand against the district which, as shown by an "amended claim" set forth in the body of plaintiff's complaint, was in the sum of $10,000. The claim was "for services rendered to Los Angeles County Irrigation District No. 3. (1) Negotiating and deciding upon the plans and specifications for the main distributing pipe lines for said district as to size of pipe, method of construction, length of pipe, and particularly the cost to be borne by said district of the Franklin Canyon, Glendale and Chatsworth main lines, which plans were necessary to ascertain the probable cost to the district of the proposed distributing system. Also negotiating and deciding whether the said district should include in its plans and specifications a portion of the cost of the Chatsworth reservoir. (2) Advice to freeholders concerning all matters arising by reason of the proposed organization of said district. (3) Checking and passing upon the description of external boundaries of said district and on the cost of same. (4) Preparation of the petition for the organization of said district and the issuance of bonds thereby." The board of supervisors on the 8th of January, 1917, by resolution purported to approve and allow said demand to the extent of and for the sum of $5,000, and ordered a warrant to be drawn upon the defendant Walter A. Lewis, as county auditor, requiring him to approve and allow said demand in the sum of $5,000, and, by the same resolution and order, directed the defendant John N. Hunt, as county treasurer, to pay said demand to the extent of the sum allowed thereon out of the funds of the district.

The plaintiff's complaint by appropriate allegations proceeded upon the theory that the demand of defendant Gibbon was not based upon the rendition to the district of any services contemplated by the legislative enactment permitting the formation of irrigation districts; that, inasmuch as none of the services which were made the basis of the demand are provided for in said legislative enactment, or elsewhere, the same are not and cannot be made a legal charge against the district; that therefore the purported and partial allowance of said claim was and is wholly illegal and void and of no effect. The plaintiff instituted the action on his own behalf and upon behalf of all of the residents, taxpayers, and freeholders within the district. The defendants' demurrers were general and based solely upon the ground of the insufficiency of the facts pleaded in the plaintiff's complaint to state a cause of action, and they were apparently sustained by the court below primarily upon the theory that the services upon which defendant claimed compensation were services rendered to the water district, or at least provided for by the act under which the district was organized, and that therefore the allowance of the claim by the board of supervisors of Los Angeles county was a matter within its jurisdiction, and also upon the ground that, when passing upon and allowing the claim,

said board was acting in a quasi judicial capacity and, as a consequence, its judgment of approval and allowance of the claim could not be reviewed and disturbed by a court of law.

[1] The demurrers were not well taken, and should have been overruled. It is conceded at the outset, as indeed it must be, that the plaintiff, as a taxpayer of and resident within the district, has the legal right to invoke the remedy of injunction to restrain the expenditure of the funds of the district if it can be said that such expenditure finds no sanction in the law, and, the case coming here as it does upon a judgment rendered upon an order sustaining demurrers to the plaintiff's complaint, the question of the legality of the claim, as well as the legality of its allowance by the board of supervisors, must be determined by the consideration of the scope and effect of the allegations of the complaint.

[2] The complaint specifically and affirmatively alleges, among other things, that the services claimed to have been rendered to the district by the defendant Gibbon, and which constituted the basis of his demand against the district, were not the services provided for or contemplated by the legislative enactment (Stats. 1913, p. 785), permitting and providing for the organization of the district; that said Gibbon did not in fact perform or render any services in connection with the district subsequent to its formation or at any time when it had a legal existence; that said defendant did not in fact perform any services for said district or for the use and benefit of said district. These allegations of the complaint are fortified by the recitals of the demand made upon the district by the defendant Gibbon, which was incorporated in the complaint. These recitals make manifest that the services rendered by the defendant Gibbon and for which the board allowed him compensation in the sum of $5,000 were performed at a time when the district was but a proposition—incipient and inchoate—and that the precise nature of said services consisted in the furnishing of aid in connection with the preparation and filing of the petition for the formation of the district. Consequently the complaint sufficiently shows, as against a general demurrer, that such services were performed at a time prior to the formal formation of the district into an organized and existing corporate legal entity.

It is well settled that a private corporation cannot be held liable for the acts of its promoters, nor be obligated by their conduct and contracts, in the absence of charter provisions providing therefor or of an adoption of such conduct or contracts by the corporation after it comes into existence. Mitchell v. Patterson, 120 Cal. 286, 293, 52 Pac. 589; Ehrich on Promoters, pp. 74–83. This is so upon the obviously correct theory that a corporation cannot, no more than can an individual, have agents or enter into contractual relations until it is actually in being as a thing apart from its procreators. Fletcher, Cyc. of Corporations, § 150. The rule in this behalf is perhaps more precisely stated and the reason therefor aptly illustrated in the case of Gent v. Ins. Co., 107 Ill. 652, 658, where it was said:

"That a corporation should have a full and complete organization and existence as an entity before it can enter into any kind of a contract or transact any business, would seem to be self-evident. This is unconditionally true, unless the act of incorporation authorizes the corporators to perform acts and enter into contracts to bind the company when it shall be organized. As well say a child in ventre sa mere may enter into a contract, or that its parents may bind it by contract. A corporation, until organized, has no being, franchises, or faculties. Nor do those engaged in bringing it into being have any power to bind it by contract, unless so authorized by the charter. Until organized as authorized by the charter there is not a corporation, nor does it possess franchises or faculties for it or others to exercise, until it acquires a complete existence. By its birth, so to speak, it for the first time acquires its faculties to transact its business and perform its functions."

The rule in this behalf has been held to apply to the conduct and contracts of promoters, who, after incorporation, became and constituted all of the stockholders, directors and officers of the corporation. Battelle v. Pavement Co., 37 Minn. 89, 33 N. W. 327. And it has been applied with equal force to public as well as to private corporations. Mitchell v. Patterson, supra. It is well settled that municipal corporations cannot, any more than can private corporations, exercise any power other than those which are conferred on them by the act under which they are incorporated, or such as are necessarily incidental to the exercise of their corporate rights, the performance of their corporate duties, and the accomplishment of the purposes for which they are created. Hood v. Mayor, 1 Allen (Mass.) 103. And it has been held that a municipality has no authority to appropriate money from the treasury of the municipality for the purpose of paying expenses incurred by individuals prior to its incorporation for legal advice or for the services of lawyers rendered in the procurement of the passage of an act permitting the incorporation, in the absence from the act itself of a grant of any authority for the payment of such expenses. Frost v. Inhabitants of Belmont, 6 Allen (Mass.) 152. In so holding the court said:

"The act of incorporation does not provide for the payment of any of these expenses, and it has never been the custom of the Legislature to make provision for the payment by towns newly incorporated of any part of the expenses incurred in procuring the passage of the act of incorporation. And the authorities

cited by the plaintiffs establish the point for which they contend, that towns have no right under their general acts of incorporation, or under any of the statutes relating to the subject, to apply the money of the town to the payment of debts or expenses incurred by individuals prior to their corporate existence as a town, or to raise money for such a purpose. The town therefore had no authority to make any provision for the payment of any portion of these bills, because they are for expenses incurred before the town was incorporated." Frost v. Inhabitants of Belmont, supra.

It is thus apparent that the rule to the effect that acts of promoters performed prior to the existence of the corporation are not binding upon the corporation, unless made so by the act under which the incorporation took place or adopted by the corporation after it comes into existence, applies alike to private and public corporations. It is therefore immaterial, for the purposes of this case, whether the water district involved here comes within the category of municipal corporations or is to be considered as a mere special organization created by permission of the state as an agency of the state for the performance of work which the policy of the state permits and requires to be done. In either event, the district is a corporation, and this rule is applicable to all such bodies by reason of having its foundation in the fundamental theory of corporate existence, namely, that a corporation is a distinct and independent entity brought into existence solely by sanction of law and possessing only those powers ascribed to it by law.

[3] This then brings us to a consideration of the provisions of the act under which the water district involved here was authorized and created. The act under which said water district was created provides that the petition, which may and which must, of course, be presented to the board of supervisors for the formation of the district, shall contain the name and boundaries of the proposed district, a general description of the desired improvements, the construction, installation, etc., of the waterworks, and "an estimate of the cost of the proposed improvements and of the incidental expenses in connection therewith." Following the presentation of a sufficient petition for the purpose stated, the act authorizes the board of supervisors to proceed and provide by ordinance or resolution for the holding of a special election at which there shall be submitted to the qualified voters of the proposed district "the proposition of forming such district and incurring a debt by the issuance of bonds of such district for the purposes set forth in said petition." The ordinance or resolution calling such special election must also recite "the objects and purposes for which the proposed indebtedness is to be incurred, the estimated cost of the proposed improvement, the amount of the principal of the indebtedness to be incurred therefor," etc. There is nothing in these provisions of the act which empowers the board of supervisors to contract and pay for legal or other services rendered to the freeholders of the proposed district in the preparation and procurement of the petition for the ultimate creation of the district, or which authorizes the board to pay for legal or other services rendered to such freeholders in the preliminary promotion of the district. Fairly construed the provision of the act requiring the petition for the creation of the district to contain "an estimate of the cost of the proposed improvements and of the incidental expenses in connection therewith" has reference, as do the required provisions of the ordinance calling the election, wholly to such expenses as are generally and incidentally necessary to the construction and the maintenance and operation of the plant and business of the proposed district after it has actually come into being as a legal entity. The language of the requirement of the act that the petition shall contain an "estimate of the cost of the proposed improvements and of the incidental expenses in connection therewith" does not in and of itself, nor when read in conjunction with other provisions of the act, indicate, as counsel for respondents contend, that the Legislature intended that the district when finally formed should pay the cost of legal advice and the expenses of preparing plans and specifications, or any other expenses incidental to the mere promotion of the district. As employed in the act, the word "incidental" must be taken in its usual and ordinary meaning and, therefore, as having reference to something which is subordinate to and dependent upon and follows the existence of another and principal thing. Webster's Dictionary; McFarlan Co. v. Potter, 21 Ind. App. 692, 51 N. E. 737. More precisely, an incident is defined to be "a thing which either usually or naturally and inseparably depends upon, appertains to or follows another that is more worthy." Bouvier. In short, a distinguishing and dominating characteristic of an incident is to be found in the fact that it always and necessarily appertains to a pre-existing and principal thing, and manifestly the pre-existing and principal thing dealt with by the act in question is the probable cost as a whole of the proposed improvement when finally formulated into a going corporate concern. This being so, the "incidental expenses in connection therewith" contemplated by the act must be those detailed expenses which naturally and necessarily appertain to and follow the estimate of the whole cost of the proposed improvements, and, being so, the conclusion is inescapable that it was no part of the legislative intent when enacting the act in question to provide for the payment for services per-

formed in the preparation and presentation of a petition for the formation of the district. This conclusion is fortified, if need be, by a consideration of the provisions of the act permitting and prescribing the procedure for the formation of the district. Thus, the ordinance for the calling of a special election following the presentation and approval of the petition is not required to make reference to the petition other than to recite that the election shall be called for the purpose of submitting the proposition of forming the district "and incurring a debt by the issuance of bonds of such district for the purposes set forth in said petition." While the ordinance itself must also recite "the objects and purposes for which the proposed indebtedness is to be incurred," it is not required, in so far as the cost of the enterprise is concerned, to do more than set out "the estimated cost of the proposed improvement" and "the amount of the principal of the indebtedness to be incurred therefor."

[4] Furthermore, the act provides that the money raised from the sale of bonds "shall be applied exclusively to the purposes and objects mentioned in the ordinance or resolution ordering the holding of the bond election, as aforesaid." It will be noted that "incidental expenses" incurred prior to the formation of the corporation are not called to the attention of the voters nor recited as among the purposes for which the money raised from the sale of the bonds may be expended, and, as the act provides that such money must be applied to certain designated purposes and objects and no others, then it would seem inevitably to follow that the board of supervisors are without power to expend the money raised from the sale of the bonds for the payment of expenses not designated by the act. This conclusion is not impaired by anything contained in those further provisions of the act which require to be filed with the petition for the formation of the district an undertaking in double the amount "of the probable cost of forming such district," obligating the sureties thereon to pay such cost in the event "that the formation of such district shall not be effected." True, the latter provisions of the act were apparently intended to guard against a liability on the part of the county for the "cost of forming such district" only in event of the failure of formation. Obviously, if no bond were required to cover this cost, the burden of the election, and perchance repeated elections for the same purpose, if the formation of the district failed to carry, would fall upon the county, and, having such a contingency in mind, the Legislature therefore placed the burden of the cost of forming the district, through the medium of the required undertaking, upon the promoters of the district only in the event of the failure of the formation of the district. And it may well be that the legislative intent contemplated that the burden of such cost, if the proposition carried, should be ultimately borne by the district when finally formed. However, it does not follow from this that the Legislature thereby indicated an intention that the funds of the district when organized should be resorted to for the payment of expenses incurred by individuals prior to the formation of the district. While the act does not specify the items of the "probable cost of forming such district," nevertheless there is a manifest and decided difference between the "cost of forming the district" and the "cost of proposed improvements" necessary to the operation of the district, and, when limited, as is the undertaking, specifically to the "cost of forming," it can only cover and control, it seems to us, such cost as would be necessarily and naturally incurred in putting in motion the procedure requisite for the formation of the district after the preliminary step of filing the petition has been taken; such expenses, for instance, as the cost to the county of calling and holding the required election for the submission to the voters of the proposed district of the question of forming the district.

It follows inevitably from this interpretation that the statute under which the district involved herein was organized did not bind the district to pay the expenses incurred by promoters in connection with the preparation and filing of the petition for the formation of the district.

[5] Furthermore, not only were the acts of the promoters in incurring such expenses not binding upon the corporation in and of themselves, but those acts could not be adopted by the corporation after it came into existence, for, as previously stated the statute specifies and limits the purposes for which the funds of the district may be expended, and such specification is totally devoid of any provision for the payment from said funds of expenses in connection with the petition for organization. Payment of these expenses from the funds of the district is therefore ultra vires as to the district, and an act or contract which the corporation is not legally permitted to perform cannot be ratified or adopted by such corporation, whether the corporation be private or municipal. Fletcher, Cyc. of Corporations, vol. 1, § 153; McQuillin on Municipal Corporations, vol. 3, §§ 1255, 1256. The claim of defendant Gibbon was consequently not a legal charge against the district.

[6] It will be noted that the water district in question is referred to constantly throughout the act authorizing its creation as a "county" water district, and, in this behalf, it will be further noted that the board of supervisors is made the governing body of the district after the district is created, and that the funds of the district are deposited in the county treasury to the especial account of the district and the disbursement thereof is un-

der the control of the board of supervisors. It will thus be observed that the management of the district is, to some extent at least, a county affair, and, therefore, in the absence of more specific provision in the act, the same general rules and regulations which govern the board of supervisors in acting upon claims against the county proper must cover and control the allowance of claims against the district. The board of supervisors has jurisdiction to allow only such accounts as are "legally chargeable against the county" (Pol. Code, § 4041), and, therefore, in dealing with claims against a water district, it can have jurisdiction only to examine, settle, and allow accounts "legally chargeable" against the district.

[7] A court of law is not precluded from reviewing an allowance by a board of supervisors for the purpose of ascertaining whether the allowance of the claim was within the jurisdiction of such board. It may be conceded "that when passing upon the correctness of the claim in controversy the board of supervisors was sitting and acting as a quasi judicial body, and that therefore its conclusion that such claim should be allowed and paid was an adjudication which * * * would ordinarily be final and conclusive. * * *" Jacks v. Taylor, 24 Cal. App. 667, 671, 142 Pac. 121, 122. This, of course, is the settled and general rule in this state, but the rule presupposes jurisdiction in the board to allow the claim at all. In other words, the mere presentation of the claim was not sufficient in and of itself to clothe the board with jurisdictional power to allow it, nor did the order for its allowance in itself operate to prevent a consideration of the question by the courts as to whether or not the board did, in fact, have jurisdiction to allow the claim, and the mere fact that the claim was allowed by the board did not invest the claim with a validity which it did not theretofore possess. Jacks v. Taylor, supra. The question here raised of the power to attack the validity of an allowance of a claim by a board of supervisors is similar to the question considered in the case of Walton v. McPhetridge, 120 Cal. 440, 444, 52 Pac. 731, 733, where the court said:

"The case at bar is not one merely involving the findings of fact by a board with respect to a claim clearly chargeable against the county and within the jurisdiction of the board to allow or reject. In such a case the conclusion of the board is final, and the auditor has no discretion to disregard it. Here the question is not one of fact, but whether or not the claim is in its nature one which the board had jurisdiction to allow. The mere introduction of the written claim which appellant presented to the board, with the indorsement of allowance, does not make a prima facie case. It does not show upon its face that it is a claim chargeable against the county; and, when viewed in the light of the complaint, the contrary appears."

The claim of defendant Gibbon being in its inception and by its very nature an unauthorized and therefore illegal charge, its allowance by the board of supervisors was without jurisdiction and illegal. Perry v. Ames, 26 Cal. 372, 35 Pac. 153, 556; Linden v. Case, 46 Cal. 171; Los Angeles County v. Lankershim, 100 Cal. 525, 35 Pac. 153, 556; Von Schmidt v. Widber, 105 Cal. 151, 38 Pac. 682; Kelley v. Sersanous, 5 Cal. Unrep. Cas., 485, 46 Pac. 299.

Concluding, as we do, that the claim in question was not a legal charge against the district, and therefore was beyond the jurisdiction of the board of supervisors in allowing claims against the district, it will be unnecessary for us to discuss the question as to whether or not the complaint, in the face of a general demurrer, sufficiently alleges that the claim was not presented to the board within the time required by law.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; LAWLOR, J.; OLNEY, J.; SHAW, J.; WILBUR, J.; SLOANE, J.

183 Cal. 636

Ex parte DANIELS. (Cr. 2261.)

(Supreme Court of California. Sept. 10, 1920.)

1. Municipal corporations ⇐592(1) — Traffic regulations inconsistent with general law invalid.

While Const. art. 11, § 6, gives supremacy to municipal legislation where the municipality is acting under charter in municipal affairs and the charter of Pasadena (article 8, § 10, subsec. 27, St. 1901, p. 906; St. 1913, p. 1466) authorizes regulation of traffic upon streets, the matter is not a municipal affair in which, by the Constitution, chartered cities are given a power superior to that of the Legislature, but such power is subject to the general law of the state, and if municipal regulations are inconsistent therewith they are void.

2. Municipal corporations ⇐592(1) — Where Legislature does not act, it cannot forbid municipality from regulating traffic.

Where the Legislature does not enact traffic regulation, it cannot validly forbid municipalities from acting in the matter.

3. Constitutional law ⇐48—Statute should be construed so that it will be both valid and effective.

A statute as the motor vehicle law should be given such a construction that it will be both constitutional and effective, provided this can be done without doing violence to the language used.

4. Municipal corporations ⇐592(2) — Ordinance as to speed of vehicles void as conflicting with general law.

Under the Motor Vehicle Law, as amended in 1917 and 1919 (St. 1917, p. 382, St. 1919,

p. 223), declaring that the speed limit fixed shall be exclusive of all other limitations fixed by any law, and that local authorities shall have no power to maintain any ordinance or regulation in conflict, which after declaring that specified speeds were unreasonable under described circumstances and prescribing a maximum of 20 miles per hour, prohibited the operation of motor vehicles at unsafe and unreasonable speeds, and declared a violation of the act to be a crime, the question whether the operation of a motor vehicle was at unreasonable speed, there being no direct inhibition, is for the jury, and so a municipal ordinance, fixing a maximum speed of 15 miles per hour, is void because conflicting with the general law, and in attempting to constitute the judgment of the local authorities for that of the jury as to whether the speed was unreasonable.

5. Criminal law ⊂⊃13 — Motor Vehicle Law, which made question of unreasonable speed for jury, not uncertain.

The Motor Vehicle Law, which declared the operation of a motorcar at unreasonable speed a crime, and left the question of unreasonableness for the jury, is not invalid for indefiniteness.

6. Habeas corpus ⊂⊃95—Questions not presented will not be determined.

On habeas corpus to secure release from custody under a charge of violating municipal ordinance regulating the speed of motor vehicles, where it was contended the ordinance was void because conflicting with the general Motor Vehicle Law, the validity of a provision of the general law not presented will not be determined.

Shaw, J., and Angellotti, C. J., dissenting.

In Bank.

Application by Earle M. Daniels for a writ of habeas corpus to be directed to W. F. McIntyre, Chief of Police, to secure the release of petitioner from custody on a charge of violating an ordinance of the city of Pasadena, regulating the speed of automobiles. Petitioner discharged.

David R. Faries and Ivan Kelso, both of Los Angeles, John W. Stetson, of Oakland, Martin T. Forrest and Earle M. Daniels, both of Los Angeles, for petitioner.

Charles S. Burnell, City Atty., of Los Angeles, for respondent.

Jesse E. Stephens, Asst. City Atty., and James G. Leovy, Deputy City Atty., both of Los Angeles, amici curiæ.

WILBUR, J. Petitioner was charged with the offense of driving an automobile within the limits of the city of Pasadena on the 28th of April, 1919, in violation of a municipal ordinance of the city of Pasadena, prohibiting a greater rate of speed than 15 miles an hour at the place in question. It is stipulated that the Motor Vehicle Act of 1917 (Stats. 1917, p. 382), then in force, permitted the driving of a motor vehicle at a speed not exceeding 20 miles an hour at that place, and that the petitioner was not exceeding that limit. The Motor Vehicle Act of 1917 not only fixed the maximum rate of speed there at 20 miles an hour, but expressly prohibited municipalities from fixing as a maximum a lesser rate of speed. Motor Vehicle Law, St. 1915, p. 397, § 22, subd. (d), as amended by Stats. 1917, pp. 382, 406. If there is a conflict between this statute and the municipal ordinance, the question as to which controls is to be determined by the provisions of the state Constitution. When this case was originally presented it was conceded by the parties that there was a conflict between the city ordinance and the Motor Vehicle Act, and that the sole question involved in the case was whether the municipal ordinance should prevail over the statute because the matter of the regulation of traffic upon the streets of cities was a municipal affair within the meaning of the Constitution, which gave supremacy to cities acting under charters in municipal affairs. Section 6, art. 11. The court having tentatively arrived at the conclusion that the regulation of street traffic within municipalities was not a municipal affair, was impressed with the fact that the attempt of the Legislature to prohibit the enactment of municipal ordinances regulating speed might be an unconstitutional interference with the regulatory powers granted by the Constitution itself to municipalities by article 11, § 11, of the Constitution, which provides that—

"Any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

That matter not having been touched upon in the original presentation, the case was placed upon the calendar for reargument, and additional briefs were submitted upon this question. The respondent upon reargument took the position that the ordinance was not in conflict with the state law, and therefore claims that, even conceding that the matter of traffic regulation is not a municipal affair, the ordinance is nevertheless valid as an exercise of police power not in conflict with general law. Since the argument of this case several matters have been presented to us bearing upon the questions involved. In Ham v. County of Los Angeles (App.) 189 Pac. 462, the appellate court, division 2, second district, determined that a county ordinance fixing a speed limit at 5 miles an hour on bridges was not in conflict with the Motor Vehicle Act of 1913 (St. 1913, p. 639). An application for hearing in this court was denied. 189 Pac. 462. In Mann v. Scott, 182 Pac. 281, it was held that there was no conflict between the provisions of the Motor Vehicle Act of 1913, which required that a

motor vehicle be operated with due care and caution when it overtakes a street car which has stopped on a city street to take on or discharge persons, and be brought to a full stop if reasonably necessary for the safety of the passengers, and a municipal ordinance which required that the vehicle in all cases be stopped at a distance of 10 feet in the rear of the stopped car. It was held that the municipal ordinance merely imposed new and additional regulations in furtherance of the general purpose of the law. In Helmer v. Superior Court of the County of Sacramento, 191 Pac. 1001, decided by the appellate court of the first district, it was held that the regulation of street traffic was not a municipal affair within the meaning of the constitutional provision, and this court, having reached the conclusion that it was not a municipal affair, denied a petition for transfer to this court. In view of these decisions it will only be necessary for us to briefly indicate our reasons for the conclusion that the regulation of street traffic is not a municipal affair within the meaning of that term as used in the Constitution, which gives supremacy to the city in municipal affairs. It is the usual practice throughout the United States to delegate to municipalities power to regulate street traffic within the municipality. This practice is followed by the city of Pasadena, whose charter expressly authorizes such control. Charter of Pasadena, art. 8, § 10, subd. 27; Stats. 1901, p. 906; Id. art. 13, § 1; Stats. 1913, p. 1466.

[1] The streets of a city belong to the people of the state, and every citizen of the state has a right to the use thereof, subject to legislative control. People v. County of Marin, 103 Cal. 223, 232, 37 Pac. 203, 26 L. R. A. 659; Elliott on Roads and Streets, §§ 25, 505, 543, 544, 1112, 1115; Dillon on Mun. Corps. (5th Ed.) vol. 3, § 1122. The right of control over street traffic is an exercise of a part of the sovereign power of the state. Elliott on Roads and Streets, sections cited supra. While it is true that the regulation of traffic upon a public street is of special interest to the people of a municipality, it does not follow that such regulation is a municipal affair, and if there is a doubt as to whether or not such regulation is a municipal affair, that doubt must be resolved in favor of the legislative authority of the state. The rule is that—

"Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied." Hyatt v. Williams, 148 Cal. 585, 587, 84 Pac. 41, 42, citing Von Schmidt v. Widber, 105 Cal. 157, 38 Pac. 682; Dillon on Mun. Corp. §§ 89, 91.

See sections 237, 239, Dillon on Mun. Corp. (5th Ed.); Gassner v. McCarthy, 160 Cal. 82, 84, 116 Pac. 73; Oro Electric Corp. v. Railroad Comn., 169 Cal. 466, 477, 147 Pac. 118; Hayne v. San Francisco, 174 Cal. 185, 186, 162 Pac. 625; City of Long Beach v. Lisenby, 175 Cal. 575, 166 Pac. 333. In dealing with a conflict between state and local legislation on the subject of street traffic the Supreme Court of Oregon in State ex rel. v. Port of Astoria, 79 Or. 1, 10, 154 Pac. 399, 402, thus expressed the rule:

"While the prime purpose is to ascertain and give effect to the intention as expressed in the language employed, yet the two sections now being considered are designed to grant attributes of sovereignty to specified local subdivisions; and, such grant being a limitation on the power of the Legislature, it should be strictly construed, as was properly held in Thurber v. McMinnville, 63 Or. 410."

The same rule of construction has been applied in dealing with the powers of municipalities in those states which recognize that municipalities have certain inherent powers, and there great reluctance has been expressed to interfere with the legislative assumption of authority in a case where the rights of a municipality were so difficult of ascertainment, "because of the manifest impossibility of indicating any distinct boundary to the powers which may lawfully be exercised by the Legislature in matters of local concern; an embarrassment much more serious than can possibly exist in most cases where a distinct and specific inhibition of the Constitution is supposed to be disregarded. * * * Under such circumstances, with no unmistakable signs to guide us between the domain of state and local powers, it becomes us to exercise more than the usual caution not to refuse the sanction of judicial authority to legislation which is supposed to have exceeded a boundary so difficult to locate and define." People v. Common Council of Detroit, 29 Mich. 108. See, also, People v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; People v. Common Council of Detroit, 28 Mich. 228, 15 Am. Rep. 202; Indiana Ry. Co. v. Calvert, 168 Ind. 321, 324, 80 N. E. 961, 10 L. R. A. (N. S.) 780, 11 Ann. Cas. 635. Under the Constitution of Oklahoma it has been held that in municipal matters the charter supersedes the general laws of the state in conflict therewith (Owen v. Tulsa, 27 Okl. 264, 111 Pac. 320; Lackey v. Grant, 29 Okl. 255, 116 Pac. 913; Mitchell v. Carter, 31 Okl. 592, 122 Pac. 691; Oklahoma Ry. Co. v. Powell, 33 Okl. 737, 127 Pac. 1080; In re Simmons, 4 Okl. Cr. 662, 112 Pac. 951), but that such charter cannot conflict with the general laws of the state (State ex rel. Burns v. Linn, 49 Okl. 526, 153 Pac. 826, Ann. Cas. 1918B, 139). Notwithstanding this holding that the charter powers of the city are supreme in municipal matters, in Ex parte Shaw, 53 Okl. 654, 157 Pac. 900, it was held that the state law regulating traffic controlled local ordinances in conflict therewith. In a recent

case the Supreme Court of Oregon has held that the ordinances of municipalities are supreme under the Constitution of that state and supersede the state legislation on that subject within the municipality. The Constitution of that state, however, is so different from ours that that decision is not authority for the construction of our Constitution. We, therefore, conclude that the regulation of traffic upon the streets of a city is not one of those municipal affairs in which by the Constitution chartered cities are given a power superior to that of the state Legislature, but that such power is subject to the general laws of the state, and if inconsistent therewith are invalid.

[2-4] We will now consider whether or not there is such a conflict. The Legislature which met in January, 1915, added the following clauses, which were subsequently incorporated in the legislation of 1917 (Stats. 1917, p. 406) and 1919 (Stats. 1919, p. 223):

"Limitations as to the rate of speed herein fixed shall be exclusive of all other limitations fixed by any law of this state or any political subdivision thereof. Local authorities shall have no power to enact, enforce or maintain any ordinance, rule or regulation in any way in conflict with, contrary to or inconsistent with the provisions of this act, * * * and no such ordinance, rule or regulation of said local authorities heretofore or hereafter enacted shall have any force or effect, excepting, however" in certain matters which need not now be considered.

It must, of course, be conceded that a mere prohibition by the state Legislature of local legislation upon the subject of the use of the streets, without any affirmative act of the Legislature occupying that legislative field, would be unconstitutional and in violation of the express authority granted by the state Constitution to the municipality to enact local regulations. In other words, an act by the state Legislature in general terms that the local legislative body would have no power to enact local, police, sanitary, or other regulations, while in a sense a general law, would have for its effective purpose the nullification of the constitutional grant, and therefore be invalid. City of Freemont v. Keating, 96 Ohio St. 468, 118 N. E. 114, holding invalid section 6307 of the General Code. But it was contemplated by the constitutional provision in question that the state Legislature had the absolute right by general law to enact statutes which would have validity in all parts of the state, including municipalities, and, having done so, local laws in conflict therewith ipso facto become void. The legislative declaration that "local authorities shall have no power to pass, enforce or maintain any ordinance, rule or regulation in any way in conflict with, contrary to or inconsistent with the provisions of this act," amounts to no more than the similar constitutional declaration that general laws control municipal police regulations. Article 11, § 11. If it were to be construed as an attempt to limit the power of local legislative bodies to pass regulations not inconsistent with such general law, it would of course be unconstitutional. The provision that "limitations as to the rate of speed herein fixed shall be exclusive of all other limitations fixed by any law of this state or any political subdivision thereof," in so far as it would operate to prohibit municipalities from passing regulations not inconsistent with the general law would for the same reason be unconstitutional. We are bound, however, in the construction of this section of the Motor Vehicle Act to give it a construction which will be both constitutional and effective if it can be done without violence to the language used. It was clearly the intention of the Legislature to declare that the limitation upon speed fixed in the law shall be the only limitation controlling the conduct of the driver of a motor vehicle upon the streets and highways of the state. The intent of the Legislature in adopting this general scheme for the control of motor vehicles upon the public highways of the state, for the collection of licenses and the appropriation thereof to the improvement of highways, is not to be measured alone by the language used, but by the whole purpose and scope of the legislative scheme. It cannot be doubted that the Legislature, in enacting section 22d with relation to the authority of municipalities to regulate speed, intended to occupy the whole field of traffic regulation, and in construing these prohibitory clauses relating to the powers of local legislative bodies, such provisions should not be ignored as unconstitutional, if a reasonable or even a strained construction can be adopted which would give them a constitutional effect. The Legislature, however, having complete control of the highways of the state, has as much right by general law to make it lawful to travel 10 miles per hour as to make it unlawful to travel 15 miles an hour. It seems to have been the legislative purpose, by the declaration that "the limitations as to the rate of speed herein fixed shall be exclusive of all other limitations," to authorize vehicles to travel at those limits within cities and counties. Indeed, as all the highways of the state are within either counties or municipalities, and as both have the same legislative power under article 11, section 11, of the Constitution, the purpose of the Legislature to prevent a reduction of speed limits, and a consequent lack of uniformity in such, is apparent. If this was the legislative purpose, such enactment is clearly within the scope of their constitutional power, and local ordinances, fixing other and different rates of speed, ipso facto conflict with the state legislation. The

difficulty in determining whether or not the state Legislature has occupied the whole field of traffic regulation results in part from the form of the legislation. The Legislature did not, in terms, authorize a vehicle to travel at any time at the maximum speed limit fixed by the statute for different localities, but prohibited the operation of motor vehicles at any time or place at an unsafe and unreasonable rate of speed (section 22a), and in effect declares that the speeds of 35, 30, 20, 15, and 10 miles an hour, are, under circumstances described in the ordinance, unreasonable and unsafe, and therefore that it shall be unlawful to operate a motor vehicle in excess of such speeds. It is made a crime to violate any of the provisions of the act (Motor Vehicle Act, section 32, Stats. 1917, p. 410; section 32a, Stats. 1919, p. 225), and therefore a crime to operate a motor vehicle at a dangerous and unsafe rate of speed at any time within the state. This legislation would seem to occupy the whole field of traffic regulation. But it is contended that, in so far as there is an attempt to make criminal the operation of a motor vehicle at an unreasonable rate of speed, the law is so uncertain as to be void, and that, therefore in so far as the statute attempts in terms to make it a misdemeanor to operate a motor vehicle at an unreasonable and unsafe speed, the law is unconstitutional, and that the city may enact legislation to fill this hiatus in the law. On the other hand, it is argued that the law is valid, and, the state having prohibited unreasonable speed, no ordinance of the city can make any different or other prohibition, for the reason that every ordinance must be reasonable, and to prohibit a reasonable speed would be unreasonable, and that therefore no ordinance can be enacted except to prohibit the very thing prohibited by the state law, namely, exceeding a reasonable speed. In effect, however, the local ordinance fixing a different speed limit from that contained in the Motor Vehicle Act is a declaration of the local legislative body, to the effect that to exceed the limit thus fixed would be unreasonable. This legislative declaration would be binding upon the courts in the absence of a clear violation of the legislative power. Courts go to great extent in upholding the exercise of such power where it exists. Ex parte McKenna, 126 Cal. 429, 58 Pac. 916; Ex parte Berry, 147 Cal. 523, 82 Pac. 44. In the prosecution for a violation of the state law, the question of whether or not the speed traveled is unreasonable and unsafe is a matter for the consideration of the jury, and the scheme of the Legislature authorizes the submission of this question to a jury in a criminal case, called upon to pass upon the guilt or innocence of a person charged with traveling at an unreasonable speed. The effect of a local ordinance is to foreclose the question of the reasonableness of the speed, and to substitute the judgment of the local legislative body for the judgment of a jury. It is evident that the two plans are in direct conflict, and that the conflict is a very material one. Under the state law a motor vehicle driver, provided he keeps within the limits expressly fixed by law, is only confronted with the problem of keeping his vehicle at a speed which reasonable men would conclude to be a reasonable speed. While, on the other hand, he is confronted with an arbitrary rule fixed by a local legislative body, so that he would be wholly within his rights in traveling at a speed of 14.9 miles, and violating a criminal law if traveling at a speed of 15.1 miles, whereas, in fact, it might be much more reasonable to travel at a speed of 15.1 miles sometimes on that particular highway than to travel at a slower rate of speed at other times when the traffic was more congested. The tremendous difference between the two systems of legislation is emphasized by the fact that each county in the state has the same legislative power under the Constitution (article 11, section 11) as every city. Thus, every highway in the state, as well as every city street, is subject to local legislative control; and, while the Legislature has authorized the citizens of the state to travel upon the highways thereof at a speed which is not unreasonable and unsafe, every part of a trip from Siskiyou to San Diego would be controlled by arbitrary speed limits fixed by legislative bodies whose action he is presumed to know, but of which he is much more likely to be totally unaware. The difficulty is increased by the fact that while the state Legislature meets but once in two years and the people of the state not only take notice of the time and place of the meeting, but make an effort to ascertain the results of its deliberations, in the case of local communities the legislative bodies are frequently in continuous session, and, if not, meet at frequent intervals, and can pass regulations of which the general public has no information and of which the courts, other than the police courts of the particular municipalities, will not take judicial notice. It seems, then, that local legislation which determines the question of what speed is reasonable and which forecloses that question in a judicial investigation, is in direct conflict with the legislative scheme by which that question is left open for the determination of a jury. If the Legislature had merely fixed the maximum speed limit, it is clear that local legislation fixing a lesser speed limit would not be in conflict therewith, but would be merely an additional regulation. Ham v. Los Angeles County, supra; Ex parte Hoffman, 155 Cal. 118, 99 Pac. 517, 132 Am. St. Rep. 75. If we seek to uphold the local legislation by concluding that it is not in conflict with the state law for the reason that the ordinance, as well as the state law, prohibits

an unreasonable speed, we are met with the proposition that a local ordinance cannot prohibit exactly the same thing prohibited by the state law and still be valid (In re Sic, 73 Cal. 142, 14 Pac. 405), and the invalidity of such an ordinance is emphasized by the fact that under the scheme of state legislation contained in the Motor Vehicle Act the fines and penalties imposed for its violation are placed in a special fund for the improvement of highways, whereas if imposed for the violation of a municipal ordinance they go into the municipal treasury. Or, if both are valid, a man by traveling at an unreasonable rate of speed has committed two offenses instead of one—one against the municipality and the other against the state. We conclude, then, that section 22d of the Motor Vehicle Act of 1919 evidences an intent on the part of the Legislature that the restriction that the speed cannot be unreasonable and unsafe shall be the test of the legality of the speed at any place within the state, and that this involves the right to have that question determined by a jury rather than by a local legislative body.

[5, 6] We have so far assumed that the state law prohibiting an unreasonable speed is not too uncertain to be a valid criminal statute. Numerous authorities are cited upon the question as to whether or not the criminal law therein considered is too uncertain to be enforced. We will not undertake to review the authorities cited on this subject, but will call attention only to those which in our judgment clearly establish the validity of such legislation. In this connection it may be stated that there has been a tendency to a much more liberal construction of such statutes in the more recent decisions, and this may in part be the result of more humane and liberal methods of dealing with those who are convicted of crime, and in part from the wide field now covered by the criminal law. In the Standard Oil Case, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, the Supreme Court of the United States, in interpreting the anti-trust law, adopted what has been characterized as the "rule of reason," holding that this law "really was not a denial of all restraint of trade, but only a denial of an unreasonable restraint of trade," thus leaving to courts and juries the determination of what restraints of trade were unreasonable. It is scarcely to be assumed that this court would read into a statute by construction a provision which, had it been included therein at the time of its enactment, would have rendered the statute void and unconstitutional, because of the uncertainty involved in the use of the very term read into it by the court, namely "reason." In People v. Pearne, 118 Cal. 154, 50 Pac. 376, the defendant was charged with killing the deceased by driving through the streets of Biggs in a reckless manner and at a great and unusual rate of speed. It was held proper to submit to the jury the question of whether or not the defendant had committed manslaughter in the performance of a lawful act "without due care and circumspection." In Schultz v. State, 89 Neb. 34, 130 N. W. 972, 33 L. R. A. (N. S.) 403, Ann. Cas. 1912C, 495, a provision of a motor vehicle act identical with that of the California law was held constitutional. A similar statute was held constitutional in State v. Campbell, 82 Conn. 671, 74 Atl. 927, 135 Am. St. Rep. 293, 18 Ann. Cas. 236, and in State v. Schaeffer, 96 Ohio St. 215, 117 N. E. 220, L. R. A. 1918B, 945, Ann. Cas. 1918E, 1137. An ordinance similar in terms was held constitutional in Hood and W. Furniture Co. v. Royal, 200 Ala. 607, 76 South. 965; Fitzsimmons v. Snyder, 181 Ill. App. 70; State v. Welford, 69 Iowa, 467, 29 N. W. 450; People v. Lloyd, 178 Ill. App. 66; Commonwealth v. Cassidy, 209 Mass. 24, 95 N. E. 214; Chrestenson v. Harms, 38 S. D. 360, 161 N. W. 343. See, also, United States v. Knight, 26 Phil. 217. Upon the authority of these cases and our own case of People v. Pearne, supra, we must hold that the provision making it unlawful to travel at an unreasonable or unsafe speed and punishing the violation of such law as a crime is valid and constitutional legislation, although there are cases holding to the contrary. Hayes v. State, 11 Ga. App. 371, 75 S. E. 523. The recent case of Mann v. Scott, supra, is not opposed to the view herein expressed, for that decision is based upon the proposition (page 283) that—

> "It follows that a conflict, if any, can exist only upon the theory that the ordinance prohibits that which is affirmatively authorized by the Motor Vehicle Act. In short, the appellants are placed under the necessity of contending that that act affirmatively authorizes motor vehicles to pass a stopping street car in a city whenever the apparent risk involved in so doing would not deter an ordinarily prudent and careful driver. We do not so construe the statute."

In this case the petitioner had a right to drive on the highway at a speed that was reasonable and proper under all the circumstances, and the fixing of an arbitrary speed limit by the city authorities restricted that right, and was therefore in conflict with that right. If the statute had expressly provided that the driver of a motor vehicle could pass a standing street car whenever it was reasonable and proper so to do, and thus affirmatively authorize him to proceed, the situation would be more nearly parallel. We conclude that the city ordinance of Pasadena, fixing a speed limit of 15 miles an hour, is in direct conflict with the state law, and therefore void.

It is proper to say that the Motor Vehicle Act purports to authorize the state highway commission to establish less rates of speed than those provided in the law itself in traversing bridges, viaducts, etc. Motor Vehicle Act, Stats. 1919, p. 221, § 22. No point is made by the parties with reference to this feature of the act, and we deem it unnecessary to consider the questions of law which might result from this situation, in view of the fact that the same has not been argued or presented. We make this observation solely for the purpose of showing that this point has not escaped our attention, and that it is not decided.

Petitioner discharged.

We concur: LENNON, J.; LAWLOR, J.; SLOANE, J.

OLNEY, J. I concur. The main opinion might, however, be taken as holding that the conflict between the city ordinance and the state law, which renders the former invalid, was between the provision of the ordinance fixing a maximum speed of 15 miles an hour and the provision of the state law that no one should travel at an unsafe speed. I do not so view the matter. The conflict in my judgment is with the provision of the state law fixing a different maximum, that of 20 miles an hour. Two things are essential for any law effectively regulating the rates of speed on highways. One is that no one shall exceed a certain speed. The other is that no one shall drive at a speed that is actually unsafe under the conditions which exist at the particular time and place. The two things are quite distinct, and the state law endeavors to provide for both. If the provision of the city ordinance fixing a maximum is in conflict with the state law, it is with the provision of the latter which fixes a different maximum, not with the provision that no one shall drive at an unsafe speed, maximum or no maximum.

If the state law merely provided a maximum which should not be exceeded, without any expression of intention affirmatively to authorize any speed not unsafe less than the maximum, it might well be held under the authority of the milk ordinance case and Mann v. Scott, referred to in the main opinion, that a city ordinance, fixing a lesser maximum, was not in conflict with it. But this is not, in my judgment, the true construction of the state law. It provides that a man traveling the road shall not travel at an unsafe rate of speed, and in no case in excess of a certain maximum, and also that no other limitation shall be put upon him. This prohibition of any other limitation, viewed purely as a prohibition upon municipalities and counties, is undoubtedly void. Cities and counties have the right given them by the Constitution to pass local regulations not in conflict with the state law, and this right the Legislature cannot prohibit them from exercising.

But the prohibition here involved is not to be viewed solely as a prohibition upon counties and municipalities. It is a prohibition designed for the regulation of the speed of those traveling the highways, and clearly designed for the purpose of permitting such parties to travel subject only to the regulations as to rate of speed provided by the state law. Putting it in another way, if the state law had read that a man traveling the highway should not exceed a certain speed, but should have the right to travel up to that speed, provided it was not unsafe for him to do so under the immediate surrounding conditions, there would have been no prohibition on counties and municipalities involved, and no question as to the validity of such prohibition would have arisen. Nevertheless, any local ordinance fixing a lesser maximum would be invalid, as plainly in conflict with the provision of the state law authorizing any speed not unsafe up to the maximum fixed by it. Now, the only difference between such a reading of the state law and its actual reading is that the permission to travel at any speed, not unsafe, up to the maximum fixed, instead of being couched in the affirmative, is put in the negative. The traveler is told, you may not travel at an unsafe speed and you may not exceed a certain speed—safe or unsafe—but any other limitation upon you is prohibited. This can mean but one thing, and that is that the traveler is authorized to travel at any rate of speed he desires, provided he does not travel at an unsafe rate or exceed the limit fixed. It is merely putting in a negative and roundabout way what could better have been said directly and affirmatively. With such a law a city ordinance fixing another and a lower limit is plainly in conflict.

SHAW, J. I dissent. Daniels is charged with driving an automobile faster than 15 miles an hour over the Colorado street bridge in Pasadena, in violation of two city ordinances, one forbidding a speed over 15 miles an hour upon any bridge in the city, the other a speed over 10 miles an hour upon that bridge. The Motor Vehicle Act forbids "a greater rate of speed than twenty miles an hour" at any place in a street "where the territory contiguous thereto is closely built up." The Colorado street bridge is contiguous to such territory. The question is whether the general law or the ordinances shall prevail.

Section 11, article 11, of the Constitution provides that—

"Any county, city, town or township, may make and enforce within its limits all such lo-

cal, police, sanitary and other regulations as are not in conflict with general laws."

Section 6, article 11, makes city charters and ordinances upon "municipal affairs" paramount, as to such affairs, to general laws, in all cities organized under a freeholders' charter. Pasadena is a city of that character. If the matter of the speed to be allowed in the streets of a city is a municipal affair, section 6, of course, settles this case. Assuming, however, for the present, that it is an affair not wholly municipal, I am of the opinion that these ordinances do not conflict with the Motor Vehicle Act, and consequently that they are valid under section 11 of the article.

It is a settled rule of decision in this state that where, upon any matter subject to the police power, a city ordinance makes a local regulation tending to afford greater protection to the safety or health of the people than is given by the general laws regulating the same matter, such city ordinance is not in conflict with the general law. Thus a city ordinance, requiring that all milk sold within the city shall contain at least 3½ per cent. of butter fat, does not conflict with a general law requiring that all milk sold shall contain at least 3 per cent. of butter fat. Ex parte Hoffman, 155 Cal. 118, 99 Pac. 517, 132 Am. St. Rep. 75. So, also, a county ordinance, limiting the rate of speed of vehicles upon bridges to 5 miles an hour, is not in conflict with a state law fixing a higher rate as a maximum speed limit thereon. Ham v. Los Angeles Co., 189 Pac. 462. And a city ordinance, requiring that automobiles overtaking a street car which has stopped to discharge passengers shall stop 10 feet behind the street car, does not conflict with a general law, requiring an automobile approaching or passing such car to be operated with due car and caution, and to come to a full stop, if reasonably necessary for the safety of such passengers. Mann v. Scott, 182 Pac. 281. This proposition is apparently conceded by the majority opinion. It does not purport to overrule the decisions above cited, though, in my opinion, it wholly disregards them. The soundness of the principle is obvious, and the reasons for it are nowhere better stated than in Ex parte Hoffman, supra. They need not be here repeated. The present case, upon this point, cannot be distinguished from Ham v. Los Angeles, supra. A petition for rehearing in this court in that case on that point was denied, and it is virtually a decision of this court.

Another rule, equally sound and obvious, is that the Legislature cannot, by general law, purporting merely to forbid the exercise by a county, city, town, or township of the police powers conferred upon it by section 11, article 11, of the Constitution take away or impair such local police power. This, also, the majority opinion admits. It is too plain for argument that the "general laws," in order to conflict with such local police regulations, must themselves contain regulations applicable to the same subject and inconsistent with the local regulations. A general law which does not in itself regulate a particular act, but which expressly or by implication provides that there shall be no local regulation thereof, would be a legislative attempt to nullify the constitutional grant to the local bodies politic, and would be to that extent invalid. In such a case the local power would remain, and local regulations would be valid.

The Motor Vehicle Act declares that—

"Limitations as to the rate of speed herein fixed shall be exclusive of all other limitations fixed by any law of this state of any political subdivision thereof." Section 22, subd. (d); Stats. 1917, 404.

It is admitted that this provision, if taken by itself, is void, so far as it relates to the local speed regulations of a city. The provision immediately following it, to the effect that local authorities may not make regulations "in conflict with, contrary to or inconsistent with" the provisions of the act, is itself inoperative, so far as it purports to limit such local authority, for it is a mere repetition of the Constitution on that point. In order to limit the powers of cities the law must provide regulations inconsistent with, and not merely prohibitive of, city regulations.

The majority opinion, while admitting that the Legislature cannot, by its mere declaration, forbid the exercise by a city of its police power under section 11, article 11, concludes that it can do so indirectly, in the matter of speed, by first fixing the maximum speed allowable in certain described conditions, and then declaring its own limitations to be "exclusive of all other limitations." This it finds to be the equivalent of a law affirmatively authorizing any speed up to the specified maximums under the respective conditions, and it declares that such an enactment by the Legislature "is clearly within the scope of their constitutional power."

I am unable to see why the original admission does not destroy the final conclusion on this point. The fact that more than 20 miles an hour is unsafe in closely built-up territory, and must for that reason be forbidden there (and this is the effect of that clause of the act), is in no wise inconsistent with the fact that more than 15 miles an hour is unsafe upon a bridge, or with the fact that more than 10 miles an hour is unsafe in going over a high and crooked bridge. Hence the legislative declaration that no one shall go more than 20 miles an hour along a road closely built up, does not conflict with the municipal declaration that it is unsafe for

any one to go more than 15 miles an hour over any bridge or more than 10 miles an hour over a certain bridge which is high and crooked. Just as richer milk is better than poorer and may therefore be required by local authority, notwithstanding the general law fixing the lower standard, so the slower speed is safer than the higher speed upon bridges, and may be required by local authority, notwithstanding the general law fixing a lower standard of safety. The additional legislative declaration that its own limitation of speed shall be exclusive of all municipal speed limitations is entirely distinct and separable from the regulatory clause, and is nothing but a legislative attempt to prevent a city from exercising the police power given to it by the Constitution.

This difficulty was apparently perceived, though not admitted, by the majority, for the conclusion that the Motor Vehicle Act prevails over local speed regulations is finally put upon the ground that by another provision of the act the "state Legislature has occupied the whole field of traffic regulation," leaving nothing for the local authorities to regulate. This provision is found in the opening clause of section 22, and it reads as follows:

"Any person operating or driving a motor or other vehicle on the public highways shall operate or drive the same in a careful and prudent manner and at a rate of speed not greater than is reasonable and proper having regard to the traffic and use of the highway, and no person shall operate, or drive a motor vehicle or other vehicle on a public highway at such rate of speed as to endanger the life or limb of any person or the safety of any property; provided, that it shall be unlawful to operate or drive at a rate of speed" in excess of certain maximum rates fixed for particular conditions described, including the 20 miles an hour provision in question.

There are, in my opinion, two reasons showing that this clause does not "occupy the whole field" as the majority of the Justices say it does.

First, the other provisions of the section force the conclusion that the Legislature itself did not so understand it, and especially that it was not considered a sufficient regulation to meet the varying needs of different local conditions, particularly upon bridges. The same subdivision contains a further proviso purporting to authorize the state highway commission to establish "the maximum rate of speed over any bridge, dam, trestle, culvert, causeway or viaduct," at less than the "rate established by law," whenever in its judgment the safety of persons or the protection of the highway "shall be promoted thereby." If the act had already "occupied the whole field" of regulation, there would have been no occasion for this clause. The insertion thereof in the act shows conclusively that the Legislature did not believe that the opening clause, in connection with the maximum speed clauses following it, "occupied the whole field" of speed regulation, but did believe that further speed regulations adapted to local conditions would be necessary to insure or promote the safety of persons and property, and that for that reason it attempted to empower said commission to prescribe the regulations appropriate to the varying local needs.

Second, the language of the opening clause is too vague, uncertain, and indefinite to constitute a sufficient definition of a public offense. Who shall decide whether the rate of speed is "greater than is reasonable and proper" or so great as "to endanger the life" of a person or the safety of property, in the particular circumstances? The conditions are often very complicated. The driver at a crowded crossing, for example, is generally confronted with the necessity of choosing between several alternatives, and must decide in an instant which alternative to take and at what speed to drive to escape the greater danger. The clause reads like an instruction to a jury in an action for damages, rather than a penal statute, laying down a rule of action for the future and defining the kind of acts that are to be denounced as criminal. It calls for the constant application of the well-known rule that a person suddenly meeting an unexpected danger is not expected to choose his alternatives as wisely as one having time for observation and deliberation, or as a jury reviewing his conduct in the light of the often conflicting and always confusing testimony of excited eyewitnesses. One person might believe the speed excessive, another that it was too slow. The ultimate decision by a jury or judge could never be foreseen. Two persons might participate in the same act of driving, and might be tried separately. One jury would deem the speed dangerous, and convict one of them; another jury, upon the same evidence, might believe it safe, or reasonably "careful and prudent," and so acquit the other participant. The provision, in its practical effect, with regard to speed, is that no person shall drive at a speed which the jury that tries him, upon hearing the evidence, shall consider fast enough to endanger life, limb, or property. No person could know whether or not he had committed an offense, until after the verdict. The rule is that penal statutes are strictly construed, and that in order to be valid the offense must be so defined that a person of ordinary understanding may know therefrom when he is violating its provisions. Ex parte Jackson, 45 Ark. 158; Czarra v. Dist. of Col., 25 App. D. C. 443; State v. Gaster, 45 La. Ann. 636, 12 South. 739; Augustine v. State, 41 Tex. Cr. R. 59, 52 S. W. 77, 96 Am. St. Rep. 765. "Every man should be able to know with certainty when he is committing a crime." U. S. v. Reese, 92 U. S. 220, 23 L. Ed. 563.

It is open to at least grave doubt whether or not the Legislature intended to declare a violation of this clause to be a criminal offense, at least with regard to bridges. Section 32 declares that any person who violates any provision of the act is guilty of a misdemeanor. But the opening clause of section 22 does not forbid any specific rate of speed, and the section contains no express prohibition of speed less than the respective maximums specified therein. It leaves all lower speeds over bridges and the like, as we have seen, to the regulation of the commission. Since section 32 does not declare it to be a misdemeanor to violate a regulation of the state highway commission on the subject, it is reasonable to suppose that the mere act of driving over a bridge, contrary to such regulation of the commission, was not intended to be denounced as criminal.

If the provision of section 22 purporting to empower the commission to prescribe lower rates of speed over bridges, in connection with the penal clause of section 32, was intended to make the violation of a regulation of the commission a misdemeanor, and was valid in that respect, it might be argued with much force that the "whole field of regulation" was occupied by the general law. But if that provision of section 22 is so intended, it is invalid. It is an attempted delegation to the commission of the legislative power to define criminal offenses, and as such it is beyond the power of the Legislature. All legislative power is vested by the people in the Legislature and in local political subdivisions of the state. Const. art. 4, § 1; art. 11. The function of defining public offenses requires the exercise of a discretion which the people have committed exclusively to the Legislature and the local authorities named. It cannot be transferred by the Legislature to any state commission of its own creation. No proposition is better settled than this. People v. Parks, 58 Cal. 624; Ex parte Cox, 63 Cal. 21; Harbor Com'rs v. Excelsior Co., 88 Cal. 491, 26 Pac. 375, 22 Am. St. Rep. 321; Ex parte Wall, 48 Cal. 313; Hardenburg v. Kidd, 10 Cal. 402; Ford v. Harbor Com'rs, 81 Cal. 36, 22 Pac. 278; Cooley, Const. Lim. p. 163; 12 Cor. Jur. 839.

Furthermore, the regulation and control of the use of streets within a city should not be made a matter exclusively of general concern, but should be classed as, at least in part, a "municipal affair," within the meaning of that phrase as used in section 6, article 11, of the Constitution. The cities lay out and improve the streets and build the bridges and viaducts. The cost is paid out of funds raised either by general city taxation or by assessments on adjacent private property specially benefited. It is settled that the doing of these things is a municipal affair in which city ordinances prevail over general laws. Sunset, etc., Co. v. Pasadena, 161 Cal. 281, 118 Pac. 796; Byrne v. Drain, 127 Cal. 663, 60 Pac. 433; Fritz v. San Francisco, 132 Cal. 376, 64 Pac. 566; Banaz v. Smith, 133 Cal. 102, 65 Pac. 309; Duncan v. Ramish, 142 Cal. 696, 76 Pac. 661. The cities have the power and it is their duty to keep in repair the city streets, bridges, and viaducts. As a part of that power they should have the right to make all regulations concerning their use that are reasonably necessary to protect them from injury, and so keep down the expense of repairs. They cannot effectively do this if the state may by general laws provide exclusive regulations. The conditions of local use and local situations will of necessity be so variable and will be subject to such frequent changes in different parts of the state that no general law could be framed that would adequately provide for the necessities of each case. Again, many different uses are made of streets that are peculiar to cities and which vary in different cities, according to local customs and desires, such as the projection of awnings, the setting of poles for power and lighting wires and lamps, the laying of conduits and car rails, and the excavation of areas under sidewalks for access to basements. All of these are held to be municipal affairs upon which ordinances of a city operating under a freeholder's charter are superior to general laws. Sunset, etc., Co. v. Pasadena, supra. This well-considered case appears to have escaped the notice of the majority. Yet if the majority opinion expresses the law, that case stands tacitly overruled on that point, and it is within the power of the Legislature at any time to enact a general law attempting to regulate all such uses, and such law would supersede and suspend all municipal ordinances on the subject in every city in the state. The present Motor Vehicle Act concedes to each city the right to regulate traffic at crowded street crossings therein. But if the majority opinion is correct, this is not a municipal affair, and the state could make its own regulations for such places, and provide its own officers to enforce them, and if the regulations proved wholly inadequate, or the enforcement thereof wholly inefficient, the only recourse of the people of the city would be to await the next sitting of the Legislature, in the hope that out of the inevitably conflicting demands of different localities some sort of relief would be provided by a general law. It is, in my opinion, indisputable that in this state regulations of this kind have always hitherto been regarded as "municipal affairs," and that that phrase was so understood and used in the amendment of section 6, article 11, in 1896, with the intent to make such regulations paramount to general laws.

I concur: ANGELLOTTI, C. J.

48 Cal. App. 715

BLAKE v. ARP. (Civ. 3264.)

(District Court of Appeal, Second District, Division 1, California. July 28, 1920.)

1. Judgment ⊂⊃883(11)—Contribution not maintainable under statute.

Proceeding by a judgment debtor to have set off against the judgment the amount of a judgment rendered against him, plaintiff, and another, which he had paid in full, by motion in the action in which plaintiff recovered judgment, cannot be maintained as proceeding to enforce contribution, under Code Civ. Proc. § 709, where the claim was not filed with the clerk within 10 days as required by that section.

2. Judgment ⊂⊃883(6)—Payor of joint judgment cannot set off amount against judgment owed by him.

The rule that courts under their equitable powers will allow the owner of a judgment to set off the amount against a judgment owned by his judgment debtor against him applies only to existing judgments, and does not authorize one who paid a joint judgment against himself and two others to set off the amount in whole or in part against a judgment held by one of the others against him.

3. Appeal and error ⊂⊃1103—Separate orders unnecessary on cross-appeals heard together.

Where the parties stipulated that their appeals from the same order be heard on the same record, and considered together, separate orders are not required.

Appeal from Superior Court, Kern County; T. N. Harvey, Judge.

Action by Elizabeth Blake against James Arp. From an order, granting in part defendant's motion is set off against the judgment rendered to plaintiff the amount of a judgment paid by defendant, both parties appeal. Reversed.

E. F. Brittan, of Bakersfield, for plaintiff.

Kaye & Siemon, of Bakersfield, for defendant.

JAMES, J. Both plaintiff and defendant appear as appellants in this action, neither being satisfied with the order made in the superior court. On the 25th day of October, 1915, plaintiff obtained judgment against the defendant for a considerable sum of money. On the 3d day of June, 1919, plaintiff assigned this judgment to one Cohn. On January 9, 1917, in an action brought against the plaintiff and defendant here and one Hewitt, judgment was recovered in the sum of $1,050, with interest and costs. An appeal was taken from that judgment by defendant, Arp, and the judgment was thereafter affirmed, and it was fully paid by Arp about July 1, 1919. In the transcript there appears a notice of motion, made under the title of the first-mentioned action, which notice recited that Arp—

"will on Monday, the 14th day of July, 1919, * * * move the said court for an order directing the clerk to enter partial satisfaction in the sum of $1,313.30 of the judgment heretofore entered herein in favor of the plaintiff and against the defendant for the sum of $2,100, together with interest, and $138.85 costs. * * * Said motion will be made on the ground that the defendant has paid on account of the judgment entered in the action the sum of $1,313.30 in satisfaction of the judgment recovered in the said action of Ransch v. Arp, and on the ground that the judgment in the last-mentioned action was for the recovery of the debt, which was owing and payable by the plaintiff herein, and not owing by the defendant herein, and which in equity and good conscience ought to be paid by the plaintiff herein."

This notice appears to be dated July 7, 1919, but the record does not disclose the date of filing thereof by the clerk. The record does show, however, that the motion came on to be heard on the 2d day of September, 1919, and the court made its order, being the order from which the appeals are taken herein. This order directed—

"the clerk of the court to enter partial satisfaction of the judgment herein to the extent of the sum of $437.77, being one-third of the amount paid by said Arp in full satisfaction of the judgment entered in the said action of Ransch v. Arp et al."

The following also appears in the printed transcript as a part of the record:

"It being also stipulated in open court that the record in the clerk's office in this case on the hearing of said motion that no notice of payment of said judgment was filed by James Arp with the clerk of said court within 10 days after his payment of said judgment, or at any other time claiming contribution or repayment under section 709 of the Code of Civil Procedure of the state of California."

The cause of dissatisfaction of the plaintiff with the order made is, as contended by her, that the motion should not have been granted at all; defendant is dissatisfied because the court granted the motion allowing a credit of one-third of the amount which he had paid in the second judgment only, instead of offsetting the whole thereof against the judgment in the case of Blake v. Arp.

[1] In the view we take of the matter, it will be unnecessary to consider the effect which the assignment by Blake of her judgment had upon the rights of Arp, or as to whether there is merit in plaintiff's contention that the second judgment was not one on account of which contribution could be claimed against her. The procedure adopted by the defendant Arp was not one appropriate to enforce contribution under the provisions of section 709, Code of Civil Procedure, for it does not appear that he proceeded as required under that section. Aside from the fact that the papers

which he filed were not appropriate in their form or substance to make effectual any such claim, it was expressly stipulated that a claim for contribution, required to be filed within 10 days with the clerk of the court under the provisions of section 709, was not so filed. The right given by section 709 is purely statutory, and is designed to furnish a means whereby a defendant, against whom a judgment has been entered and paid, may enforce claim for contribution in a proper case without resort to suit.

"It simply provides a convenient method of enforcing contribution by a judgment debtor who has paid a judgment as against a codefendant or codefendants liable for a proportion of the debt." Dow v. Sunset Telephone & Telegraph Co., 162 Cal. 136, 121 Pac. 379; San Joaquin Valley Bank v. Gate City O. Co., 36 Cal. App. 791, 173 Pac. 781.

[2] The procedure adopted by the defendant would have been appropriate in a case where one judgment was sought to be set off against another, to effect which result it must appear that there are judgments in favor and against each of the parties.

"The satisfaction of a judgment may be wholly or partly produced by compelling the judgment creditor to accept in payment a judgment against him in favor of the judgment debtor, or, in other words, by setting off one judgment against another. This is usually brought about by a motion in behalf of the party who desires to have his judgment credited upon or set off against a judgment against him. The court in a proper case will grant the motion. Its power to do this cannot be traced to any particular statute and exists only in virtue of its general equitable authority over its officers and suitors. * * * Generally, a party will not be allowed to set off a judgment in his favor against a judgment against him, unless he is both the legal and equitable owner of the judgment in his favor, and the party against whom he seeks to exercise the right is also the beneficial owner of the judgment recovered by him." 2 Freeman on Judgments (4th Ed.) § 467a.

The cases cited by appellant Arp, notably Coonan v. Loewenthal, 147 Cal. 218, 81 Pac. 527, 109 Am. St. Rep. 128, and Haskins v. Jordan, 123 Cal. 157, 55 Pac. 786, were cases proper to be considered under the rule announced by Mr. Freeman for the judgments sought to be offset were existing judgments which had not been satisfied. If the judgment had been paid, it is satisfied; hence there is no judgment which the court may credit to the moving party upon his judgment debt in another action. The court, by its order as made herein, attempted to enforce the alleged right of contribution in favor of the defendant in a proceeding which had not been taken in the way required by the code provisions to which we have referred.

[3] The parties hereto having stipulated that both appeals be heard upon the same record and considered together, separate orders are not required to be made.

The order appealed from is reversed, appellant Blake to recover her costs.

We concur: CONREY, P. J.; SHAW, J.

(48 Cal. App. 739)

In re KLING. (Civ. 3326.)

(District Court of Appeal, Second District, Division 1, California. July 28, 1920.)

1. Appeal and error ⟹74, 82(4)—Order disallowing costs, appealable only after final judgment.

An appeal lies from an order disallowing costs only when such order is entered after the final judgment; in other cases the order is reviewed only on appeal from the final judgment.

2. Appeal and error ⟹74—Reversal of disbarment for insufficient evidence is not final judgment.

A reversal of a judgment disbarring an attorney because of insufficiency of evidence is not a final disposition of the case, but is in effect a remand for a new trial, so that an order disallowing costs is not appealable until final judgment by the trial court.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Proceedings for the disbarment of D. G. Kling, as an attorney and counselor at law. From an order granting a motion to retax, strike out, and disallow the bill of costs, after the judgment of disbarment was reversed for want of evidence, the attorney appeals. Appeal dismissed.

D. G. Kling, of Los Angeles, and Winslow P. Hyatt, for appellant.

Alfred Wright, Alexander Macdonald, Percy V. Hammon, and Paul Vallee, all of Los Angeles, for respondent.

SHAW, J. A proceeding for the disbarment of appellant as an attorney at law was instituted in the superior court by the Los Angeles Bar Association. The trial thereof resulted in an order made suspending him from practicing his profession. On appeal therefrom the judgment was reversed (Matter of Kling, 186 Pac. 152) upon the ground that the same was not warranted by the evidence. Upon the going down of the remittitur, appellant served and filed his bill of costs and disbursements made at the trial and on appeal, to which respondent interposed a motion to retax, strike out, and disallow the same, which motion was by the

court granted and from which this appeal is prosecuted.

Appellant, conceding that the allowance of costs is a matter of statutory regulation, bases his claim to the allowance thereof upon the statutes applicable to civil cases and special proceedings to the effect that the prevailing party, except in certain cases wherein this proceeding is not included, is entitled to costs both for expenditures made in the lower court upon trial and upon appeal. See sections 1022, 1024, 1025, 1027, Code Civ. Proc. These sections appear to refer alone to the allowance of costs in civil actions and special proceedings; hence we have grave doubts as to whether they constitute authority for an allowance of costs to one who successfully defends himself in a disbarment proceeding, the provisions for which are confined to chapter 1, tit. 5, pt. 1, Code of Civil Procedure, entitled, "Attorneys and Counselors at Law," wherein no reference is made to an allowance of costs in such a proceeding. See Morton v. Watson, 60 Neb. 672, 84 N. W. 91; State v. Fisher, 82 Neb. 361, 117 N. W. 882; In re Watt & Dohan (C. C.) 154 Fed. 678; and In re Eaton, 7 N. D. 269, 74 N. W. 870.

Since, however, we are clearly of the opinion that the appeal must be dismissed, we deem it unnecessary to decide the question.

[1] To entitle a party to appeal directly from an order of this character, it must, as provided by section 963, Code of Civil Procedure, appear that the same was made after final judgment rendered in the case wherein allowance of costs is sought. Crane v. Forth, 95 Cal. 88, 30 Pac. 193; Empire Co. v. Bonanza Co., 67 Cal. 406, 7 Pac. 810. As stated, the judgment of disbarment was, on appeal, reversed for insufficiency of the evidence to justify the findings implied therein. The effect of such reversal was to remand the case for a new trial. Ryan v. Tomlinson, 39 Cal. 639; Falkner v. Hendy, 107 Cal. 49, 40 Pac. 21, 386. By such action the parties, until a new trial was had or other disposition made of the case, were in precisely the same position as if a trial thereof had never been had. Sharp v. Miller, 66 Cal. 98, 4 Pac. 1065. Hence, for the reason that at the time of the making of the order no final judgment had been rendered in the case, the order is not appealable. A review thereof can be had only upon an appeal from the judgment. Lasky v. Davis, 33 Cal. 677; Stevenson v. Smith, 28 Cal. 105, 87 Am. Dec. 107; Empire Co. v. Bonanza Co., supra.

[2] There is no merit in appellant's contention that the order of this court reversing the judgment from which the appeal was taken must be deemed a final disposition of the case without further action on the part of the trial court. By virtue of the reversal the case was remanded to the trial court for further action and disposition.

The appeal is dismissed.

We concur: CONREY, P. J.; JAMES, J.

48 Cal. App. 764

Application of TRAVERS. (Cr. 916.)

(District Court of Appeal, First District, Division 2, California. July 29, 1920. On Petition for Rehearing, Aug 24, 1920.)

1. Habeas corpus ⊂=85(1)—Evidence held to sustain finding petitioner had infectious disease.

In habeas corpus proceedings to procure petitioner's release from custody in a county hospital, evidence *held* to sustain the findings of the commissioner to whom the issues of fact were referred that petitioner was suffering from infectious venereal diseases.

2. Health ⊂=23—State can restrain person afflicted with infectious diseases.

The state has power for the protection of the community at large to confine in a hospital persons afflicted with venereal diseases.

3. Health ⊂=23—Consent to physical examination to avoid trial for vagrancy not secured by duress.

Where petitioner had been arrested on a charge of vagrancy and was informed by the magistrate that if she submitted to physical examination and was found free from venereal disease, he would release her, her consent to a physical examination to ascertain the existence of disease was not void because procured by duress, and the right to confine her in a hospital because of the existence of disease, which could have been done following a compulsory examination after her conviction, was not thereby rendered illegal.

On Petition for Rehearing.

4. Habeas corpus ⊂=113(11)—Rehearing after final judgment is beyond jurisdiction.

The appellate court has no further jurisdiction in habeas corpus proceedings after rendering a final judgment remanding petitioner to custody, and cannot grant a rehearing.

Nourse, J., dissenting.

Application by Evelyn Travers for a writ of habeas corpus, prayed to be directed to the Health Officer of the City and County of San Francisco to secure the release of petitioner from detention for communicable disease. Writ discharged, and petitioner remanded to custody.

Raine Ewell, of San Francisco, for petitioner.

Matthew Brady, Dist. Atty., and Leo R. Friedman, Deputy Dist. Atty., both of San Francisco, for respondent.

BRITTAIN, J. On the petition of her attorney, a writ of habeas corpus in this matter was made returnable to this court. The petition, which was lengthy, and need not be set forth, was based upon the alleged facts that Evelyn Travers was imprisoned by the health officer of the city and county of San Francisco, in a certain ward of the city and county hospital, on the pretense that she was infected with a certain specific disease, that she was not examined by a licensed physician, and that she was examined against her consent. It was further alleged that she was arrested while on her way to her home, without warrant or cause, by a peace officer, that she was discharged by the police court on the following morning, and that she was examined by a doctor while she was under duress produced by threats that she would be convicted of vagrancy and sentenced to the county jail unless she consented to the examination. It was alleged also that she was not suffering from the particular disease mentioned in the petition, nor from any other contagious or infectious disease, that the state board of health nor its secretary had not taken control of the case, nor caused her restraint in the hospital to prevent the spread of such disease, that she had been deprived of nourishing food, access to the sunshine, and of the visits of her friends and attorney.

[1] On the return of the writ by the health officer of the municipality, who is also an inspector of the state board of health, most of the allegations of fact were traversed, and other facts set forth as a justification for the detention. Because of the wide divergence of the two statements of fact it became necessary for evidence to be taken. The matter was referred to Thos. F. Prendergast, a commissioner appointed by the court. The proceedings before the commissioner were reported by the official reporter of the court. No good result would follow from even summarizing either the evidence or the report of the commissioner. Suffice it to say that the examination was continued at great length. A large number of witnesses testified, and documentary evidence was introduced. The testimony of medical experts on the part of the respondent was direct and positive concerning the infection of the woman by two distinct, infectious, and communicable diseases most frequently transmitted through participation in social vice. The evidence of medical witnesses called on behalf of the petitioner was to the effect that when they made examinations the recognized tests failed to show the presence of the specific diseases in question. There was unquestionable evidence that by certain preliminary treatments the tests in cases of admitted infection might be rendered negative of proof for a short period during which an examination might have been made. The court is of the opinion that the finding of the commissioner that the two forms of disease in question were present at the time of the issuance of the writ is sustained by the evidence and is conclusive; and there is no evidence that either has been eradicated since that time.

[2] It is a matter of common knowledge that the federal government, the state government, and the municipal government are engaged in an effort to prevent the spread of the two diseases in question. By section 2979 of the Political Code the state board of health is vested with general power of inspection, examination, quarantine, and disinfection of persons within the state, and with power to appoint inspectors who, under the direction of the board, shall be vested with like powers. The state board of health appointed the health officer of the municipality such an inspector, and directed him, as one of its such inspectors, "to use every available means to ascertain the existence of, and immediately to investigate, all reported or suspected cases of syphilis in the infectious stages of gonococcus infection." Inspectors were further required to make examinations of all persons reasonably suspected of having either of the specified diseases, and "owing to the prevalence of such diseases among prostitutes, all such persons may be considered within the above class." The law provides for the isolation of persons suffering from infectious and contagious diseases. Such laws have been upheld in a multitude of cases, and the safety of the community depends upon the proper enforcement of health and quarantine regulations. On habeas corpus proceedings the first question, and usually the only one, presented is as to the existence of the power of restraint. In this case the power to isolate persons suffering from the particular diseases, or either of them, cannot be seriously questioned.

The commissioner finds that the arrest was made, not as stated in the petition, but in a lodging house, which the woman was visiting for purposes of prostitution; that the records of the police court show that she was charged with vagrancy; that she appeared and pleaded not guilty, waiving a jury; that she was then given a hearing, and the case was continued to a later date. It is further found that after the hearing she voluntarily submitted to a physical examination by the doctor then in charge of the diagnostic clinic of the department of public health of the city, who was assisted by a graduate nurse, and that specimens then obtained were sealed and submitted to another doctor who was the chief bacteriologist of the department, upon whose report the health officer made the order of detention in the San Francisco hospital, and of quarantine. It is further found that other allegations in the petition are untrue, particularly in regard to the food and treatment of the patient at the hospital.

Some contention was based on the ground that the examining doctor at the time was not a licensed physician. There was no suggestion that he was not a capable and learned

physician, who was in charge of the clinic by the order of the health officer. He did not make the order of detention, and the examination was made by consent.

[3] In regard to the charges of duress on behalf of the petitioner, it was sought to be shown that the police judge had stated that in every such case the woman is sent to be examined by the clinical officer, and, if she passes, the case is dismissed. Thereupon it was stipulated by the district attorney that such is the invariable practice, not, however, for the purpose of forcing the women so charged to submit to examinations, but to enable the police judge to show leniency to them. Whatever might be said concerning this method of releasing persons charged with vagrancy merely as a matter of leniency, in the particular case it cannot be made the basis of a charge of duress. The woman, if satisfied of her innocence, might have submitted to trial and judgment. If she was guilty and had been sentenced, she might have been examined even against her will. She chose the easier of the two courses open to her.

Upon the allegations in the petition the writ was ordered issued, but in view of the record the petition was without foundation. It is considered proper in this connection to add that if a person arrested on the charge of vagrancy should appear to be suffering with another disease—smallpox, for instance—and the proceedings followed which took place in this case, the evil consequences to the community might have been frightful to contemplate. Persons petitioning for habeas corpus, particularly when such petitions are made on behalf of another, should be well assured of the facts represented to the court as true. In the present instance the petitioner no doubt erred or was misinformed, but such errors, fraught with danger to the community, should not be made. This statement is considered necessary to prevent anything in this opinion being considered as authority for unwarranted applications for the release of persons properly quarantined under lawful regulations of the public health department.

The writ is discharged, and Evelyn Travers is ordered returned to the care of the respondent health officer.

I concur: LANGDON, P. J.

NOURSE, J. I dissent. The undisputed facts are that petitioner was arrested on a charge of vagrancy, was taken from her place of abode to the police court, where she pleaded not guilty, and, without trial or judgment, was ordered into the custody of the health officer. She was then taken to the city and county hospital, where, in direct defiance of a penal statute, she was subjected to a medical examination by an unlicensed employé illegally styling himself a doctor. As a result of such examination she was ordered confined in the city and county hospital for an indefinite period, and was so detained without warrant or judicial commitment when released on bail by order of this court.

The power to quarantine diseased persons for the purpose of preventing the spread of communicable diseases need not be questioned. The power to imprison a citizen in a public hospital without trial or commitment is obnoxious to every American principle of right and justice. It is one of the fundamental principles of both our federal and state Constitutions that no person shall be "deprived of life, liberty or property without due process of law." "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard." Galpin v. Page, 85 U. S. (18 Wall.) 350, 368 (21 L. Ed. 959).

In the present case the petitioner, having been charged with the crime of vagrancy, was entitled to a trial and judgment upon that charge. It matters not that she consented to go to the city and county hospital for medical examination on the promise of the judge of the police court that he would dismiss her case if found free from disease—and the implied threat that if she did not consent she would be convicted and sentenced. The magistrate was without power to make any such promises. It was his duty to try her for the offense of which she was charged and find her either guilty or not guilty of that offense. The presence of disease is no element of the crime of vagrancy, except in certain instances defined in section 647, Penal Code, which are not material to this case. If, as claimed in argument, the petitioner was a prostitute, then, under section 647, she was a vagrant. That was the issue which was presented to the magistrate, and upon that issue she was entitled to a trial. She did not have a trial upon that or any other issue.

The broad scope of the main opinion is atrocious in its consequences. Having approved the farcical and unjudicial pretense of a trial in the police court, the effect of the opinion is that any citizen may be taken from his home, and, without trial or judgment, confined in a public hospital during the will and pleasure of the health officer, if some unlicensed employé of the institution believes that he is afflicted with some contagious disease. During such confinement the victim may be denied the right to call in his own physician, but is forced to subject himself to such medical treatment as the employés of the hospital may choose to give him.

Section 2979a of the Political Code, the section under which the health officer is acting, authorizes him, when acting as an inspector under the state board of health, to "take possession or control of the body of any living person," upon being informed of any of the contagious or infectious diseases mentioned

in the section. Among the diseases therein mentioned are tuberculosis, pneumonia, diphtheria, measles, chicken pox, whooping cough, mumps, and "any other contagious or infectious disease." Thus a parent whose child is afflicted with any of the many contagious diseases prevalent among children, may be denied the right of caring for his child in his own home and of calling a physician of his own choosing. All that is necessary, under the main opinion, is for the health officer to be informed that some contagious disease exists. Then he may take possession and control of the "body of any living person" (not necessarily one afflicted with the disease), remove him from his home and the care of his family, and confine him in the county hospital, without commitment, until such time as the employés of the hospital may determine that his illegal imprisonment might cease. If such be the law, one who is afflicted with tuberculosis may suffer a greater punishment for his offense than one who has committed a burglary.

The provisions of section 2979a, in so far as they attempt to authorize the imprisonment of the individual for an indefinite term without trial and without commitment, are unconstitutional and void. The petitioner is detained by the health officer solely under the authority of that section. Her imprisonment in the city and county hospital is without the semblance of a legal confinement, and she should be discharged.

On Petition for Rehearing.

WASTE, Acting Presiding Justice. [4] The petition for rehearing is denied on the ground that this court has no further jurisdiction. Matter of Application of Shoemaker, 25 Cal. App. 568, 144 Pac. 985; Ex Parte Robinson, 71 Cal. 611, 12 Pac. 794.

49 Cal. App. 46

MITCHELL v. WHITFORD et al.

(Civ. 2151.)

(District Court of Appeal, Third District, California. Aug. 10, 1920. Hearing Denied by Supreme Court Oct. 7, 1920.)

1. Mortgages ⟹48(1)—Mistake in description, which does not prevent identification, not fatal.

A mistake or misdescription, or uncertain description, of the property in a mortgage, does not avoid the instrument, if the property is nevertheless capable of identification, and can be located by a surveyor by applying the rules of surveying to the whole description.

2. Mortgages ⟹48(2) — Obvious mistake in one call held not to invalidate.

A mistake in the description contained in a mortgage, whereby a call read 3,146 chains, instead of 3.46 chains, was obviously a mistake on its face, and since a surveyor could locate the land, notwithstanding such mistake, by running the later calls backwards, the mistake does not invalidate the mortgage, especially as against one who had both constructive and actual notice that the property was subject to the mortgage when he purchased it.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by R. C. Mitchell, as trustee, against R. A. Whitford and others for the foreclosure of a mortgage. Judgment for plaintiff, and defendant Charles Z. Soule appeals. Affirmed.

Theodore J. Savage, of San Francisco, for appellant.

R. C. Porter, of San Francisco, and L. J. Maddux, of Modesto, for respondent.

NICOL, Presiding Judge pro tem. This is an appeal from a judgment of the superior court of Stanislaus county, decreeing the foreclosure of a mortgage. The said mortgage was executed by defendants R. A. Whitford and his wife, Augusta Whitford, to one C. L. Flack, to secure a promissory note for the sum of $21,864.42, dated April 9, 1913, payable 4 years after date, with interest at 6½ per cent. per annum. Subsequent to the execution of the mortgage, the plaintiff became the holder thereof by mesne assignments. Subsequent to the making of this mortgage, the mortgagors deeded the property so mortgaged, and it was conveyed repeatedly until the fee vested in the appellant, Charles Z. Soule. The plaintiff, by his complaint, named as defendants the original mortgagors, R. A. Whitford and his wife, Augusta Whitford, and a number of others, including appellant. All the defendants, except Charles Z. Soule, defaulted. By the decree, judgment was rendered in favor of plaintiff, and against the defendants R. A. Whitford and Augusta Whitford, in the sum of $27,707.03, on the note. The decree further adjudged the same a lien upon the land described in the judgment, ordered the land sold to satisfy said sum, provided for judgment against the Whitfords for any deficiency, and foreclosed the rights of the defendant Soule. Defendant Soule appeals from the judgment, in so far as it subjects his land to the lien of the said mortgage, orders it sold, forecloses his rights, and otherwise affects his interests.

The mortgage was recorded on the same day that it was executed, to wit, April 9, 1913. The description of the land mortgaged, as given in finding III, is a surveyor's description. It commences at an established point, a section corner, and then contains some 27 calls, given by courses and distances only. Said description is as follows:

"Beginning at corner to sections 7, 12, 13, and 18, township 4 south range 7 and 8 east, Mt. Diablo base and meridian; thence south 0° 10′ east, 40 chains; thence south 0° 10′ east, 21 chains; thence north 89° 41′ east, 46.95 chains; thence north 34° 50′ west, 1.38 chains; thence north 18° 39′ west, 2.55 chains; thence north 13° 20′ west, 5.70 chains; thence north 6° 43′ east, 13.38 chains; thence north 5° 40′ east, 4.88 chains; thence north 8° 35′ west, 2.99 chains; thence north 67° 7′ east, 1.50 chains; thence north 10° 39′ east, 4.77 chains; thence north 11° 52′ east, 5.16 chains; thence north 19° 25′ east, 6.84 chains; thence north 35° 14′ east, 4.07 chains; thence north 20° 11′ east, 2.89 chains; thence north 1° 44′ west, 1.79 chains; thence north 3° 42′ west, 4.25 chains; thence north 48° 4′ west, *3.46* chains; thence north 39° 13′ west, 11.19 chains; thence north 67° 8′ west, 3.34 chains; thence north 75° 39′ west, 8 chains; thence north 55° 35′ west, 3.40 chains; thence south 37° 57′ west, 2.17 chains; thence south 27° 59′ east, 2.72 chains; thence south 11° 15′ west, 4 chains; thence south 7° 45′ east, 6 chains; thence south 89° 41′ west, 30.50 chains to point of beginning. Above described tract of land containing 300.89 acres."

The court found that the description of the—

"land set out in the mortgage was intended by the parties to be the same as that which is set out in finding No. III, and that by inadvertence and mistake the course in said description read as recorded, 'Thence north 48° 4′ west, *3,146* chains,' and the true course is 'thence north 48° 4′ west, 3.46 chains.'"

The court also found that this mistake in the description was by "inadvertence and mistake of all parties." The error is in the eighteenth call of the description, which reads: "Thence north 48° 4′ west, 3,146 chains." The correct description should read: "Thence north 48° 4′ west 3.46 chains." This erroneous description would not describe the land that the parties intended to mortgage. It simply describes a line which does not inclose the land. This erroneous description would run that course referred to over thirty miles. The mortgage called for 300.89 acres, and it is very plain that it was a mistake that any one would notice in the reading of the description.

The appellant does not claim that he suffered any injury by reason of this error in the description, and he does not claim to have been misled by the description contained in the record. The court found that the appellant—

"acquired title to said lands in good faith and for valuable consideration, and that valuable consideration was the sum of $10, and that he did not pay any greater or further consideration than the sum of $10. That at the time of the giving, granting, and delivering by him to his grantors of the said sum of $10 for said grant, as aforesaid, and prior thereto, he had actual notice and constructive notice of the records in the recorder's office of the county of Stanislaus, state of California, of said note and mortgage, and that the same was a lien on the lands described in finding No. III. * * *"

[1] The whole claim of appellant to defeat the mortgage of plaintiff is based on this error in the description—an error only in one course, and it is very apparent on the face of the record that it is an error. After describing the land almost to the place of beginning, the description on the record reads, as before stated, "thence north 48° 4′ west, 3,146 chains." The correct description should read, "thence north 48° 4′ west, 3.46 chains"; the error being the inserting of the figure 1 in the place of the period between the figures 3 and 4.

"A mistake or misdescription, or a defective or uncertain description, of the property intended to be conveyed by mortgage will not necessarily avoid the instrument. If the property is nevertheless capable of identification, and is clearly identified, the mortgagee may have the mortgage reformed or corrected." 27 Cyc. 1093.

"Whether the description is uncertain or not is to be determined from an inspection of the entire deed, and in considering it the construction to be put upon it must not only be a reasonable one (Civ. Code, § 3542) but such an interpretation must be indulged in as will give effect to the deed rather than defeat it." Hall v. Bartlett, 158 Cal. 638, 112 Pac. 176.

"A deed is not void for uncertainty because there may be errors or an inconsistency in some of the particulars. If a surveyor, by applying the rules of surveying, can locate the land, the description is sufficient; and, generally, the rule may be stated to be that the deed will be sustained if it is possible from the whole description to ascertain and identify the land intended to be conveyed." Devlin on Deeds, § 1012.

This section is cited with approval in McCullough v. Olds, 108 Cal. 529, 532, 41 Pac. 420.

[2] In the case of Walsh v. Hill, 38 Cal. 481, 485, 486, the Supreme Court held that, where there are errors in tracing the description, the surveyor might, when it is necessary, take the last call, and run the lines back to the first call—citing Noyes v. Dyer, 25 Me. 468. A surveyor following this rule in the case at bar, and taking the last call, and running the lines back, the mistake in the description is discovered, and the eighteenth call in the description, instead of being "thence north 48° 4′ west, 3,146 chains," should be "thence north 48° 4′ west, 3.46 chains."

The judgment appealed from is affirmed.

We concur: HART, J.; BURNETT, J.

49 Cal. App. 39

Ex parte RAYMOND. (Cr. 926.)

(District Court of Appeal, First District, Division 2, California. Aug. 5, 1920.)

Prisons ⟸15—Prisoner may not be denied credits, where he was not present when evidence was heard.

Under Pen. Code, § 1588, requiring prison directors, before forfeiting prisoner's credits, to give notice to the offender and hear proof, a prisoner's credits cannot be forfeited, where he was charged with participating in a riot within the prison, and pleaded not guilty, but he was not permitted to be present when the proof was heard, or to present any defense.

Waste, Presiding Judge pro tem., dissenting.

Application for habeas corpus by Harry Raymond, prayed to be directed to the Warden of San Quentin Prison, to secure petitioner's release from custody, on ground that credits were illegally forfeited. Prisoner discharged.

Harry Raymond, in pro. per.

U. S. Webb, Atty. Gen., and R. L. Chamberlain, Deputy Atty. Gen., for respondent.

NOURSE, J. Petitioner was received at the state penitentiary at San Quentin about August 25, 1911, under a sentence of 10 years for grand larceny. If entitled to the credits for good conduct allowed under section 1588 of the Penal Code, he should have been released February 25, 1918. The petition alleges that during the month of July, 1912, without previous notice, and without opportunity of preparing or presenting any defense, he was taken from his cell and led before the board of prison directors, where his credits were forfeited without trial, and that he is accordingly still held in custody by the warden of the penitentiary. Petitioner relies on the provisions of section 1588, which grant to a prisoner the credits as a matter of right, subject to forfeiture only "after due proof of the offense and notice to the offender."

The evidence produced at the hearing in brief is: Petitioner, with some 25 other prisoners, was charged with participating in a riot within the prison. The directors met in a room situated in a building where these prisoners had been placed in solitary confinement. One prisoner after another was called before the board and asked to enter his plea. When the petitioner was called, he pleaded not guilty. No testimony was taken in his presence; he was not confronted by any witnesses, and had no opportunity of presenting any defense. The witnesses produced by the Attorney General at the hearing did not controvert this positive evidence given on behalf of petitioner.

"This section [1588] requires that the board of directors, before they shall take action, shall have given notice to the offender and heard proof touching the offense." In re Knowlton, 136 Cal. 107, 109, 68 Pac. 480.

Upon the record before the court there is no escape from the conclusion that petitioner was not afforded the hearing required by the Code when his credits were forfeited. For that reason he is entitled to the credits allowed by the Code, and, his term of service having expired, he should be discharged from custody.

So ordered.

I concur: BRITTAIN, J.

WASTE, Presiding Judge pro tem. I dissent. I am unable to agree with my Associates in the conclusion reached by them in the matter of the application for a writ of habeas corpus. It appears from the return to the writ, the affidavit of the clerk to the state board of prison directors, and oral testimony taken at the hearing, that on or about the 11th day of July, 1912, a riot occurred in the dining room at the state prison at San Quentin, at a time when the board of prison directors was in session. The convicts supposed to be the ringleaders in the uprising—this petitioner among them—were apprehended, and were at once placed in solitary confinement. The prison remained in a turmoil, and the situation was tense when the board met again the next day. As a matter of precaution, the board met in a room in the building in which the solitary confinement cells were located, and into which those cells opened. All the members of the board and the clerk were present, and the session seems to have been regular in every particular.

The warden of the prison filed a charge, in writing, signed by him as warden, in which the petitioner, with others, was accused of having violated the rules of the prison by engaging in riotous conduct, and the destruction of state property. Raymond, the petitioner here, was brought before the board, informed of the charge made against him by the warden, which was read to him, and "asked if he was guilty or not guilty." He entered a plea of "not guilty," and the trial was proceeded with. The warden, the captain of the guard, and two guards were called before the board, and testified in support of the charges. From the evidence it appeared that Raymond, together with other prisoners, had engaged in a general riot, had destroyed certain property within the prison belonging to the state of California, and that, in subduing the insurrection, one inmate was killed and another seriously wounded. The board thereupon found and adjudged the petitioner guilty as charged and declared his credits forfeited.

Thus far the record is clear and unassailable. Petitioner would impeach it by certain averments in his petition, and by oral testimony, to the effect that no evidence was taken in his presence; he was not confronted by any witnesses, and had no opportunity of presenting any defense.

There is a conflict and an uncertainty in the evidence as to the presence of the petitioner during the hearing. He testified that as soon as he was informed of the charges, and caused to enter his plea, he was taken back to his cell, which was about 10 feet from where the board was in session, and that he did not hear the testimony given against him. The captain of the guard testified that to the best of his recollection the petitioner was present. The affidavit of the clerk of the board is that the warden, the captain of the guard, and two guards testified in Raymond's presence. His testimony was not so positive as to the fact. It does not appear that Raymond objected to the consideration of his case by the board, sought to make any defense and call witnesses in his behalf, or asked for a continuance or delay in the matter. He has not claimed that he did. The minutes of the board do not show such to be the fact, and the affidavit of the clerk of the board is that he did not.

By section 1588 of the Penal Code it is provided that, if any convict in the state prison—

"shall commit any assault upon his keeper, or any foreman, officer, convict, or person, or otherwise endanger life, or shall be guilty of any flagrant disregard of the rules of the prison, or commit any misdemeanor, or in any manner violate any of the rules and regulations of the prison, he shall forfeit all deductions of time earned by him for good conduct; * * * such forfeiture, however, shall be made only by the board of directors after due proof of the offense and notice to the offender; nor shall any forfeiture be imposed when a party has violated any rule or rules without violence or evil intent, of which the directors shall be the sole judges."

As said by the writer of the majority opinion:

"This section requires that the board of directors, before they take action, shall have given notice to the offender and heard proof touching the offense."

In my judgment, it has not been made to appear but that the provision of the statute was fully complied with in the instant case, and that the situation here presented is no more aggravated than that considered in the case quoted from in the majority opinion, in which the writ was discharged and the petitioner remanded. In re Knowlton, 136 Cal. 107, 109, 68 Pac. 480. That should have been the order here.

49 Cal. App. 773

PEOPLE v. GRANEY. (Cr. 709.)

(District Court of Appeal, Second District, Division 1, California. July 30, 1920.)

Criminal law ⟸407(2) — Evidence that defendant was silent when implicated in a codefendant's confession held admissible.

Where in a prosecution for attempted robbery defendant, in company with his codefendants, was taken to the sheriff's office, where one of the codefendants admitted his guilt and implicated defendant, but defendant, after listening to the implicating statement in response to a question by the prosecuting attorney, refused to make a statement in reply on the ground that his attorney had ordered him not to talk, evidence as to such occurrence *held* admissible, although it would have been inadmissible had defendant denied the truth of the statement, which he had opportunity to do.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Donald C. Graney was convicted of attempted robbery, and he appeals. Affirmed.

Fish & Eddie, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Arthur Keetch, Deputy Atty. Gen., for the People.

SHAW, J. Defendant, as charged in an indictment, was convicted of the crime of attempted robbery, and prosecutes this appeal from the judgment thereon pronounced against him.

On the afternoon of October 2d, four men, all of whom were armed, entered the First National Bank of Hynes and attempted to rob the same. One of them, Dave Curry by name, was captured while engaged in the felonious act. On the following day, defendant and two other men were arrested as participants in the commission of the crime. In company with Curry, they were taken to the office of the sheriff, at which time Curry admitted his guilt, and, in the presence of defendant, stated the latter was a full participant therein. During the examination of Curry, the question was asked: "Did you have any talk together as to what you were going to do or where you were going?" in response to which Curry said, "No." And, continuing, the interrogator stated: "Something had been said, wasn't there? What did you say to one another?" whereupon defendant interposed, saying: "Our counsel gave us orders not to talk about the case until we were taken into court." The interrogation of Curry proceeded, and upon the completion of his statement, defendant was asked if there was anything in the statement which he wanted to correct or add anything thereto, to which he replied, "No, sir." And again: "Is there anything that Curry has said, boys, that is not right or that you want to cor-

rect? * * * Anything you want to correct or fill in, Graney?" To which he replied, "No, sir." Not only did defendant object to the introduction of this testimony, but thereafter moved the court to strike out the same, which motion was denied; and this ruling constitutes the only error of which defendant complains.

While appellant concedes the rule, stated by the court in instructing the jury, that "you cannot take into consideration the substance of said confession or the truth or falsity of it against the defendant, but can only consider what the defendant did or said when said statement was made in his presence," he insists that by reason of the mere avowal that his attorney had advised him not to talk, what he said or did in response to Curry's statement as to his participation in the crime was not admissible in evidence, and hence it follows that it was likewise error to admit Curry's statement.

The denial of the truth of the statement made at the time would have rendered the evidence inadmissible (People v. Teshara, 134 Cal. 542, 66 Pac. 798), and the converse is true where an accusation is admitted. So too, it is held that where, in response to the accusation of crime, the accused remains mute under such circumstances that he was free to speak or ought to speak, the fact of his remaining mute would justify the admission of the evidence. People v. Philbon, 138 Cal. 530, 71 Pac. 650. In the instant case, defendant was free to speak, and had every opportunity to do so; indeed, his position under the circumstances was such that if the charge was untrue he should have spoken in repudiation thereof. But he neither denied nor admitted the accusation; in effect he stood mute and assigned his reasons for so doing. The court was thus called upon, in passing upon the preliminary question of the admissibility of the evidence, to determine upon the unsworn statement of defendant, not only whether the reason assigned was a subterfuge, but whether, if genuine, it justified defendant making no response to the accusation. In our opinion, it ruled correctly in allowing the evidence to go to the jury for what it was worth. If the jury believed the defendant's testimony thereafter given in his own behalf, that his attorney had advised him not to talk, and which the court did not have before it when it made the ruling, it would be of little probative weight, but this fact does not affect its admissibility. The facts of the case are very similar to those involved in People v. Philbon, supra, where the defendant was charged with grand larceny. It appearing that a bystander, who witnessed the theft, said, in the presence of and referring to defendant, "Don't you let him go, because I saw him take your purse," to which the accused replied, "I did not take it; I saw you drop it, and I picked it up and went after you." On appeal the court upheld the admission of this evidence for the purpose of showing the conduct of defendant and his reply to the statements made by the bystander who claimed to have witnessed the theft, and further said:

"It is only when there is something in the conduct of the accused person, in response to the statement that is material to the issue, that the statements of such persons are admissible at all, and they are admissible then solely for the purpose of explaining the conduct of the accused."

So here, the testimony was admissible, leaving to the jury the question as to whether, under all the circumstances shown, it had any probative force in tending to show defendant's guilt.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

49 Cal. App. 1

COHN v. RUDNECK et al. (Civ. 3216.)

(District Court of Appeal, Second District, Division 1, California. July 31, 1920.)

1. Landlord and tenant ⟸291(13)—Evidence held to sustain finding that lease gave no option for renewal.

In forcible detainer to recover possession after the expiration of a lease, both copies of which had been lost, evidence *held* to support the trial court's finding that the written lease did not contain an option for renewal, as claimed by defendants.

2. Landlord and tenant ⟸291(12)—Evidence that tenants intended to build admissible to show that they had no option to renew.

In forcible detainer, where the defendants claimed a lost lease gave them an option to renew, evidence that some time before the expiration of the lease they were preparing to build was admissible as tending to contradict their claim of option, even though it was not admissible to show waiver.

3. Appeal and error ⟸1052(5)—Evidence of rent offer not prejudicial, where court found less value.

In forcible detainer proceedings the admission of a statement by plaintiff that he had been offered $100 per month as rental for the premises was not prejudicial to defendants, where the court found the rental value to be $50, the amount specified in the lease.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by C. Cohn against M. Rudneck and others for unlawful detainer. Judgment for plaintiff, and defendants appeal. Affirmed.

Kaye & Siemon, of Bakersfield, for appellants.

E. F. Brittan, of Bakersfield, for respondent.

SHAW, J. At the expiration of a written lease of real estate made by plaintiff to defendants they refused to surrender possession, and thereupon he brought this action for unlawful detainer. Judgment went for plaintiff, from which defendants appeal.

[1] The lease was for a term of five years at a rental of $40 per month for the first two years; $45 per month for the next two years, and $50 per month for the last year. As alleged by defendants, the lease contained a provision that "at the end of the term, to wit, December 31, 1918, * * * the defendants should have the option or right or privilege of an extension or renewal of such tenancy or lease for the further or additional period of five years from and after January 1, 1919, upon the same terms and conditions provided for in said lease for the term commencing January 1, 1914, and ending December 31, 1918," as to which the court found adversely to defendants, and the sufficiency of the evidence to sustain this finding presents the chief question for determination. The burden of establishing the truth of this allegation devolved upon defendants. While the lease was executed in duplicate, both copies thereof were lost, and the question as to whether the lease contained the provision alleged was made to depend upon the conflicting testimony of the respective parties. Defendants were partners doing business under the name of the Western Junk Company, and each of them, Himovitz, Rudneck, and Bernson, testified that by the terms of the lease they were given a "five-year privilege." No claim was made by defendants or either of them that the lease contained a provision for the renewal thereof, until about December 26, 1918, four days before the expiration of the lease, at which time, and after plaintiff had served notice upon them to surrender possession, they served him with notice of an election to renew the lease upon the purported provision therein. While concededly plaintiff had talks with defendants in regard to a continuance of their tenancy, they never at any time prior to December 26th made any claim that the lease contained a provision for its renewal at their option. On the contrary, their action and conversations in reference to the subject of their tenancy were indicative of the contrary. The court no doubt in considering their testimony was impressed by the fact that they had no recollection of the contents of the lease other than that it contained, as stated by them, "a five-year privilege." Plaintiff, on the contrary, testified in positive terms that the lease contained no provision for the renewal thereof. While it is true, as contended by appellants, the witness entered into an argument based upon the conduct of defendants which he claimed tended to show that the lease contained no such provision, such argument does not detract from the weight of his positive statement which the court, considering the unsatisfactory testimony of defendants, was justified in believing. Upon the facts shown by the record it cannot be said the evidence was insufficient to justify the finding made by the court, and hence it is unnecessary to enter upon a discussion of the question as to whether or not, if the lease contained the provision alleged, it was void for uncertainty.

[2] Conceding, as claimed by appellants, that if in the lease defendants were given an option to renew the same, a waiver thereof could not be shown by parol testimony, nevertheless the conversation had in August prior to the expiration of the lease with defendant Rudneck, wherein he stated that defendants had secured a lot and had material for a building which they proposed erecting, and therefore would not continue their tenancy, was proper as tending to show that the lease contained no such provision.

[3] Neither were defendants prejudiced by the statement of plaintiff that he had been offered $100 per month as rental for the premises. The court fixed the rental value at $50 per month, and there is evidence to sustain such finding.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

48 Cal. App. 793

MacFARLANE v. DOYLE. (Civ. 3291.)

(District Court of Appeal, Second District, Division 1, California. July 31, 1920.)

1. Appeal and error ⟸1010(1)—Finding based on evidence conclusive.

Where it was undisputed that plaintiff had paid a sum of money to defendant, which he testified was a loan to defendant, and which defendant testified was a part payment on a purchase of property, the trial court's finding that the payment was a loan cannot be set aside on appeal, as not sustained by the evidence.

2. Trial ⟸393(1)—Findings, whose preparation was not directed by court, need not be served five days before signing.

The requirement of Code Civ. Proc., § 634, that where the court directs a party to prepare findings a copy shall be served on the other party five days before the findings are signed if mandatory, does not require the service of the findings five days before they were signed in the case, where it is not shown that the court directed the preparation of findings.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by D. F. MacFarlane against R. M. Doyle. Judgment for the plaintiff, and defendant appeals. Affirmed.

Wm. T. Blakely, of Los Angeles, for appellant.

E. E. Kirk and Wally Vogel, both of Los Angeles, for respondent.

SHAW, J. By one count of the complaint in this action plaintiff alleged that he loaned to defendant the sum of $900, which defendant agreed to repay on demand; that notwithstanding demand made therefor, defendant has refused to pay the same, and the whole thereof remains unpaid. The second count of the complaint states a cause of action for wages alleged to be due from defendant to plaintiff for services rendered by the latter at the former's request. By this answer defendant denied all the allegations of the complaint, and filed a cross-complaint, wherein he alleged that he sold to plaintiff a one-third interest in and to a certain business for an agreed price of $1,733.33, upon which plaintiff paid to him the sum of $900 and no more, for the balance of which he demanded judgment. The allegations of the cross-complaint were denied by plaintiff. As to all of the issues so joined, the court found adversely to defendant, and gave judgment for plaintiff as prayed for, from which defendant appeals, claiming that the findings are without support.

[1] There is no merit whatever in the contention. That defendant received from plaintiff the sum of $900 is conceded, and the testimony of plaintiff clearly shows that the sum was advanced to defendant purely as a loan, while that of defendant likewise clearly tends to prove the money was paid as a part of the pruchase price for an interest in the business, as alleged in his cross-complaint. It was, of course, the province of the trial court to determine which one of these witnesses was entitled to belief. The court, as it had the right to do, resolved the conflict in favor of the plaintiff, and such determination of the question must on appeal be deemed conclusive.

[2] It appears the findings were signed and filed upon the same day when served, contrary, as claimed by appellant, to section 634, Code of Civil Procedure, which provides that where the court directs a party to prepare findings, a copy thereof shall be served upon the other party to the action at least five days before findings shall be signed by the court. Assuming that this provision is mandatory rather than merely directory, there is nothing in the record showing the court directed the preparation of findings; and hence, as held in Hoffman v. Guy M. Rush Co., 27 Cal. App. 167, 149 Pac. 177, the case is not brought within the provisions of the section.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

48 Cal. App. 771

JONES v. JONES. (Civ. 3339.)

(District Court of Appeal, Second District, Division 1, California. July 30, 1920.)

1. Trial ⊜404(1)—Findings to be construed in support of judgment.

Findings should be construed most strongly in support of the judgment based thereon.

2. Divorce ⊜27(6)—Single act of slapping wife held not ground for divorce.

That a husband slapped his wife on one occasion did not entitle her to divorce, where it did not appear that the act caused her the slightest physical pain or mental suffering, and the act was committed in an altercation provoked by the wife, wherein she had attacked him.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Suit by Ruby L. Jones against Walter Jones for divorce. From a judgment for defendant, plaintiff appeals. Affirmed.

Willedd Andrews, of Los Angeles, for appellant.

Warren L. Williams, of Los Angeles, for respondent.

SHAW, J. Plaintiff appeals from a decree whereby she was denied a divorce from her husband, the defendant.

In her complaint, among other things, plaintiff alleged "that during the latter part of February, 1916, the said defendant willfully and without reasonable or just cause, assaulted and struck this plaintiff, and assaulted and struck a daughter of this plaintiff, and abused the said plaintiff, and used towards her profane and insulting names, in the presence of her children"; all of which allegations are denied by defendant in his answer. Upon these issues the court found as follows:

"The defendant in the latter part of February, 1916, did slap the plaintiff, and did slap the daughter of the plaintiff. This was in the course of an altercation between the defendant on one side and the plaintiff and her daughter on the other side, in which none of them were without fault. The defendant did not upon this occasion, use profane and insulting names in the presence of the plaintiff."

Appellant's sole contention is that the evidence did not justify this finding, and, further, if justified by the evidence, plaintiff was entitled to a decree of divorce thereon. Conceding that defendant did slap his wife,

as shown by her testimony, but denied by defendant, the act, as appears from ample evidence, was committed in an altercation provoked by the wife, who, without just cause attempted to eject him from a room in his residence, at which time she made a furious attack upon him by striking, kicking, and biting. In effect, while the court found that defendant, on the occasion referred to, slapped his wife, the act was provoked by her unwarranted attack and conduct.

[1, 2] Findings should be construed most strongly in support of the judgment based thereon, and, notwithstanding defendant was guilty of the act as found, it is not made to appear that it caused plaintiff the slightest physical pain or mental suffering, in the absence of which showing it cannot be said that defendant's single wrongful act, committed under the circumstances stated, entitles her to a reversal of the case.

There is no merit in the points presented; hence the judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

48 Cal. App. 753

AITKEN v. ROCHE et al., Police Com'rs. (Civ. 3527.)

(District Court of Appeal, First District, Division 2. California. July 29, 1920.)

1. Constitutional law ⊂=102(2)—Right of policeman to pension vested.

The right of a policeman to a pension under the charter of the city of San Francisco is vested, and enters into his contract of employment when he becomes a member of the department.

2. Municipal corporations ⊂=187 — Retired patrolman entitled to half of pay as increased after retirement.

Under Charter of City and County of San Francisco, art. 8, c. 1, §§ 1, 2, c. 7, c. 10, §§ 2, 3, 5, 6, 10, patrolman retired from police force of city in 1903, when the pay of a patrolman was $102 a month, *held* not limited to a pension of one-half that sum, or $51 a month, but entitled to half the pay of a patrolman, of $140 a month, as increased by charter amendment adopted in 1918 and approved by the Legislature January 21, 1919 (St. 1919, p. 1391).

3. Pensions ⊂=1—Pension statutes liberally construed.

Pension statutes are to be liberally construed.

Application for writ of mandate by James Aitken, for himself and in behalf of all other persons who receive pensions from the Police Relief and Pension Fund of the City and County of San Francisco, state of California, in sums less than one-half of the salary now attached to the rank held by the pensioner, when pensioned, or by the husband or father of the pensioner when the pension was awarded, against Theodore Roche and others, as Police Commissioners of the City and County of San Francisco and as the Board of Trustees of the Police Relief and Pension Fund of said City and County. Application granted.

Moran & Moran, of San Francisco, for petitioner.

George Lull, City Atty., and Milton Marks, Asst. City Atty., both of San Francisco, for respondents.

BRITTAIN, J. The petitioner seeks by mandamus to require the board of trustees of the police relief and pension fund of the city and county of San Francisco to allow his demand for an amount of money in excess of that to which it is conceded he is entitled. The defendants demur generally to the sufficiency of the petition. A single question of law is presented, and it is determinative of the petitioner's right.

The petitioner became a member of the police department in 1880, and served continuously until 1903, when he was retired on account of physical disability received in the performance of his duty, and since that time he has been on the pension roll, he having been retired while he was holding the rank of patrolman. At the time of retirement the pay of a patrolman was $102 a month. By a charter amendment, adopted at the election of 1918, and approved by the Legislature January 21, 1919 (St. 1919, p. 1391), the pay attached to the rank of patrolman was increased to $140 a month. The charter provides that members of the police department may be retired, as the petitioner was, "upon an annual pension equal to one-half of the amount of salary attached to the rank which he may have held three years prior to the date of such retirement, to be paid him during his life and to cease at his death. In case his disability shall cease his pension shall cease, and he shall be restored to the service in the rank he occupied at the time of his retirement." Charter, c. 10, art. 8, § 3. The sole question is whether or not pensioners are entitled to one-half of the pay attached to their retirement rank when pension installments successively become due, or to one-half of the pay which was attached to the rank when they were retired. It is alleged that over 100 such pensioners are concerned in this proceeding.

[1] On behalf of the defendants it is correctly stated that the right to pension is a vested one, and that it enters into the contract of employment when a man enters the police department. O'Dea v. Cook, 176 Cal. 659, 169 Pac. 366. From this it is argued

that the amount of the prospective pension is fixed. This is fallacious, because if it were as the defendants contend, an increase in salary while a man was on active duty would not carry with it, as it does, the right to a correspondingly increased pension upon his subsequent retirement. Under such circumstances there would be no difficulty in determining that the right which was vested is the right to have the pension, not of a particular number of dollars, but "equal to one-half of the amount of salary attached to the rank," whether it should be more or less than that attached to the rank when the contract of employment was made. A similar contention, made in regard to another sort of contract, would be swept aside with little consideration. Suppose, for instance, the owner of an office building should lease it for a term of years, reserving as rent a sum equal to one-half of the gross rentals received by the tenant from subtenants, and it were shown that the gross rentals either increased or decreased in subsequent years. The right to a sum equal to one-half of those rentals would be vested, but neither party could successfully contend that the change in the amount of gross rentals warranted any change in the proportionate amount of money to be paid to the owner of the building.

Reliance is placed by the defendants upon an opinion of a former city attorney (Opinion, City Attorney, Percy V. Long, January 20, 1908) from which, in their brief, a quotation is made:

"Since the amount of the pension attaches to the rank and not to the salary, the effect of increasing the salary of any rank necessarily means a permanent increase so far as to carry one-half of it over in the form of a pension to such retiring officer or man. The pension is increased because the salary is increased. The amount of the pension is made in terms one-half of the amount of salary attached to the particular rank. A new salary under Amendment No. 20 having attached to a particular rank, a pension amounting to one-half the new salary immediately attaches upon the retirement of the officer or man."

This was all that was necessary to sustain the action based on the opinion of the city attorney, and fully supports the views hereinbefore expressed. The quotation, however, goes further, the following being added:

"Since the salary of only those officers and men who were in the active service of the department was increased by Amendment No. 20, it follows, of course, that only such portion of the police force (and not those who were pensioned and retired before the amendatory legislation) is entitled to an increase of pension based upon such increase of salary."

This quotation supports the contention of defendants.

A similar question has arisen in regard to the pay of retired officers of the United States army. The case is not exactly parallel, but the reasoning upon which the Supreme Court of the United States reached a conclusion opposed to that expressed in the opinion of the city attorney applies with equal force to this case. A statute of the United States provided that—

"Officers retired from active service shall receive seventy-five per centum of the pay of the rank upon which they were retired." U. S. Rev. St. § 1274 (U. S. Comp. St. § 2138).

Another section of the same statute provided that—

"There shall be allowed and paid to each commissioned officer below the rank of brigadier general * * * ten per centum of their current yearly pay for each term of five years' service." U. S. Rev. St. § 1262 (U. S. Comp. St. § 2099).

Said the Supreme Court, speaking by Mr. Justice Miller:

"The question is therefore whether an officer thus situated is in the service within the meaning of section 1262. That section allows an increase of pay for every five years' service. When the service ends, there can be no increase on that account. As long as the service continues, the increased pay applies whenever it amounts to five years."

It will be noted that the opinion of the city attorney is based on the fact that retired men are no longer in active service. Said Mr. Justice Miller:

"The law under which these officers are retired does not require their consent, nor does it require that the order for their retirement shall be based upon any absolute incapacity for further service. It may be based upon age, which, being fixed at a minimum of sixty-two years by no means implies such incapacity. It may be based upon wounds received in battle, but the person retired for this cause may, for many purposes, be a very useful officer."

After reciting certain other provisions of the statutes under which such retired officers are permitted to wear uniforms and may be required to perform special service or return to active duty, and in which they are spoken of as officers of the army on the retired list, Mr. Justice Miller continued:

"It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still not in the military service.

"If Congress chose to provide for their qualified relief from active duty, and for a diminished compensation, it did not discharge them from their other obligations as part of the

army of the United States. And if, because they were not required to do full service thereafter, their compensation was diminished by the statute 25 per cent., that is no reason why the accounting officers should add a further limitation of pay not found in any statute.

"We are of opinion that retired officers are in the military service of the government, and that the increased pay of 10 per cent. for each five years' service applies to the years so passed in the service after retirement as well as before."

United States v. Tyler, 105 U. S. 244, 26 L. Ed. 985.

In the O'Dea Case it was held that the right to a pension entered into the contract of the employment of a policeman. The charter provides that the "Police Department shall consist of a board of police commissioners, a chief of police, a police force and of such clerks and employés as shall be necessary to carry into effect the provisions of this article." Charter, art. 8, c. 1, § 1. Section 2 of the same chapter provides that—

"All members of the police department shall hold office during good behavior, subject to the provisions hereinafter set forth relating to promotions, suspensions, dismissals and disratements."

Chapter 7 relates to promotions, suspensions, dismissals, and disratements, and provides for charges and trial for punitive purposes. Chapter 10 relates to the police relief and pension fund. Section 3 contains the provisions in question in this case. Section 5 provides that—

"Any person receiving a pension * * * who shall be convicted of felony, shall become dissipated, an habitual drunkard, or shall become a nonresident of this state, shall forfeit all right to said pension."

Section 7 provides that—

"The commissioners shall make rules and regulations to carry out the provisions of this chapter and to enforce compliance therewith on the part of members of the department."

Section 10 vests in the board of pension fund commissioners the powers of the board of police commissioners to make rules and regulations for its guidance. It has been shown that in case the disability of the pensioner shall cease he shall be restored to service.

[2] These provisions of the charter would seem to bring the case clearly within the reasoning of Mr. Justice Miller in United States v. Tyler. Paraphrasing his statement:

"It is impossible to hold the men who are by the charter declared to be a part of the police force, who may be reassigned to duty, who are subject to the rules of the police department and who may be tried for offenses against those rules, and for drunkenness, and required upon conviction, to forfeit their vested right to a pension, are still not in the police department."

This conclusion is supported by the language of the charter itself. Section 2 of chapter 10, relating to the police relief and pension fund, provides for the retirement of aged, infirm, or disabled members of the department and contains the following clause:

"Such retired member shall receive * * * a monthly pension. * * * No such pension shall be paid unless such person has been an active member of the department for twenty years continuously next preceding his retirement, and the same shall cease at his death."

Again, in section 6 of the same chapter, which provides a benefit for the widow or children of a member of the department who dies from natural causes, it is further provided that—

"The provisions of this section shall not apply to any member of the department who shall have received any pension under the terms of this chapter."

The Supreme Court has decided that a retired officer who has not resigned or been dismissed still remains a member of the department. Kavanagh v. Police Pension Fund Commissioners, 134 Cal. 53, 66 Pac. 36. Under the provisions of section 2 of chapter 1, relating to the police department, a member of the department shall cease to be such only upon his death unless dismissed for cause after trial, or unless he resigns and thereby forfeits his right to participate in the pension fund.

Apart from the compelling force of the decision in United States v. Tyler, or if the question were entirely new, upon somewhat different reasoning, the same conclusion would be reached. Since, under the O'Dea Case, the right to participate in the pension fund enters into the contract of employment, and since increases of salary of police officers are made from time to time, and if a man faithfully performs his duty his contract is for the remainder of his life, it may well be assumed that a man entering the department contemplates the possible increase of the salary which, but for these beneficial provisions, would be small. Under the construction contended for by the defendants, if two men should have entered the department on the same day, and one of them should have been shot in making an arrest, and his injuries necessitated the amputation of one of his legs, and if, in the regular course of the proceedings of the pension commissioners, he had been retired the day before the increase of salary became effective, he would be entitled to a pension of $51 a month. If the other man had been similarly injured at the same time with similar results, and action on his retirement were deferred until the bill for the increase of salary became effective, he would receive a pension of $70 a month.

The article of the charter relating to the fire department also provides for retirement pensions. At the same election at which the charter amendment was adopted increasing the salaries of members of the police department there was a corresponding amendment adopted providing for the increase of the salaries of the members of the fire department. Stats. 1919, p. 1391. The charter amendment relating to the increased salaries of firemen contained the following clause: "The purpose of this amendment being to increase the salary of each officer, member and employé herein mentioned for the period specified herein" (the provisions being for an increase of the sum of $20 per month for a period of five years to those members of the department receiving an annual salary of $1,860 or less), "but not to increase the pensions mentioned in sections 3, 4, and 5 of chapter 7, article 9 over and above the amounts provided before the adoption of this amendment." Under this provision, the legislative intent was clearly expressed not to increase the pensions provided prior to the amendment for members of the fire department. The amendment providing for the increase of salaries of the members of the police department simply amended the original charter provisions—sections 1 and 6 of chapter 5 of article 8—specifically fixing the salary attached to the various ranks in the police department. There was no limitation or exception in the amendment similar to that relating to the temporary increase of salary granted the members of the fire department.

[3] If doubt remained in regard to the proper construction of the amendment, relating to the police department, it would be resolved in favor of the petitioner because of this difference in the two amendments submitted to the people and adopted at the same election. It is firmly established that pension statutes are to be liberally construed. O'Dea v. Cook, 176 Cal. 662, 169 Pac. 366; Walton v. Cotton, 60 U. S. (19 How.) 355, 15 L. Ed. 658; Hanscom v. Malden, 220 Mass. 1, 107 N. E. 426, Ann. Cas. 1917A, 145.

The evident purpose of the amendment was to make provision for the greatly increased cost of living. It is alleged in the petition that of the 100 or more pensioners, who are situated similarly to the petitioner, most of them are old, disabled, and infirm and unfit for active service in the police department or elsewhere, and that others are widows and children, largely dependent upon their pensions. The increased cost of living peculiarly affects persons so situated, and the reasons which actuated the voters of San Francisco to increase the pensions of men on the active list of the police department apply quite as strongly to those members of the police department who are not on the active list.

The writ of mandate will issue as prayed.

I concur: LANGDON, P. J.

49 Cal. App. 30

PEOPLE v. HAMILTON. (Cr. 491.)

(District Court of Appeal, Third District, California. August 5, 1920.)

1. Homicide ⟸228(2)—Corpus delicti may be proved by circumstantial evidence.

Both elements of the corpus delicti of homicide—that is, the death of the person alleged to have been killed and the criminal agency accomplishing the death—may be proved by circumstantial evidence.

2. Homicide ⟸228(2) — Circumstantial evidence held sufficient to establish corpus delicti.

Evidence that deceased and her companion were last seen alive with defendant, that he had a rifle with shells similar to those found near the bodies, and that he made untrue statements as to their disappearance, *held* sufficient to establish the corpus delicti of killing, though only the skeletons and some of the clothing were found.

3. Criminal law ⟸829(9) — Requested instructions, already covered, need not be given.

Requested instructions that a crime of the character charged, or an inferior crime necessarily included therein, must be proved to have been committed, need not be given, where it was sufficiently covered by the instructions of the court already given.

4. Criminal law ⟸829(15) — Requested instruction on circumstantial evidence held covered by given instructions.

It was unnecessary to give a requested instruction that each fact in the chain must be established beyond reasonable doubt, where the court had already charged that the jury should acquit, if there was doubt as to one of the facts essential to establish guilt, and that to convict circumstantial evidence must be inconsistent with any other rational conclusion, except guilt.

5. Homicide ⟸340(3)—Accused cannot complain that instruction on manslaughter was unsupported by evidence, which showed murder or nothing.

On appeal from a conviction for manslaughter, accused cannot complain that it was error to charge on the offense of manslaughter, because the evidence established murder, if it established any offense, since such error was favorable to accused.

6. Criminal law ⟸1039—Objection that sheriff is disqualified to have custody of jury must be made below.

Accused cannot complain on appeal that the sheriff, whom the court had found disquali-

fied to summon the jury, was given custody of the jury during their deliberations, where that objection was not made in the trial court at the time.

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Fred Hamilton was convicted of manslaughter, and he appeals. Affirmed.

J. D. McLaughlin, of Quincy, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

NICOL, Presiding Judge pro tem. The defendant, Fred Hamilton, was charged by an information filed in the superior court of Plumas county, on the 12th day of August, 1919, with the murder of one Gussie Redhead, an Indian woman, on or about the 27th day of July, 1917, near Quincy, in said county of Plumas, and on the trial of the case the defendant was convicted of the crime of manslaughter, and judgment was pronounced thereon. This appeal is from the judgment and an order refusing to grant a new trial.

The principal point upon which defendant relies for a reversal is that the evidence is insufficient to prove the corpus delicti, that it fails to prove that any criminal violence had been used, and that the identity of the deceased was not sufficiently established.

It appears that on or about the 12th day of April, 1919, two children, while gathering wild flowers at a place called "Hospital Hill," about 1⅛ miles from the town of Quincy and about ¼ of a mile from the county hospital, at a point about 100 yards from the county road between Quincy and Greenville, found two human skulls. They reported the find, and the officers made an investigation, and found the remains of two human beings. One of the skeletons was apparently that of a woman, the ribs being incased in a corset, while the other was apparently that of a male. These skeletons were near together, being about 100 yards apart. There was a man's coat by the female skeleton, and an arm bone was still in one of the sleeves. It was a blue coat, with small white stripes. There were also found by the female skeleton a part of a shirt, underclothes, some lace, crotchet, and a silver watch, and near the male skeleton were found some teeth, hair, a pocketknife, and part of a vest, the cloth of which was identical with the cloth of the coat by the remains of the female. At the trial the skeleton of the female was identified to be that of Gussie Redhead, and the skeleton of the male to be that of Henry Lee, an Indian. The defendant and the said Gussie Redhead had been for some time living together, and in the early part of July, 1917, he was working on a ranch for one Hugh Seaman. During the time he was employed on this ranch, he was absent at one period for two days, and on his return Mr. Seaman asked him where he had been, and he replied that he had been hunting for his wife, who had run away.

On the night of July 26, 1917, after a picture show in the town of Quincy, the said Gussie Redhead, Henry Lee, Noanie Hardgrave, Tom Hardgrave, Harry Beatty, and the defendant, Fred Hamilton, went together from the town of Quincy to a place on the road called by one of the witnesses "the pines," near the high school. They were drinking, and during the time that they were there a violent quarrel ensued between the defendant and Gussie Redhead, and the language used by both of these parties, according to the evidence of the witness Harry Beatty, was very profane. During this quarrel the defendant attempted to strike said Gussie Redhead and he said something to her about "trying to kill him." While at this place Gussie Redhead complained to Henry Lee about her being cold, and asked him for his coat, which he gave her, and she put the coat on and wore it. It was a blue coat, with small white stripes, and was of the same material as the vest then being worn by the said Henry Lee. As above stated, this coat was found by the remains of Gussie Redhead, and a portion of the vest by the remains of Henry Lee. During the time these parties were at this particular place, Harry Beatty went to sleep among the pines. Afterwards Tom and Noanie Hardgrave went to their home, and Gussie Redhead, Henry Lee, and the defendant left, and went in the direction of the town of Quincy. This was the last time Gussie Redhead and Henry Lee were seen alive. Beatty slept out in the pines until the next morning at about daylight. When he went there the evening before, he had on his person a silver watch, which was missing when he awoke in the morning. He stated that "during the night there was some one came to me, and put their arms around me, and was talking to me; but I couldn't understand what the person said." He knew that the person was a woman by the voice; but he did not remember anything that she said. This silver watch was found lying on the inside of the coat by the remains of Gussie Redhead, rolled up in an old handkerchief, a piece of lace, and crochet.

The next morning after this meeting on the road, at about daylight, the defendant called at the home of Mike Hedrick and borrowed a rifle, saying that he wanted to go hunting. The rifle was a 30-caliber Winchester, model 94. Hedrick also gave him six cartridges for the rifle. These cartridges were soft-pointed, with jackets. Two empty 30-30 cartridge shells (the same kind of cartridges as used in this rifle) were found near the remains of Henry Lee, and near the body was also found a jacket from a bullet of a 30-30 cartridge. There was also found

by Dr. Styan, in the decomposed tissues still adhering to the spinal column of the remains of Henry Lee, a similar jacket of a bullet, which jacket was lying against the vertebral column, against the twelfth dorsal vertebra.

The defendant, on the 4th day of July, 1918, in speaking to one Charley Redhead in reference to Henry Lee and Gussie Redhead, said:

"He camped out this side of hospital son of a bitch Gussie and Henry Lee."

He also in 1918, about a year before the trial, in talking to one Tom Epperson about Gussie Redhead, said that she was at Beckwith; that he had been so informed. On or about the 1st day of August, 1917, the defendant called at the "Quincy Laundry" and told a Mrs. G. Que that Henry Lee and Gussie had gone away. This statement was untrue.

[1] In the note to State v. Williams, 78 Am. Dec. 253, it is said by the editor, after referring to the rule that direct and positive evidence is unnecessary to prove the corpus delicti, and the cases in support thereof, that:

"This rule is now clearly established, and it would be most unreasonable to always require direct and positive evidence. Crimes, especially those of the worst kind, are naturally committed at chosen times, in darkness and secrecy. Human tribunals must therefore act upon such indications as the circumstances of the case present or admit, or society must be broken up. The cases just cited show that the jury may find a verdict of guilty upon circumstantial evidence, and that the corpus delicti may be proved by such evidence, as well as any other part of the case, and that this rule applies in cases of murder and manslaughter, as well as in all other crimes. But a few courts have, by refined distinctions, qualified this doctrine slightly. Thus in New York it was laid down, in the first instance by a divided bench, that in murder, either the death, or the criminal agency producing it, must be proved by direct evidence; then the other may be proved by circumstantial evidence. Ruloff v. People, 18 N. Y. 179. The same thing was held as to the crime of murder or manslaughter in People v. Bennett, 48 N. Y. 137; but the court was divided. The better rule, however, is that either element of the corpus delicti, or both, may be proved by circumstantial evidence, and this is the one sustained by the weight of authority, as shown by the cases above cited. But circumstantial evidence should be acted upon with great caution, especially where the public anxiety for the detection of a great crime creates an unusual tendency to exaggerate facts and draw rash inferences (Pitts v. State, 43 Miss. 472); because, of all the various sources of error, one of the most copious and fatal is an unreflecting faith in human testimony."

In State v. Williams, 46 Or. 287, 80 Pac. 655, the Supreme Court of Oregon, in approving this rule as above stated, said:

"To the doctrine of these cases and the rule thus stated we give our assent. The strict rule contended for by defendant would operate completely to shield a criminal from punishment for the most atrocious crime, and afford him absolute immunity if he were cunning enough to consume or destroy the body of his victim by fire or some chemical agency, or completely hide it away, or otherwise destroy its identity, although the proof of his guilt might be of the most clear and convincing kind, and remove all possible doubt in the premises. The death of the person alleged to have been killed is a distinct ingredient in the case of the prosecution for murder or manslaughter, and must be established by direct testimony or presumptive evidence of the most cogent and irresistible kind. Great care in such a case should always be observed in acting upon presumptive or circumstantial evidence. No conviction should be had or allowed to stand on mere suspicion or conjecture alone. * * * Where, as here, the entire circumstances point with one accord to the death of the person alleged to have been murdered, the finding of fragments of a human body, or of metallic articles which are positively identified as part of the body of the alleged victim, or as articles worn by him, will be sufficient, if believed by the jury, to establish the fact of death, when this is the best evidence that can be obtained under the circumstances. People v. Alviso, 55 Cal. 230; McCulloch v. State, 48 Ind. 109; Commonwealth v. Webster, 5 Cush. 295, 52 Am. Dec. 711; State v. Williams, 52 N. C. 446; 78 Am. Dec. 248; Gray v. Commonwealth, 101 Pa. 380, 47 Am. Rep. 733."

In People v. Alviso, 55 Cal. 230, the point was made by the defendants that the corpus delicti was not shown; that, the body of deceased not having been discovered, an essential fact in any charge of murder, viz. death, has not been established. In establishing a charge of murder, two facts are essential to a conviction, viz. the death of the alleged victim and the existence of criminal agency as the cause. The court, in answer to this contention of the defendants said:

"It is very seldom that a conviction occurs without positive proof of the former, either by eyewitnesses of the homicide, or the subsequent discovery of the body; and while the general rule is clearly laid down, yet the authorities concede that there may be exceptions. Thus, Wharton, in his work on Homicide, § 637, relates instances of the human body being disposed of by fire, or boiled in potash, or dissolved by acids, rendering it impossible that it should ever be produced"

—and concludes:

"It is clear that in such cases the corpus delicti may be proved circumstantially or inferentially."

In this case of People v. Alviso, the body of the deceased had been burned in a fire, and in the ashes were found a few pieces of bones, "too small to be identified as human

bones." But the other circumstances of the case were of a convincing character.

In the case of Mary Ann Nash, 6 English Criminal Appeal Reports, 225, it was held that a jury is entitled to infer that there has been a violent death from circumstantial evidence. In that case Mary Ann Nash was convicted on June 1, 1911, of the murder of her illegitimate son, and sentenced to death. The child was 5 years and 9 months old on June 27, 1907, the date of its murder. The body was discovered by two workmen in a well in April, 1908. The features were unrecognizable and decomposition was very far advanced. There was no evidence as to sex except from the general appearance and dress. * * * She appealed from the conviction, and Lord Alverstone, the Lord Chief Justice, in deciding the case, said:

"It has been submitted that there was not sufficient evidence to go to the jury (1) of the identity of the body, and (2) of unlawful killing. As to the identity, counsel was no doubt right in admitting at the trial that there was some evidence; his argument must be that it was not sufficient to justify the jury in convicting. The facts which are undisputed (because appellant did not give or call any evidence), are that on the morning of the 27th of June, 1907, the appellant left with her child, saying that she was going to Mrs. Hillier's, that she would pass near the well where the body was found, and that a woman was seen there with the child on a day about that time. Alone those facts might not be sufficient, but she left with the child in perfect health, and when she returned she said she had left it with Mrs. Hillier; she packed up its clothes, and said she had sent them to her, and later she said the child was well. All these statements were untrue. * * * It is said that there is no evidence of violent death, but we cannot accept that. Counsel cannot have meant that there must be proof from the body itself of a violent death. His argument means that on the whole evidence the possibility is left so open that it was not safe to leave it to the jury. * * * In view of the facts that the child left home well, and was afterwards found dead, that the appellant was last seen with it, and made untrue statements about it, this is not a case which could have been withdrawn from the jury."

[2] In the case at bar the facts that Gussie Redhead and Henry Lee were last seen alive with the defendant on the night of July 26, 1917, and near the time of the homicide, and that the defendant procured a rifle early next morning, and the finding of empty cartridge shells and the jacket of a bullet, of the same caliber as this rifle, near the body of Henry Lee, and the finding of a similar jacket of a bullet in his body, and that the remains of the said Henry Lee and Gussie Redhead were found substantially in the same place, and the untrue statement made by defendant, on or about August 1, 1917, as to their going away, are facts that in our opinion are sufficient to establish the death of the alleged victim within the rules of law above referred to.

It is contended that the court erred in the admission of evidence. We have carefully examined the objections, and we find no error in any of the court's rulings.

[3] Complaint is made of the trial court's refusal to give certain instructions requested by the defendant. The instruction:

"That as a prerequisite to the conviction of any person charged with the commission of a crime, it must be established that a crime of the character charged against him or a crime of inferior grade necessarily included therein has in fact been committed," etc.

—was sufficiently covered by the instructions of the court given elsewhere.

[4] The proposed instruction as to reasonable doubt was given in the court's charge to the jury, and the proposed instruction to the effect that each essential and independent fact in the chain or series of facts must be established to a moral certainty and beyond a reasonable doubt, etc., was in our opinion covered by the instructions by the court. Thus the jury was told:

"That when the evidence against the defendant is made up wholly of a chain of circumstances, and there is a doubt as to one of the facts essential to establish guilt, it is the duty of the jury to acquit. That in order to convict the defendant upon evidence of circumstances, it is necessary, not only that all the circumstances concur to show that he committed the crime charged, but that they are inconsistent with any other rational conclusion. It is not sufficient that the circumstances proved coincide with, account for, and therefore render probable, the hypothesis sought to be established by the prosecution, but they must exclude to a moral certainty every other hypothesis but the one of guilt, or the jury must find the defendant not guilty."

The jury was also instructed:

"That defendant's plea of not guilty puts in issue every material allegation of the information, and places the burden upon, and makes it the duty of the prosecution, before a conviction can be had, to establish to your satisfaction, to a moral certainty and beyond a reasonable doubt, by legal and competent evidence, each and every material fact essential to a conviction."

[5] Appellant claims that it was error for the court to instruct the jury:

"That under the information in this case the jury may, if the evidence warrants it, find the defendant guilty of * * * manslaughter."

He argues that:

"There is no evidence of manslaughter; it was murder in the first degree, or it was nothing."

But the appellant cannot complain of the giving of this instruction, as it was in his favor, as tending to reduce the charge against him. In a prosecution for murder, where the evidence shows murder in the first degree, error in instructing the jury on the law of manslaughter is favorable and not prejudicial to the defendant. People v. Tugwell, 32 Cal. App. 520, 163 Pac. 508.

"The doctrine is well settled by this court that a defendant cannot complain where the determination of his case was more favorable to him than the evidence warranted." People v. Muhlner, 115 Cal. 303, 47 Pac. 128; People v. Barnhart, 59 Cal. 381; People v. Maroney, 109 Cal. 277, 41 Pac. 1097; People v. Lowen, 109 Cal. 381, 42 Pac. 32.

Criticisms are made to other instructions given to the jury, but we find these criticisms to be without merit. The jury was very fully and fairly instructed by the court, and we find no material error in the instructions.

[6] It is lastly contended that the court committed error in placing the sheriff and one of his deputies in charge of the jury during their deliberations. In order to obtain a jury to try this case, it became necessary to order a special venire. The court took evidence, and determined that both the sheriff and the coroner were disqualified, and an order was duly made appointing an elisor to summon such jurors as were required. When the case was about to be submitted, the sheriff and one of his deputies were sworn, and the jury were placed in their charge during their deliberations. There was no objection whatever made by defendant to this proceeding.

In the case of People v. Fellows, 122 Cal. 233, 54 Pac. 830, it was held that a sheriff who was disqualified to summon a jury should not be intrusted with the charge of the jury when retiring to deliberate upon their verdict. In that case the sheriff was shown to be disqualified, and, when the time came for the jury to retire to deliberate upon its verdict, the said sheriff, under defendant's objection and exception, was given charge of it. This was held to be error. But in the case at bar, when it came time for the jury to retire to deliberate upon its verdict, no objection whatever was made by the defendant to the sheriff and his deputy being placed in charge of the jury. Not having objected to the proceeding at the proper time, he cannot now be heard to complain that there was any error in such proceeding.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

183 Cal. 677

PEOPLE v. CLARK. (Cr. 2289.)

(Supreme Court of California. Sept. 14, 1920.)

1. Criminal law ⊂=957(5) — Misconduct of jury cannot be established by juror's affidavit or declarations.

Misconduct by the jury in reading newspaper accounts during the trial cannot be established by an affidavit of a juror, or by declarations by a juror to others, so that an affidavit by an attorney that a juror had stated to him he had read such paper does not entitle accused to a new trial.

2. Criminal law ⊂=789(11) — Instruction to believe as jurors what they would believe as men held not erroneous.

In a prosecution for murder, where the court had correctly instructed on the presumption of innocence and reasonable doubt, it was not erroneous to charge that the jury are to believe as jurors what they would believe as men, though such charge is needless.

3. Criminal law ⊂=1129(4) — Assignment of error to all adverse rulings need not be considered.

An assignment of error to all rulings overruling objections of counsel for accused, or sustaining objections of the district attorney, together with the giving of the instructions, does not call for consideration on appeal.

In Bank.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

James C. Clark was convicted of murder in the first degree, and the death sentence imposed, and he appeals from the judgment of conviction and from the order denying his motion for new trial. Affirmed.

J. E. Strong and Neal Chalmers, both of Woodland, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

LAWLOR, J. This is an appeal by the defendant, James C. Clark, from a judgment of conviction of murder of the first degree, calling for the death penalty, and from an order denying his motion for a new trial.

The defendant was accused of having, on June 11, 1919, in the town of Esparto, county of Yolo, killed and murdered one Richard Raevell. It is shown by the record that the defendant made certain antecedent threats against the deceased. Carl Richardson, a butcher, testified that, in a conversation with the defendant on the morning of June 10, the latter told him he had "lost his money," and asked the witness whether he thought various persons, naming them, had taken it, but that he did not in any way accuse the deceased. Grady Morgan testified:

That he, the defendant, and the deceased had been drinking together the night before the killing. That the deceased had just returned from Sacramento. That defendant asked him how much money he had spent there, and the deceased laughingly replied, "I spent your $75 and $60 more." That later the same evening the three men came into Raevell's room, where defendant said to the deceased, " 'Dick, I believe you took my money,' or something like that, and Dick, he puffed up right away, and he says, 'Where in hell do you get that * * * old stuff?' " That subsequently defendant and he (the witness) repaired to the latter's room. That just before they parted for the night "He asked me * * * if I would wake him up in the morning. * * * I says, 'Where you going to work?' 'Oh,' he says, 'no place; I just got something I want to attend to.' " That between 5:30 and 6 the next morning, while the witness was still in bed, defendant came into his room and told him: "I heard Dick talking all night. * * * I never slept at all. * * * I'm satisfied Dick took my money." That about an hour later defendant again entered his room, showed him a 32-caliber revolver, and said, "Grady, I've made up my mind to kill Dick." That the witness attempted to dissuade him from his purpose, but defendant replied: " 'I want you to get up and dress and go down to the breakfast table and watch it. I'm going to kill him right in the dining room.' The last thing he said when he went out of the door was: 'Well, I've made up my mind, Grady.' "

W. C. Chilson and Charles Bloom testified that they were in the former's room about 7 o'clock on the morning of the murder, when defendant came in and said he "had a line on the fellow that got my money," and showed them a 32-caliber revolver; that both of them told him to "throw that d——d thing away; and that he went out, saying that he would. John Lewis stated:

That "a little before 8 o'clock" on the same morning he met the defendant on the street in Esparto. "He walked up there, and he sat down for a minute, I suppose, not more; and he says, 'Well, Lewis, I got a trace of my money.' And I says, 'Is that so?' He says: 'Yes; * * * Dick Raevell. I'm going to walk up and shoot him.' And just about that time Dick came walking across from the hotel [where he, the defendant, Morgan, Chilson, and Bloom were staying]. * * * Clark got up and went over where he was, and I got up and went down the street."

It appears from the testimony of Lewis, Chilson, Bloom, and Charles Mack who were eyewitnesses to the murder, that about 5 minutes before 8 o'clock they were sitting in front of a butcher shop on the east side of the main street of Esparto. Just north of the butcher shop, on the same side of the street, was a garage. Shortly after the talk between defendant and Lewis, as already detailed, the former was seen walking north on the west side of the street in company with the deceased. When about opposite the garage they crossed the street, and just before they reached the sidewalk the defendant turned aside as if to join the other men in front of the butcher shop. The deceased continued on to the sidewalk, where he stopped and stood looking into the garage, with his back to the defendant. The defendant, after taking a few steps toward the witnesses, suddenly wheeled around, pulling a revolver from his pocket, walked up behind Raevell, and fired one shot, which struck just back of his left ear. Raevell sank to the ground, rolling over on his back. His face was thus exposed to the defendant, who then stepped to the feet of the wounded man and fired a second shot into the outer corner of his left eye. The death of Raevell from these wounds followed in the course of a few hours. When the defendant was arrested by the sheriff, about 9 o'clock, while on his way to Woodland, he handed over a revolver to the officer with the remark, "This is what I shot Dick with."

The evidence above outlined is substantially uncontroverted. It was testified by several of the witnesses for the prosecution on cross-examination that the defendant was addicted to the use of intoxicants, and that on the day preceding the homicide he had been drinking heavily. This was relied on in part to establish insanity as a defense to the crime charged, and the record shows that the jury was elaborately instructed on that subject, as well as partial insanity and irresistible impulse, and the meaning of section 22 and subdivisions 2 and 3 of sec-

tion 26 of the Penal Code. In view of the adverse verdict, and the absence of any suggestion in the case that the deceased had said or done anything to provoke, or to cause him to apprehend, an attack, we must assume that the jury found that the defendant was guilty of an unprovoked, deliberate, and premeditated murder, without any extenuating circumstances.

[1] 1. Appellant's first contention is that—

"The trial court erred in refusing defendant's motion for a new trial. At the hearing of this motion defendant introduced an affidavit, made by J. E. Strong, one of defendant's attorneys, in which affidavit it was alleged that one of the jurors * * * admitted to the said J. E. Strong that he had read certain articles appearing in certain newspapers"—referring to publications touching the trial, including an alleged attempt by the defendant to simulate insanity.

No other showing of misconduct was made. The contention cannot be sustained. As was said in People v. Findley, 132 Cal. 301, 308, 64 Pac. 472, 475:

"It is the settled law of this state that the verdict of a jury cannot be impeached by the affidavits of jurors showing misconduct on the part of any member of the jury. * * * Nor can a verdict be impeached by the hearsay statements of jurors regarding such misconduct. People v. Azoff, 105 Cal. 632. It is equally clear that defendant's affidavit as to the misconduct of the jury, based as it is solely on information and belief, is entitled to no weight. There was no competent or proper evidence of misconduct of the jury laid before the court, and the court very properly refused to grant a new trial."

The rule is thus stated in People v. Kromphold, 172 Cal. 512, 524, 157 Pac. 599, 604:

"On the motion for a new trial, an affidavit made by one of the counsel for defendant was read and filed, reciting certain statements made to said counsel after the trial by one of the jurors. On this affidavit alone is based the claim of misconduct of the jury, and that the verdict has been decided by means other than a fair expression of opinion on the part of all the jurors. The trial court refused to consider the affidavit on two grounds, viz. that a juror cannot be allowed to impeach his own verdict, and that the affidavit here set forth matters purely of a hearsay nature, not being made by the juror, but by another, who simply stated what the juror told him. It is definitely settled in this state, both that the affidavit of a juror cannot be received to impeach the verdict, except where it is the result of a resort to the determination of chance (People v. Soap, 127 Cal. 408, 59 Pac. 771; People v. Azoff, 105 Cal. 632, 39 Pac. 59), and that the same policy that prohibits a juror from impeaching his verdict by his affidavit prevents such impeachment by statements made by the juror to others (People v. Azoff, 105 Cal. 632, 39 Pac. 59; People v. Dobbins, 138 Cal. 694, 699, 72 Pac. 339)."

See, also, 16 C. J. 1241.

The case of People v. McCoy, 71 Cal. 395, 12 Pac. 272, cited by appellant, can have no application here. In that case the court granted a new trial upon an affidavit made by appellant's attorney stating unequivocally that he had seen certain of the jurors reading a newspaper containing "an editorial commendatory of the administration of justice in criminal actions." Here the affiant avers that one of the jurors told him he had read certain newspaper articles during the course of the trial, and states on information and belief that others of the jury read the same articles. Appellant also refers to People v. Leary, 105 Cal. 491, 39 Pac. 24, but it appears in that case that the proof of misconduct consisted of direct testimony by another that the jurors had read a newspaper. This authority is distinguishable on the same ground as the McCoy Case. Plainly the affidavit here was not admissible to impeach the verdict of the jury.

[2] 2. Appellant next assigns error in the giving of that portion of the following instruction requested by the prosecution which we have italicized:

"15. I instruct you, gentlemen, that you are to take into account, in weighing the testimony of any witness, his interest or want of interest in the result of the case, his appearance upon the witness stand, his manner of testifying, his apparent candor or want of candor, whether he is supported or contradicted by the facts and circumstances in the case as shown by the evidence. You have a right to believe all the testimony of a witness, or believe it in part, or you may reject it altogether, as you may find the evidence to be. *You are to believe as jurors what you would believe as men, and there is no rule of law that requires you to believe as jurors what you would not believe as men.*"

Appellant claims that this language "is not a correct statement of the law." Instructions phrased in the same or substantially similar language have frequently been subjected to scrutiny by appellate courts in this and other jurisdictions. In Commonwealth v. Harman, 4 Pa. 269, the defendant had been charged with murder. Chief Justice Gibson, in instructing the jury, declared:

"All evidence is more or less circumstantial, the difference being only in the degree; and it is sufficient for the purpose when it excludes disbelief; that is, actual, and not technical, disbelief; for he who is to pass on the question is not at liberty to disbelieve as a juror while he believes as a man. It is enough that his conscience is clear."

This language was incorporated in an instruction given in State v. Collins, 20 Iowa, 85, and it was held on appeal, reversing the judgment, that—

"The detached fragment embodied in the instruction above quoted we cannot but believe to be of dangerous tendency. * * * We all

believe facts as men, when we would not believe them and act upon them as jurors. The idea sought to be conveyed is that a juror is not an artificial being, whose judgment is to be governed by technical and artificial rules, but that he is a man, and should, while acting as a juror, act as a man, exercising his reason, his intelligence, his everyday judgment, and his common sense. In this sense the proposition that, if one believes as a man, he should also believe as a juror, is correct, providing that belief be founded upon and produced by the evidence in the case, and by nothing else, and is so strong, clear, and satisfactory as to exclude all reasonable doubt. If the guilt of the defendant had been fully and undeniably established, if the verdict upon the evidence were satisfactory, we might not have interfered with the judgment in consequence of the giving of the instruction under consideration. The instruction, as given, was, without explanation, calculated to mislead the jury."

We quote from People v. Whitney, 53 Cal. 421:

"At the request of the district attorney the court instructed the jury that 'a juror has no right to disbelieve the evidence as a juror while he believes it as a man. If, therefore, from the evidence in the case, you believe as men that the defendant is guilty, you should as jurors believe him guilty' [quoting from Commonwealth v. Harman, supra]. The instruction, it may be assumed, was taken mainly from the language above cited; but, by directing the attention of the jurors to the evidence, and not merely to the question of the guilt of the defendant, or even to the ultimate facts to be established by the prosecution, it avoids the objection stated by Mr. Justice Dillon in State v. Collins, 20 Iowa, 98, and in our opinion was not calculated to mislead the jury. The only objection to the instruction is that it is useless, and that, having been given, it affords the defendant an opportunity to bring it up to this court for review. It is not to be presumed that jurors would, from the charge of the court, the arguments of counsel, or anything transpiring at the trial, entertain the idea that in becoming jurors they had ceased to be men, or had acquired any new capacity by which they might test the truth of evidence. It was therefore as unnecessary to instruct them that a juror has no right to disbelieve the evidence as a juror while he believes it as a man as it would have been to charge them that in becoming jurors they had not lost the capacity which they possessd as men, to distinguish truth from falsehood or mistake."

And in People v. Worden, 113 Cal. 569, 575, 45 Pac. 844, 847, it was said:

"Of course it would be much the better course for trial judges, as has frequently been said by this court, to limit their description of reasonable doubt to language which has received repeated judicial approval; but they usually desire to add something in their own language, and in the case at bar the judge added something to the well-known definition of Chief Justice Shaw. We see nothing, however, in his charge on this subject, that was erroneous, or likely to mislead the jury, even if it did not make the matter any clearer. The judge said: 'If, after considering all the evidence, you can say you have an abiding conviction,' etc., and then immediately said as follows: 'A juror is not at liberty to disbelieve, as a juror, what he believes as a man.' This latter clause, of course, referred to a belief founded on the evidence; and a similar instruction was held in People v. Whitney, 53 Cal. 420, to be 'useless,' but not erroneous or misleading."

The instruction complained of is in the identical language of one given in Dodge v. Reynolds, 135 Mich. 692, 98 N. W. 737, where it was held that "it was not misleading, and was a proper charge." See, also, Nevling v. Commonwealth, 98 Pa. 322; Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 461, 19 C. J. 995. In State v. Kellison, 56 W. Va. 690, 47 S. E. 166, it was said:

"Instruction No. 2 told the jury that a reasonable doubt was not a vague or uncertain doubt, and that what the jury believed from the evidence as men, they should believe as jurors. This, taken in connection with the instruction given for the defendant, saying it was the duty of the state to prove the accused guilty beyond all reasonable doubt in order to convict, states the law with sufficient accuracy. They were told that their belief must be founded upon the evidence, and that a vague and uncertain doubt is not a reasonable doubt within the meaning of the law. How there could be any difference between their belief as men and their belief as jurors is not perceptible. Being jurors, they were still men, and the only belief possible is that which fastens itself upon the human mind, and they were told that it must be belief beyond all reasonable doubt. All the authorities say that reasonable doubt is difficult to define, but that its meaning is not difficult for a jury to comprehend. State v. Sheppard, 49 W. Va. 582, 609, 610. * * * As the jurors were acting under oath, it cannot be assumed that they were men of such feeble understanding as to deem themselves relieved from the obligations thereby imposed by the terms of the instruction."

The judgment in this case was affirmed.

Robinson v. State [Wyo.] 106 Pac. 24, is cited by appellant. Instruction 6 contained this language:

"You are not at liberty to disbelieve as jurors, if you believe as men; your oath imposes upon you no obligation to doubt, where no doubt would exist if no oath had been administered."

The court declared:

"One of the essential elements of that instruction is lacking, viz. that the belief in the guilt of the accused sufficient to convict must be based upon the evidence."

But in the instruction here the language complained of is immediately preceded by this:

"You have a right to believe all the testimony of a witness, or believe it in part, or you may reject it altogether, as you may find the evidence to be."

It is plain that the verdict at which the jury was to arrive "must be based on the evidence in the case."

Appellant also cites on this point People v. Johnson, 140 N. Y. 350, 35 N. E. 604. We quote from the opinion in that case:

"There was a request to charge * * * that the jurors should be convinced as jurors when they would be convinced as men, and should doubt as jurors when they would doubt as men."

This "eliminates the oath and the responsibility of the jury."

The instruction was held to have been properly refused. This authority, like the Robinson Case, is distinguishable from the one at bar.

In the first instruction requested by appellant, and given, the jury were told that—

"Every intendment of the law is in favor of innocence. The law presumes the defendant to be innocent of any degree of crime until his guilt is proven beyond all reasonable doubt by competent evidence. This presumption of innocence rests with the defendant throughout all stages of the trial until the case is finally submitted to you for your deliberation, and during your deliberation and until a verdict is agreed upon. Each and every fact and circumstance relied upon by the prosecution to establish the guilt of the defendant must be proven by the evidence in the case beyond a reasonable doubt; but the defendant is only called upon to raise in your minds a reasonable doubt as to the truth of any fact relied upon by him to establish his innocence."

In the third instruction requested by the defendant, and given to the jury, the term "reasonable doubt" was correctly defined.

In the light of the foregoing authorities and the cognate portions of the charge which we have quoted, it cannot be said that the instruction in question was calculated to confuse the jury, or that it was erroneous. As in People v. Whitney, supra, the attention of the jurors was directed to the testimony, and not to the question of the guilt or innocence of the defendant. The entire instruction pointed out the matters which the jurors should take into consideration in resolving the credibility of the witnesses (section 1847, Code Civ. Proc.; section 1102, Penal Code), and merely concluded with an injunction that in determining such credibility whatever they believed as men they were to believe as jurors, and that there was no rule of law requiring them to believe as jurors what they would not believe as men—an admonition sagely sound, but palpably unnecessary. It is not conceivable that the jury understood the instruction in any other sense than that, while passing upon the evidence as jurors, they were to be governed by the conclusions which they would reach as men. It may be observed, however, that where a jury in a criminal case has been properly instructed as to the presumption of innocence and the doctrine of reasonable doubt, an instruction like the one under review should not be given, for, as Mr. Justice Rhodes remarked in the Whitney Case:

"The only objection * * * is that it is useless, and that, having been given, it affords the defendant an opportunity to bring it up to this court for review."

[3] 3. Appellant's third assignment of error is to—

"all of the rulings of the court overruling the objections of his counsel, or sustaining the objections of the district attorney, * * * together with the giving of the instructions as they appear in the record."

No portions of the record are referred to or quoted, no authorities are cited or discussed, and, indeed, appellant does not specify wherein the court erred in the giving of the instructions or in the rulings on the evidence. We do not feel called upon to consider points so presented. See Gray v. Walker, 157 Cal. 381, 108 Pac. 278; Dore v. Southern Pacific Co., 163 Cal. 182, 124 Pac. 817; Born v. Castle, 175 Cal. 680;[1] Scott v. Times-Mirror Co., 184 Pac. 672. But, because of the gravity of defendant's situation, we have scrutinized the record, and, apart from the assignments of error already considered, we do not find that any of the objections require discussion. The trial was conducted with marked fairness on the part of both court and counsel. The charge to the jury was complete, every one of the 21 instructions proposed by the defendant, covering a wide range of subjects, being given, and upon the evidence it does not seem that any other verdict could have been returned.

Judgment and order affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LENNON, J.; SLOANE, J.; SHAW, J.; OLNEY, J.

[1] 167 Pac. 138.

(183 Cal. 709)

CHARLES EHRLICH & CO. et al. v. J. ELLIS SLATER CO. (L. A. 6057.)

(Supreme Court of California. Sept. 16, 1920.)

1. Process ⟸166—Objections not made ground of motion to quash service are waived.

Objection to service of process on defendant foreign corporation, that it was not such corporation in fact at the time of service, was waived where not made a ground of motion to quash, but, on the contrary, affidavits filed by defendant in support of the motion referred to itself as a foreign corporation.

2. Corporations ⟸659 — Foreign corporation estopped to deny legality of organization to attack service.

Defendant foreign corporation, which, although it had not completed its organization under the laws of Illinois, nevertheless allowed itself to be held out in California as a corporation, conducting business in the state as such, is estopped to deny the validity of its organization, to invalidate service of process on it through an agent.

3. Corporations ⟸668(10) — Agent held to have acted for foreign corporation, to warrant service on him.

Where the agent of a foreign corporation, compensated by commissions, acted, negotiated, and made binding contracts for it, pursuant to its business of purchasing fruit in California for shipment to itself in Illinois, from the scope and extent of the business done by him, the court was warranted in holding that he sufficiently represented the company to bring it into court by service of process on him pursuant to Code Civ. Proc. § 411, subd. 2.

4. Corporations ⟸668(16)—Evidence held to show agent was such for service of process.

Evidence on a motion to quash service on a foreign corporation *held* sufficient to show that its agent in California for the purchase of fruit was the company's business agent at the time of service of process on him, pursuant to Code Civ. Proc. § 411, subd. 2, though his authority to sign drafts had been withdrawn.

Department 2.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Charles Ehrlich & Co. and others against the J. Ellis Slater Company, a corporation. From a judgment for plaintiffs, defendant appeals. Affirmed.

Frank C. Collier, John Schlegel, Louis F. Laberere, and Walter H. Sprague, all of Los Angeles, for appellant.

I. Henry Harris, of Los Angeles, for respondents.

PER CURIAM. The following opinion was prepared by Mr. Justice KERRIGAN, of the District Court of Appeal for the First Appellate District, while acting as justice pro tempore in this court in place of Mr. Justice MELVIN. It is adopted as the opinion of this court.

This is an action instituted by the plaintiffs against the appellant to recover the sum of $2,926.48 for the breach of a contract, by the terms of which the plaintiffs sold and delivered to the defendant, f. o. b. California, three carloads of fruit, for which one H. J. Martin issued three drafts, aggregating the agreed price of the fruit, upon the defendant at its office in Chicago, and which he signed "J. Ellis Slater Co., H. J. Martin."

It is alleged in the complaint that the defendant is a corporation created and existing under the laws of the state of Illinois, and throughout the transcript the defendant is referred to as a corporation. The defendant was served with process in the action in the method prescribed for service thereof upon foreign corporations, viz. by delivering it to H. J. Martin as its business agent; said Martin in the transaction referred to, as well as in many others of similar character, having represented the defendant as its agent. The defendant, appearing specially for that purpose, moved to set aside and quash such service, upon the grounds that at the time thereof it was not doing business in this state, that the said Martin was not a managing or business agent of the defendant, and that the defendant had not designated him as a person upon whom process might be served. The motion was heard upon affidavits and oral evidence, and was denied. The defendant refusing to appear in the case, judgment by default was entered against it as demanded in the complaint, from which judgment defendant has appealed, and urges upon such appeal that the superior court acquired no jurisdiction of its person by the service of process so made.

Section 411, of the Code of Civil Procedure declares that a summons in a civil action must be served by delivering a copy thereof:

"* * * 2. If the suit is against a foreign corporation, * * * doing business and having a managing or business agent, cashier or secretary within the state: To such agent, cashier or secretary."

Defendant contends that it was not a corporation at the time of the alleged service of process; but that, if it is to be considered as such, it was not subject to service of process in California, for the reason that it was not doing business and had no agent in this state; also that, even if it had been doing business here, and if Martin had been its managing agent, still he was no longer such at the time of the purported service of summons. It is upon these contentions that the appellant bases its argument of lack of jurisdiction of its person in the lower court.

[1] It is provided in the Illinois statute relative to the formation of corporations for

profit that a corporation is not fully organized until after certain specified papers have been filed in the office of the secretary of state and a certificate of complete organization has been issued and filed. It appears that the certificate of incorporation of the defendant had not been filed at the time of the service of process in this case, and the appellant accordingly argues that at that time, under the law of Illinois, the state of its creation, it had no legal existence as a corporation, and hence that this action is not maintainable against it. This objection was not made one of the grounds of the motion to quash. On the contrary, not only in the notice of motion, but in the affidavits filed by the appellant in support of the motion, it refers to itself as a foreign corporation. The appellant must therefore be deemed to have waived this ground of objection. Dickinson v. Zubiate Mining Co., 11 Cal. App. 656, 662, 106 Pac. 123.

[2] Moreover, the record plainly discloses that the defendant conducted business in this state in the garb of a corporation; such acts inducing the present transaction. It will not be permitted, therefore, to deny its corporate existence. Plainly, under the circumstances, it was a de facto corporation. It allowed itself to be held out as a corporation, and this is sufficient to estop it to deny the legality of its organization. Los Angeles, etc., Band v. Spires, 126 Cal. 541, 58 Pac. 1049; San Diego, etc., Co. v. Frame, 137 Cal. 441, 70 Pac. 295; 10 Cyc. 245. This also appears to be the law in Illinois. Bushnell v. Con. Ice, etc., Co., 138 Ill. 67, 27 N. E. 596; Marshall v. Keach, 227 Ill. 35, 81 N. E. 29, 118 Am. St. Rep. 247, 10 Ann. Cas. 164.

[3] As to the appellant's second contention, the evidence shows that the company was doing business in California and that Martin was its managing or business agent at the time of this transaction. It appears that, during a period antedating the present transaction and extending beyond its close, the appellant, through H. J. Martin, was engaged in purchasing fruit in California for shipment to Chicago; Martin negotiating and making contracts for such purchases with the growers in the southern part of the state, the fruit to be accepted by him f. o. b. California points. He examined the fruit so purchased, and saw to it that it was packed in accordance with the instructions of the defendant; he arranged with the railroad companies for its shipment; he fixed the wages of employés here; and for the purchase price of fruit, or any other indebtedness incurred here by him for the defendant, he drew sight drafts on the company, signed with its name "per" himself.

It is true that Martin was instructed as to the price to be paid for the fruit, as to its character and quality, how and when it was to be shipped; but as to these matters, especially upon the question of quality, his duties required the exercise of judgment and discretion. He acted, negotiated, and made binding contracts for appellant, and from the scope and extent of the business transacted by him the court below was warranted in holding that he sufficiently represented the appellant to bring it into court by service of process on Martin. Brophy v. Fairmont Creamery Co., 98 Neb. 307, 152 N. W. 557, L. R. A. 1918A, 367; Smith v. Farbenfabriken of E. Ci., 203 Fed. 476, 121 C. C. A. 598; Nelson, Morris & Co. v. Rehkopf (Ky.) 75 S. W. 203. The fact that the compensation received by Martin for his services was in the form of a commission upon the amount of his purchases is not, of course, controlling upon the question of agency; and when, as here, the representative of the foreign corporation has charge of and conducts the business of the corporation in the manner already pointed out, the method of compensating him for his service will make him none the less the business agent of the corporation, and service of summons on him as such representative will be good as against his principal.

[4] The appellant finally urges that, conceding that Martin was its business agent relative to the business conducted in California, the evidence fails to show that he was such agent at the time of the service of summons. It is true that after the purchase of plaintiff's fruit, and its rejection by defendant, and when defendant apparently expected litigation to follow, it forbade Martin to sign its name to drafts, and in a letter to Martin attempted an interpretation of their relations; but there is also evidence showing that their relations continued as before, with the exception of the right to sign defendant's name to drafts until after the time when the summons in this case was served, which was about a month after the sale of the fruit. We think it is sufficient to show that Martin was the business agent of defendant at the time of the service of process.

The judgment is affirmed.

WILBUR, LENNON, and SLOANE, JJ., concur.

183 Cal. 687

BITUMINIZED BRICK & TILE CO. v. SIMONS BRICK CO. et al. (L. A. 6082.)

(Supreme Court of California. Sept. 14, 1920.)

1. Corporations ⊂=96—Evidence held to show that stock was paid for by corporation and not officers to whom issued.

In action involving ownership of stock of corporation as between another corporation and certain officers thereof in whose name the stock was issued, evidence *held* to sustain finding that the consideration for the stock was paid by the other corporation, and not by such officers.

2. Evidence ⊂=424—Parol evidence admissible to prove consideration for stock was paid by one not a party.

In action involving ownership of stock of corporation as between other corporation and certain officers thereof in whose name stock was issued, parol evidence *held* admissible to prove that consideration for stock was paid by other corporation as against contention that such testimony contradicted the recitals of the minutes of the first corporation that stock was issued to such officers, and therefore varied the terms of a written contract, since the controversy was not between the two corporations, and since the rule prohibiting the admission of oral testimony to vary the terms of a written contract applies only to a controversy concerning the subject-matter of contract, arising between the parties to the contract.

3. Appeal and error ⊂=690(4)—Admission of document in evidence not considered, where document is not contained in record.

Supreme Court may refuse to consider alleged error in admitting document in evidence, where absence of document from record makes it impossible for the court to ascertain extent to which the recitals of the document were material.

4. Evidence ⊂=318(4)—Statement of assets of corporation held not hearsay.

Written statement of assets of a corporation *held* admissible as against contention that it was hearsay in so far as particular defendant was concerned, where there was evidence that the statement had been prepared at the request of such defendant, and that the data therefor had been assembled by such defendant and another in the office of the corporation.

5. Evidence ⊂=317(5)—Testimony as to conversation not in hearing of party inadmissible.

In action involving ownership of stock of corporation as between other corporation and certain officers thereof in whose name stock was issued, testimony as to conversation between such officers *held* inadmissible, in absence of evidence that the conversation was in the presence and hearing of other officer and principal stockholder of such other corporation.

Department 2.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action of interpleader by the Bituminized Brick & Tile Company against the Simons Brick Company, Joseph Simons, and others, in which the defendants cross-complained. Judgment for plaintiff, and for defendant Simons Brick Company as against certain of the other defendants, and defendant Joseph Simons and such other unnamed defendants appeal. Affirmed.

W. J. Ford and Henry G. Bodkin, both of Los Angeles, for appellants.

Davis, Kemp & Post and Kemp & Clewett, and Gibson, Dunn & Crutcher, all of Los Angeles, for respondents.

Walter R. Simons, in pro. per.

LENNON, J. The corporation plaintiff in this action of interpleader sought a judgment determining the ownership of certain designated shares of its corporate capital stock. The plaintiff's complaint proceeded upon the theory that there were conflicting claims to the title of the stock in suit which were being asserted repeatedly by the defendant Simons Brick Company on the one hand and the six other defendants on the other hand. All of the defendants to the action cross-complained, and by appropriate allegations pleaded their various claims to the stock in question. The trial court found, among other things, that the consideration for the issuance of the stock in controversy was paid solely by the Simons Brick Company; that said stock was issued in the name of Joseph Simons and E. O. Simons as trustees for the owner thereof, namely, the Simons Brick Company; that the latter, as the owner of the stock, was entitled to all dividends paid thereon; and that neither defendant Joseph Simons nor the other defendants, as the heirs of E. O. Simons, deceased, had any interest in said stock or in the dividends due therefrom. The plaintiff, Bituminized Brick & Tile Company, was adjudged to be relieved from all liability for and on account of its dealings with the said stock, and judgment was rendered and entered in favor of the defendant Simons Brick Company, declaring it to be the owner of and entitled to the said stock. From this judgment an appeal has been taken upon the judgment roll and bill of exceptions, a reversal being urged primarily upon the ground that the evidence does not sustain the findings in the particulars: (1) That it does not appear from any competent evidence that the defendant Simons Brick Company was the actual owner of the stock; (2) that there is no evidence that the consideration for the stock was paid by the defendant Simons Brick Company. The two questions involved in this contention are so closely interwoven as to justify a single discussion of the evidence bearing upon that phase of the case.

Upon behalf of the Simons Brick Company and in support of its claim of ownership of

the stock in suit evidence was adduced to the effect as follows: The plaintiff, Bituminized Brick & Tile Company, was incorporated about the 17th day of February, 1908, and at that time the defendant Simons Brick Company was a corporation of which the defendant Joseph Simons and E. O. Simons were directors and, respectively, president and secretary. Aside from purely nominal stockholders, all of the stock in the Simons Brick company was owned by three brothers, Joseph Simons, Walter Simons, and E. O. Simons, since deceased. The Bituminized Brick & Tile Company was organized and incorporated under the laws of the state of California pursuant to an agreement entered into by and between the Simons Brick Company, Fairchilds-Gilmore-Wilton Company, and one George P. Griffith, whereby it was understood and agreed that the parties to the agreement would respectively advance proportionately the money needed to establish and maintain the new corporation in the business of manufacturing bituminized brick. The defendant Simons Brick Company advanced to the Bituminized Brick & Tile Company, from time to time in keeping with said agreement, the sum of two thousand and sixty-odd dollars in cash or the equivalent of cash. At its organization meeting, the Bituminized Brick & Tile Company caused to be issued 40½ shares of its capital stock in the name of E. O. Simons and the defendant Joseph Simons. At the time of the issuance of said stock said Joseph and E. O. Simons were, respectively, the president and secretary of the Bituminized Brick & Tile Company. After the issuance of the said stock to the said Joseph Simons and E. O. Simons, the Bituminized Brick & Tile Company levied an assessment thereon, which was paid by the defendant Simons Brick Company. When issued the said stock was deposited in the safe of the Simons Brick Company, and remained there up to the time of the commencement of the action, and was at all times carried as a corporation asset on the books and bank statements of the corporation. Prior to the commencement of this action, Walter Simons purchased from the other stockholders of the Simons Brick Company all of the stock in the said Simons Brick Company with the exception of the shares of the minor children of E. O. Simons, deceased, and the 1 share of stock apiece held by the members of the board of directors to enable them to qualify. The question thereupon arose as to whether the shares of stock in the Bituminized Brick & Tile Company passed as assets of the Simons Brick Company, or whether they were personal holdings of the parties in whose names they were issued, namely, Joseph, Walter, and E. O. Simons. The defendants Laura Simons Garfield, Joe Taylor Simons, and Helen Simons, the two last-named persons being minors, and Laura Simons Garfield, the guardian of the persons and estates of the minors, were, during all of the times involved in the controversy concerning the stock, the sole legatees and devisees by last will and testament of the estate of E. O. Simons, deceased, who died in or about the month of June, 1913. They were the widow and children of E. O. Simons, deceased, and were made defendants in this action in his place and stead.

The minutes of the organization meeting of the Bituminized Brick & Tile Company show that the president and secretary thereof namely, Joseph and E. O. Simons, were authorized to issue the shares of stock in controversy here to said Joseph and E. O. Simons "in consideration of moneys to be paid by said parties for the building of the plant of this company." Apparently it is upon this latter piece of evidence that counsel for appellant rely primarily to support their contention that the initial agreement to advance the needed funds for the establishment of the business of the Bituminized Brick & Tile Company was purely personal to Joseph and E. O. Simons, and was not the corporate conduct and contract of the Simons Brick Company. Standing alone, the minutes of the organization meeting mentioned might suffice as prima facie evidence of the fact that the agreement to advance the money was the personal and individual obligation of Joseph and E. O. Simons. But, taken and considered in conjunction with established circumstances concerning the conception and consummation of the initial agreement, the conclusion is inescapable that the Simons Brick Company, as represented by Joseph and E. O. Simons, was the real party obligated and to be benefited by the initial agreement, and not Joseph and E. O. Simons individually. Incidentally, it should be noted that the record is barren of any evidence showing or tending to show that Joseph and E. O. Simons individually and directly gave any consideration for the issuance of the stock in suit, or that any consideration was given therefor aside from the money or its equivalent advanced by the Simons Brick Company to the Bituminized Brick & Tile Company. Moreover, there is evidence that, when the cross-defendant Walter Simons discovered that the stock in suit stood in the names of Joseph and E. O. Simons upon the books of the Bituminized Brick & Tile Company, and not in the name of the Simons Brick Company, he made objection thereto, specifying as grounds thereof that "it was the Simons Brick Company's money that went into the investment," and insisted that "the stock belongs to the Simons Brick Company." To this objection and claim of Walter Simons, Joseph and E. O. Simons replied, "All right, we will straighten it out," and thereupon, so some evidence shows, agreed with the said Walter Simons that the stock in suit should be "divided up in the names of Joe Simons, Elmer Simons, and Walter Simons, * * * and that it would be held by the Simons Brick Company

in that way." The stock was accordingly returned and reissued by the Bituminized Brick & Tile Company to Joseph, E. O., and Walter Simons in certain specified proportions. There is evidence tending to show that the purpose in causing the stock to be issued in the names of the three brothers, rather than in the name of the corporation, was to enable the former to qualify as officers of the Bituminized Brick & Tile Company.

It may be conceded, as counsel for appellant contend, that the manner of making the several payments or advancements, either in cash or the equivalent of cash, claimed to have been made by the Simons Brick Company, coupled with the character of the bookkeeping entries of the several amounts which went to make up the sum total of $2,060, might have supported the inference that said sum and the several items thereof were carried by the Simons Brick Company as an open account with the Bituminized Brick & Tile Company, rather than as an entry of the passing from the Simons Brick Company of the consideration called for by the initial agreement. On the other hand, there was much evidence in explanation of said several payments which, when coupled with the circumstances, unnecessary to be detailed here, preceding, attending, and following the creation of the new corporation, tended to show, and consequently warranted the inference which the trial court apparently made, that the said several items were entered and carried upon the books of the Simons Brick Company as evidence of the passing of the consideration called for by the initial agreement to promote the Bituminized Brick & Tile Company.

[1] True, there is some evidence in the record which would have supported a finding contrary to that made by the trial court, and, while counsel for appellant argue with much vigor that the preponderance of the evidence adduced upon the whole case should have compelled the trial court to make findings favorable to the appellant, of course, such an argument necessarily involves a weighing of conflicting evidence in order to determine where the preponderance may rest. That, however, was solely the province of the trial court. In short, a careful consideration of the evidence adduced upon the whole case satisfies us that there exists a substantial conflict of competent evidence, which was directed to the issue of the ownership of the stock in controversy, which issue, of course, involved the subsidiary issue of the source and character of the consideration for its issuance. Confronted, as we are, with this condition of the evidence, it is idle to argue here in this court that there is no evidence to support the trial court's finding "that the consideration for said stock was paid by the Simons Brick Company, a corporation, and was not paid for by the said Joseph Simons, or the said E. O. Simons, or either of them, but said stock was issued in the name of E. O. Simons and Joseph Simons, as trustees for the Simons Brick Company, and the Simons Brick Company has at all times been and now is the owner of the said stock since the issuance thereof to the said E. O. Simons and Joseph Simons." Needless to say, these findings being supported by some sufficient evidence, it follows necessarily as a matter of law that the judgment is supported by the findings, and it goes without saying that the finding of ownership in the Simons Brick Company of the stock in suit is ample support for the other and further finding that the Simons Brick Company was and is entitled to the dividends emanating from said stock.

[2] Concerning the competency of some of the evidence to support the assailed findings, it is suggested, rather than contended, that the minutes of the organization meeting of the Bituminized Brick & Tile Company constituted a contract in writing between that corporation and Joseph Simons and E. O. Simons, which contract completely evidenced the intent and covenant of the parties thereto, and consequently that the trial court erred in permitting parol evidence for the purpose of contradicting the recitals of the contract. In response to this it will suffice to say that, conceding the minutes of the organization meeting to be a contract, the rule prohibiting the admission of oral testimony to vary the terms of a written contract applies only to controversies concerning the subject-matter of the contract arising between the parties to the contract. Dunn v. Price, 112 Cal. 46, 51, 44 Pac. 354; Smith v. Goethe, 159 Cal. 628, 632, 115 Pac. 223, Ann. Cas. 1912C, 1205; Massy v. Chatom, 163 Cal. 772, 777, 127 Pac. 56; In re Smith's Estate, 176 Cal. 729, 171 Pac. 289. Obviously the controversy here was not between the Bituminized Brick & Tile Company and Joseph Simons and E. O. Simons, and consequently the rule referred to has no application to the facts of this case.

It is contended upon behalf of appellant that, even though it be conceded, as we find, that there was evidence sufficient to support the finding of the trial court that the consideration for the stock in controversy was paid by the Simons Brick Company, nevertheless, the evidence adduced upon the whole case shows, it is claimed, that after the stock was issued there was an amicable agreement by and between Walter Simons, Joseph Simons, and E. O. Simons, who were practically the owners of the entire capital stock of the Simons Brick Company, to apportion unto themselves and hold and own individually the stock of the Bituminized Brick & Tile Company, and that, as a consequence of that agreement, Walter Simons, as one of the parties thereto, is estopped from questioning the validity of the agreement. The answer to this contention is to be found in the fact that the record shows, as previously indicated, evidence to the effect that, when Walter Si-

mons protested the assumption of individual ownership of the stock in suit by Joseph and E. O. Simons, the latter agreed, not only that the stock should be held in certain designated proportions in the names of Joseph, E. O., and Walter Simons, but that it should be so held by them as the property and asset of the Simons Brick Company. We need not stop, therefore, to consider the doctrine of estoppel as perhaps it may be applied to a situation where the stockholders of the corporation voluntarily and unanimously consent to a distribution of all or a part of the corporate assets among themselves in a manner and under circumstances which in no way impair the rights of creditors.

[3] Complaint is made of the ruling of the trial court admitting in evidence a document produced from the files of the Simons Brick Company, claimed to be a statement of the assets of the Simons Brick Company for which the data was assembled by the three brothers, Joseph, Walter, and E. O. Simons. Objection was made to the document in evidence upon the ground that it was but a copy of an original statement sent to a bank for the purpose of obtaining credit, and therefore was not the best evidence. To what extent the recitals of the document were material we can only surmise, for, while it was "ordered received in evidence and marked 'Defendant's Exhibit 1'" we have been unable to find it in the record, and therefore we might dispose of the claim of error in this particular upon the ground that the record before us does not show affirmatively all the facts upon which the claim of error is predicated. However, assuming, as may be fairly inferred from the record as a whole, that the document in question was the statement of assets frequently referred to throughout the testimony adduced upon the whole case, wherein the stock in suit was listed as a corporate asset of the Simons Brick Company, the objection to its admission upon the ground stated was not well taken. This is so for the reason that it was ultimately shown that the document in question was not a copy, but an original statement filed among the papers of the corporation, a copy of which was delivered to the bank.

[4] It was, as the trial court ruled, an original document. The contention that the subject-matter of the document in question was hearsay in so far as defendant Joseph Simons was concerned is effectively and adversely answered by the record itself, which shows the foundation evidence for the introduction of the document in evidence to be that it had been "prepared by the Simons Brick Company at the request of the president Joe Simons," and that the "data" therefor was "assembled" by "Mr. Joseph Simons * * * and Elmer Simons in the office of the Simons Brick Company."

[5] There is no merit in the contention that the trial court erred in refusing to permit defendant Joseph Simons to narrate a conversation purporting to have been had between himself and E. O. Simons as to whether or not they would take the stock in suit from the Bituminized Brick & Tile Company and keep it as their individual personal property or take it on behalf of and for the Simons Brick Company. It was not shown, nor attempted to be shown, that this conversation was had in the presence and hearing of the defendant Walter Simons, and therefore as to him it was hearsay, and consequently properly rejected upon that ground, which was the ground of objection made in the trial court.

The judgment appealed from is affirmed.

We concur: WILBUR, J.; SLOANE, J.

183 Cal. 728

BRAUN v. CREW et ux. (L. A. 6083.)

(Supreme Court of California. Sept. 22, 1920.)

1. Mortgages ⟸283(1)—Relation of principal and surety arises on assumption of mortgage debt by mortgagor's purchaser.

Assumption by mortgagor's purchase of payment of the mortgage debt makes both mortgagor and purchaser personally liable therefor and creates the relation of principal and surety between them; the purchaser being the principal and the mortgagor the surety.

2. Mortgages ⟸283(2)—Change in obligation between mortgagee and mortgagor's purchaser relieves mortgagor.

Where mortgagor's purchaser has assumed payment of mortgage debt, any contract or arrangement between purchaser and mortgagee which has the effect of materially altering the terms of the obligation to pay the mortgage debt, to which mortgagor does not consent, operates to release mortgagor.

3. Mortgages ⟸282(1) — Purchaser not assuming payment of mortgage debt not personally liable.

Where mortgagor's purchaser does not assume payment of mortgage debt, the purchaser is not personally liable therefor.

4. Mortgages ⟸278—Land primarily liable, where sold subject to mortgage.

Where land is sold subject to mortgage, the land becomes, so far as the mortgagor is concerned and as between mortgagor, the mortgagee, and the purchaser, primarily liable for the payment of the debt, and under Code Civ. Proc. § 726, mortgagee's debt cannot be collected by action except by foreclosing the mortgage, in which case mortgagor is liable only for such balance as may remain unpaid after the money realized on the foreclosure sale has been applied on the debt and costs.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

5. Mortgages ⟸278 — Mortgagor released from personal liability by mortgagee's agreement with mortgagor's successor extending time for payment.

Where land has been sold subject to mortgage agreement between mortgagee and purchaser's successors extending the time of payment without mortgagor's consent releases mortgagor from personal liability in view of Civ. Code, §§ 2819, 2836, 2840, since in such case the relation of principal and surety exists between the land and the mortgagor; the mortgagor being the surety and the land the principal debtor.

6. Principal and surety ⟸104(1)—Surety released by creditor's extension of time.

Where there is an extension of time by the creditor to the principal without the consent of the surety, the question of the extent of the injury which the surety sustains therefrom cannot be inquired into, and the creditor cannot show that the principal debtor was then wholly or partially insolvent and remained so; the surety being released by the mere fact that the contract is materially altered without his consent.

7. Mortgages ⟸278 — Extension of time for payment completely releases mortgagor, regardless of value of land.

The rule that the mortgagor, on mortgagee's unauthorized extension of time for payment to one who has purchased land subject to mortgage, is released only to the extent of the value of the land, so that mortgagor, to show his complete release, must show that value of land is equal to or greater than amount of mortgage debt, does not, in view of Civ. Code, § 2819, obtain in California, but the ordinary rule of principal and surety, that any unauthorized extension releases the surety completely, applies, and the value of the land is immaterial in such case.

8. Mortgages ⟸278 — Extension to mortgagor's grantee released grantor though conveyance contained no covenant against incumbrances.

Where land was sold subject to mortgage, mortgagee's unauthorized extension of time for payment given mortgagor's successor in interest released mortgagor under Civ. Code, § 2819, regardless of whether conveyance by mortgagor to his successor contained any covenant against incumbrances.

9. Mortgages ⟸278—Agreement for extension of time must be founded on consideration.

Agreement between mortgagee and mortgagor's successor, extending the time for payment of mortgage debt is not valid, so as to discharge the mortgagor if given without mortgagor's consent, unless founded on some new and valuable consideration.

10. Mortgages ⟸278—Presumption that written agreement, extending time for payment, was based on consideration not conclusive.

Under Civ. Code, § 1614, written agreement between mortgagee and mortgagor's successor, extending time for payment of mortgage debt is presumptively based on a consideration, so as to operate to discharge the mortgagor if unauthorized, but such presumption is not conclusive, and the contrary may be shown by other evidence.

11. Mortgages ⟸278 — Payment of part of mortgage debt after maturity not consideration for extension.

The payment of a part of a mortgage debt after maturity would not be a sufficient consideration for extension of time for payment between mortgagee and mortgagor's successor in interest, for such extension to discharge the mortgagor, if given without his consent.

Department 1.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Catherine Braun against Thomas Crew and wife. Judgment for plaintiff, and from that portion thereof which provides for a deficiency judgment against defendants, defendants appeal. Reversed.

Geo. M. Bennett, of Los Angeles, for appellants.

G. A. Gibbs, of Pasadena, for respondent.

SHAW, J. The complaint states a cause of action to foreclose a mortgage executed by the two appellants to the plaintiff. The court gave judgment foreclosing the mortgage and providing for a deficiency judgment against the two appellants in case the foreclosure sale did not satisfy the debt. The appellants do not complain of the portion of the judgment foreclosing the mortgage. Their objection is to the provision for the deficiency judgment against them, their claim being that they have been released from personal liability on the debt by an extension of time made by the plaintiff to a subsequent holder of the land under the appellants, after said purchase and without the consent of the appellants.

The mortgage and the note which it was given to secure were executed by the appellants on September 13, 1912. The debt was due three years after date. Afterwards Crew and wife sold the property to one Peters, and thereafter by subsequent transfers Clyde E. Cate became the owner thereof, and while he was such owner, on October 20, 1915, at his request and without the knowledge or consent of the appellants, the plaintiff, by a written agreement with Cate, extended the time of payment of the mortgage debt for the term of two years from that date. These facts appear from the findings. The appeal is on the judgment roll alone. The value of the land was not put in issue, and does not appear from the findings or elsewhere in the record. It is not alleged or found that the purchaser of the land from the mortgagor, or any subsequent purchaser thereof, assumed or agreed to pay the mortgage debt, or that the same constituted a part of the consideration of either of the respective transfers. Neither

does it appear that the conveyance made by Crew and wife to Peters contained any covenant that the land was free from incumbrance, or that Peters, or any subsequent purchaser, took subject to the mortgage, by the contract of transfer. The mortgage, however, was duly recorded, and therefore their interest in the land was necessarily subject to such mortgage.

[1, 2] Where the purchaser from the mortgagor assumes the payment of the mortgage debt, both are personally liable therefor. It is settled by many decisions in this state that in such a case the relation of principal and surety at once arises between the mortgagor and the purchaser, the purchaser being the principal and the mortgagor the surety, and that any contract or arrangement between the purchaser and the mortgagee which has the effect of materially altering the terms of the obligation to pay the mortgage debt operates to release the surety, unless he consents thereto. Woodward v. Brown, 119 Cal. 292, 51 Pac. 2, 542, 63 Am. St. Rep. 108; Herd v. Tuohy, 133 Cal. 61, 65 Pac. 139; Tuohy v. Woods, 122 Cal. 667, 55 Pac. 683; Tulare Co. Bank v. Madden, 109 Cal. 314, 41 Pac. 1092; Williams v. Naftzger, 103 Cal. 438, 37 Pac. 411.

The case is precisely the same as any other contract to pay money executed by two persons, where one is surety for the other and the creditor is aware of that relation.

[3, 4] Where the vendee of the mortgagor does not assume payment of the mortgage debt, the vendee is not personally liable therefor, and consequently no relation of principal and surety can arise between the two, with regard to the personal liability. If such vendee takes subject to the mortgage the land thereupon becomes, so far as the mortgage is concerned, and as between him, the creditor, and the vendee, primarily liable for the payment of the debt. Under the Code (Code Civ. Proc. § 726), his debt cannot be collected by action, except by foreclosing the mortgage, and he can be adjudged liable only for such balance as may remain unpaid after the money realized upon the foreclosure sale has been applied upon the debt and costs. Brown v. Willis, 67 Cal. 235, 7 Pac. 682; Biddel v. Brizzolara, 64 Cal. 362, 30 Pac. 609. When such conveyance is made, the relation of principal and surety springs up between the land and the mortgagor, he being the surety and the land the principal debtor. Bridge v. Conn, etc., Co., 167 Cal. 782, 141 Pac. 375; Crisman v. Lanterman, 149 Cal. 651, 87 Pac. 89, 117 Am. St. Rep. 167; Murray v. Marshall, 94 N. Y. 616. He becomes at once entitled to all the protection which the law gives to sureties. "A surety cannot be held beyond the express terms of his contract." Civ. Code, § 2836. "A surety is exonerated—1. In like manner with a guarantor." Civ. Code, § 2840. "A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended." Civ. Code, § 2819.

[5] In the light of these rules, treating the land as the principal debtor, it will be readily seen that by the agreement of the creditor mortgagee with the then owner of the land, extending the time of payment of the then matured mortgage debt for the term of two years, to which the mortgagor did not consent, the original obligation of the principal, in such a case the land, is materially altered, since the time within which it may be resorted to by foreclosure is extended two years. The right of the mortgagee to foreclose and his remedy to enforce payment of his debt in the only way allowed by law, is thereby suspended for that period. There is no escape from the conclusion that the mortgagor, standing, as he does, in the relation of surety for the payment of the debt, is by such extension of time exonerated from further liability therefor.

In Murray v. Marshall, supra, the Court of Appeals of New York, after stating that the land became primarily liable for the payment of the debt, and that the original mortgagor, after his sale to a third person who did not assume payment of the mortgage, "stands in the position and has the rights of surety," went on to say that—

> "It must be steadily remembered that he can only be discharged so far as he is surety; that he holds that position only up to the value of the land; and beyond that is still principal debtor without any remaining equities."

The position of the court was that to show his complete release by an extension of time to the subsequent purchaser, the mortgagor must show that the value of the land was equal to or greater than the amount of the mortgage debt, and that if it was less, he stood released only to the amount of its value, and was personally liable for the excess, notwithstanding the extension. The point was not essential to the decision, for it proceeds to demonstrate that the findings showed that the value of land equaled the debt, and that the release was complete. The reasoning above given seems to lose sight of the main principle on which the release of the surety is grounded, which is that the surety is entitled to stand on the strict letter of the contract upon which he is liable, and that any change therein made without his consent, by which the contract is altered so as to impair or suspend the right of the creditor to proceed to enforce payment, fully releases the surety. This principle obtains, we believe, in New York as fully as elsewhere. The New York court was at liberty to ingraft

this qualification upon the law of principal and surety, for it was not bound by statute. But in this state, as we have shown, the Code fixes the law, and it does not contain any such qualification. We are therefore bound by it, and the decision of the New York court on that point is not authority here.

[6, 7] The rule in this state is that where there is an extension of time by the creditor to the principal, without the consent of the surety, the question of the extent of the injury which the surety sustains therefrom cannot be inquired into. The creditor cannot show, for example, that the principal debtor, was then wholly or partially insolvent, and so remained. The surety is released by the mere fact that his contract is materially altered without his consent. Driscoll v. Winters, 122 Cal. 66, 54 Pac. 387; Tuohy v. Wood, supra, 122 Cal. 688, 55 Pac. 683, 1 Brandt on Suretyship, §§ 483, 376, 416. We are therefore of the opinion that the failure of the defendant to allege and prove the value of the land, in addition to the extension without his consent, does not impair his defense.

[8] Neither is it material that it was not shown that the conveyance by Crew to Peters did not contain any covenant against incumbrances. The creditor, by his extension of time to the purchaser, suspended his own power to enforce his remedy against the land, and this, under section 2819, operated to release the mortgagor, regardless of such covenant. While there is no direct finding that Peters and the other purchasers took subject to the mortgage, we think the fact sufficiently appears by implication from the other facts contained in the record.

[9-11] It is proper to say, in view of a possible new trial below, that the agreement extending the time was not valid unless it was founded upon some new and valuable consideration. The fact that it was a written agreement "is presumptive evidence of a consideration." Civ. Code, § 1614. But it is not conclusive. The contrary may be shown by other evidence. The debt was then due, and the payment of a part thereof would not be a sufficient consideration for such extension.

The judgment is reversed.

We concur: OLNEY, J.; LAWLOR, J.

183 Cal. 696

SILVERS v. GROSSMAN. (L. A. 5151.)

(Supreme Court of California. Sept. 14, 1920.)

1. Accord and satisfaction ⟸19—Obligation not extinguished by "accord" till acceptance of consideration.

"Accord," defined by Civ. Code, § 1521, as an agreement to accept something in extinction of an obligation, does not by provision of sections 1522, 1523, extinguish the obligation, till fully executed by acceptance of the consideration of the accord, constituting satisfaction.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accord.]

2. Accord and satisfaction ⟸18—Offer to perform or tender not enough.

An offer to perform an accord, or an actual tender of performance, will not sustain the defense of accord and satisfaction.

3. Accord and satisfaction ⟸5—An act or a promise is consideration for accord.

An accord may provide for the doing of an act or the giving of a promise as consideration for extinction of the existing obligation.

4. Accord and satisfaction ⟸25(2)—Plea must allege giving and acceptance of promise.

Where accord provides for giving of a promise as consideration for extinction of the pre-existing obligation, a plea relying thereon must allege the giving and acceptance of the promise.

5. Accord and satisfaction ⟸25(2)—Plea held to merely allege an unexecuted accord.

Plea in action for personal injury *held* to merely allege an unexecuted agreement for satisfaction of the claim for injury by payment and acceptance of a certain sum, and so insufficient.

6. Pleading ⟸17—Matters of substance to be alleged in direct terms.

In general, matters of substance must be alleged in direct terms, and not by way of recital or general reference.

7. Pleading ⟸311—Rule against aider by attached instrument not applicable to contract on which action or defense is founded.

The rule that a defective allegation of a pleading cannot be aided by recourse to recitals in a document attached to and made a part of the pleading, unless the document is expressly referred to for the avowed purpose of aiding the defective pleading, applies only to the pleading of recitals in instruments not constituting the contract on which the action or defense is founded, or of matters of substance preliminary or collateral to the instrument pleaded.

8. Pleading ⟸32—Statement of what instrument must contain that it may be pleaded in hæc verba.

That one may plead an instrument, which is the foundation of the cause of action or defense, in hæc verba, rather than according to its legal effect, either by setting out a copy in the body of the pleading or by attaching a copy as an exhibit and incorporating it by proper reference, the instrument must show on its face, in direct terms and not by implication, all the facts which the pleader would have to allege in pleading it by its legal effect.

9. Pleading ⟸32—Definite construction must be put on ambiguous instrument, foundation of action or defense.

If an instrument constituting the foundation of the cause of action or defense is defective or

ambiguous in not showing on its face in direct terms all the facts necessary to be alleged in pleading it by its legal effect, some definite construction must be put on it by averment, or the pleading will be subject to demurrer.

10. Pleading ⊂=35—Statement of when construction in pleading of attached instrument may be treated as surplusage.

It is only where an instrument attached to a pleading and made part of it is unambiguous that a construction put thereon in the pleading can be disregarded as surplusage and erroneous.

11. Pleading ⊂=35—Instrument attached ambiguous, so construction pleaded cannot be disregarded as surplusage.

The instrument attached to and made part of the answer in action for personal injury: "In consideration of the promise of G. [defendant] to pay $50 in settlement of claim for damages, I [plaintiff] hereby agree to give a release of all claim"—is not clearly an agreement to accept the promise to pay as consideration for the release, so that the construction placed thereon by the answer as an agreement that the payment of the $50 was to be accepted as such consideration cannot be disregarded as surplusage.

12. Pleading ⊂=36(1)—Pleader bound by construction placed on attached ambiguous instrument.

An instrument attached to and made part of a pleading being ambiguous, the pleader is bound by the construction thereof, of which it is readily susceptible, put on it by the averments of the pleading.

13. Pleading ⊂=205(1) — Answer relying on accord and satisfaction, by failure to allege payment and acceptance, is subject to general demurrer.

Defect in answer, in action for personal injury, construing an ambiguous agreement, attached to and made part of the pleading, as an agreement that payment of $50 was to be accepted by plaintiff as consideration for release of the claim for injury, in not alleging payment and acceptance of the money necessary for satisfaction of the accord, is not a mere variance between the averments of an answer, stating facts sufficient for a defense, and the terms of an attached agreement, which is merely a defect of uncertainty or ambiguity that can be reached only by a special demurrer, but is a failure to make a necessary averment, and therefore subject to general demurrer.

14. Appeal and error ⊂=1040(13)—Error in overruling demurrer to defense on which judgment is based prejudicial.

Error in overruling a demurrer to a defense is prejudicial; it appearing from the record that judgment for defendant was made and based entirely on findings in support of such defense.

15. Appeal and error ⊂=672—Record showing that pleading was demurred to, specification that it did not support finding and judgment available.

Though appeal is on the judgment roll, so that it cannot be said that there was objection at the trial to introduction of evidence, it appearing from the record that the pleading on which is based the finding and judgment was questioned by demurrer, specification of error that the finding and judgment are unsupported by the pleadings is available.

16. Pleading ⊂=432 — Not aided by finding where questioned by demurrer.

The doctrine of aider by findings has no application to a pleading the sufficiency of which was questioned by demurrer.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Carrie Silvers against Harry Grossman. Judgment for defendant, and plaintiff appeals. Reversed, with instructions.

J. W. Hocker and Robert E. Austin, both of Los Angeles, for appellant.

Seth B. Smith, of Los Angeles, for respondent.

LENNON, J. Plaintiff sued to recover damages in the sum of $20,000 for injuries received in an accident alleged to have been caused by defendant's negligent operation of an automobile. Defendant made answer, in which he denied negligence, pleaded contributory negligence, and, for a third and separate defense, alleged that plaintiff and her husband entered into a written agreement with defendant, through his attorney, "whereby the plaintiff and her husband agreed to receive and accept from defendant, and defendant agreed to pay to plaintiff and her husband, the sum of $50, in full satisfaction, settlement, and payment of any and all claims plaintiff and her husband, or either of them, had or claimed to have against this defendant by reason of the collision or accident hereinbefore referred to in defendant's first and second defenses in this answer contained; * * * that by the terms of said agreement plaintiff and her husband were fully compensated by the payment to them by the defendant of the said sum of $50." The answer then alleged a tender of the said sum of $50, a refusal to accept the same on the part of plaintiff and her husband, and defendant's readiness and ability at all times to pay the said sum. A general demurrer to the third defense was overruled, and the case was thereupon tried. The court found the allegations of plaintiff's complaint to be true, save and except as to the amount of damages suffered by plaintiff, which was found to be $1,000, but rendered judgment in favor of the defendant. Said judgment was based upon the finding that—

"prior to the beginning of this action, to wit, on the 17th day of February, 1916, as set out in defendant's amended answer under the title

'Third and Separate Defense,' the defendant gave to plaintiff his promise in writing to pay the sum of $50 in full settlement of all claims for damages plaintiff held against the defendant by reason of that certain accident sued upon and set out in plaintiff's complaint herein, and that said plaintiff then and there accepted said promise in writing in full settlement and satisfaction thereof."

Plaintiff appeals upon the judgment roll, specifying as error (1) that the demurrer to the third defense was erroneously overruled; (2) that the judgment is not supported by the pleadings.

[1-4] The reports are replete with authority to the effect that accord alone, by which is meant a mere agreement to accept something in extinction of an existing obligation, is insufficient as a defense to an action on the original obligation, and that such original obligation is not actually extinguished until there has been an acceptance of the consideration agreed upon, or, in other words, satisfaction. Civ. Code, §§ 1521, 1522, 1523; Holton v. Noble, 83 Cal. 7, 23 Pac. 58. Neither an offer to perform nor an actual tender of performance will sustain the defense of accord and satisfaction (White v. Gray, 68 Me. 579), and a plea which avers an unexecuted accord fails to state facts sufficient to constitute a defense (Holton v. Noble, supra). The terms of the accord may provide either for the performance of an act or the giving of a promise as the consideration for the extinction of the existing obligation. In the latter case, the giving and acceptance of the promise is the execution of the accord, and therefore, if the promise per se is relied upon, the giving and acceptance of the promise in satisfaction of the pre-existing obligation must be averred in the pleadings. White v. Gray, supra; Gowing v. Thomas, 67 N. H. 399, 40 Atl. 184; B. & W. Ry. Co. v. Clem, 80 Ga. 534, 7 S. E. 84; 1 C. J. 577.

[5] The sufficiency of the third defense of the answer in the case at bar must be tested by the application of these well-established rules. The answer, as is evidenced by the excerpts therefrom which appear above, merely alleges an unexecuted agreement for the satisfaction of plaintiff's claim by the payment and acceptance of a specified sum of money. Nowhere in the answer is there an averment that there was any agreement to accept, in satisfaction of said claim, defendant's mere promise to pay, and the reading of the context will not permit such construction.

[6-9] Nor was the necessary averment supplied by attaching a copy of the agreement to the answer and making it a part thereof. In general matters of substance must be alleged in direct terms, and not by way of recital or general reference, and defective allegations of a pleading cannot be supplied by recourse to recitals in a document attached to and made a part of the pleading, unless the document is expressly referred to for the avowed purpose of aiding the defective pleading. City of Los Angeles v. Signoret, 50 Cal. 298; Burkett v. Griffith, 90 Cal. 532, 27 Pac. 527, 13 L. R. A. 707, 25 Am. St. Rep. 151; Hibernia S. & L. Soc. v. Thornton, 117 Cal. 481, 483, 49 Pac. 573; Est. of Cook, 137 Cal. 184, 190, 69 Pac. 968. This rule, however, applies only to the pleading of recitals in instruments which do not constitute the contract upon which the action or defense is founded, or of matters of substance which are preliminary or collateral to the instrument pleaded. It in no way conflicts with the rule that a written instrument which is the foundation of a cause of action or defense may be pleaded in hæc verba, rather than according to its legal effect, either by setting forth a copy in the body of the complaint or other pleading or by attaching a copy as an exhibit and incorporating it by proper reference. Stoddard v. Treadwell, 26 Cal. 294; Lambert v. Haskell, 80 Cal. 611, 22 Pac. 327; Ward v. Clay, 82 Cal. 502, 23 Pac. 50, 227; Santa Rosa Bank v. Paxton, 149 Cal. 195, 86 Pac. 193. "But to enable the pleader to adopt this latter mode, the instrument which is thus adopted as a part of the complaint must show upon its face in direct terms, and not by implication, all the facts which the pleader would have to allege under the former mode of pleading by averment" (Joseph v. Holt, 37 Cal. 250, 253), and if the instrument is not free from defect or ambiguity in those particulars, some definite construction must be put upon it by averment, or the pleading will be subject to demurrer (Durkee v. Cota, 74 Cal. 313, 16 Pac. 5; Lambert v. Haskell, supra; Merkeley v. Fisk, 179 Cal. 748, 178 Pac. 945; Hill v. McCoy, 1 Cal. App. 159, 81 Pac. 1015).

The instrument attached to the pleading now under consideration reads as follows:

"Los Angeles, Cal., February 17, 1916.

"In consideration of the promise of Geo. Grossman to pay $50 in settlement of claim for damages, I hereby agree to give a release of all claims in his favor.

"[Signed] Carrie Silver.
"J. A. Silver.
"Ivan Kelso,
"Attorney for Mr. Grossman."

[10-12] It is contended that any defect in the answer, by reason of the failure to allege that the promise of payment was the consideration for the release, is cured by the recitals of the agreement. It will be noted that by its terms plaintiff in consideration of a promise of payment agrees to give a release. It does not appear from the face of the instrument whether the claim was actually released in consideration of the promise per se or whether the agreement was prelimi-

nary in nature; that is to say, a promise to give a release in the future in consideration of the promise of payment, the release not to be given, however, until payment of the money. In this respect, which is vital under the circumstances of the case, the instrument is defective and ambiguous as a matter of pleading, for it does not contain a recital, in sufficiently definite language, of an acceptance of a promise of payment in satisfaction of plaintiff's claim against defendant.

Accordingly defendant has, in compliance with the rule above stated, eliminated the ambiguity of the instrument by putting a definite construction upon it by averment in the pleading, and by way of interpretation, has alleged that it was agreed that the payment of the sum of $50 (not the promise to pay) was to be accepted as the consideration for the release. The allegations thus construing the instrument cannot be disregarded as surplusage, as may be done where the instrument is unambiguous and the construction is an erroneous one. Stoddard v. Treadwell, 26 Cal. 294, 303. On the contrary, inasmuch as the instrument is ambiguous, and the construction put upon it by the averments of the answer is one of which the instrument is readily susceptible, the pleader is bound by the interpretation adopted by him and set forth in his answer.

"Presumptions are always against the pleader, and all doubts are to be resolved against him, for it is to be presumed that he has stated his case as favorably as possible to himself." Joseph v. Holt, supra.

Taken as a whole, therefore, the answer alleges nothing more than an unexecuted accord.

[13, 14] It follows that the defect in the pleading now under consideration is not a mere matter of variance between the averments of an answer, which states facts sufficient to constitute a defense, and the terms of a written agreement attached thereto. Such a defect is merely one of uncertainty or ambiguity, and can be reached only by a special demurrer. Blasingame v. Insurance Co., 75 Cal. 633, 17 Pac. 925. Here, however, the third defense of the answer is lacking in a necessary averment, and is therefore subject to general demurrer. Inasmuch as it appears from the record that the judgment in favor of defendant is made and based entirely upon findings in support of said third defense, the error in overruling the demurrer was obviously prejudicial to plaintiff. Brittan v. Oakland Bank of Savings, 112 Cal. 1, 44 Pac. 339.

[15, 16] But one point remains to be considered, namely, the question of the conclusiveness upon appeal of the findings of the trial court. The trial court found in effect that there was an executed accord, in that defendant's promise to pay was accepted in satisfaction of the claim sued upon. It is therefore not claimed that the finding is repugnant to the judgment in favor of defendant, but that the finding and judgment are not supported by the pleadings. Ordinarily findings outside of the issues will be disregarded. Hall v. Arnott, 80 Cal. 348, 22 Pac. 200. Where, however, it appears from the record that the case was tried upon the theory that the pleadings were sufficient to raise certain issues, and no objection was made in the court below to the introduction of evidence upon these issues, the point cannot be raised for the first time upon appeal that the findings are not within the issues raised by the pleadings. Moore v. Campbell, 72 Cal. 251, 13 Pac. 689; Carpy v. Dowdell, 115 Cal. 677, 687, 47 Pac. 695. And where the appeal is upon the judgment roll alone, so that the record fails to disclose whether or not, at the trial, objections were interposed to evidence as not within the issues, it has been held that it will be presumed in support of the findings and judgment that the pleadings were treated as sufficient to raise the issues upon which the findings were made and that evidence in support of such issues was introduced and went in without objection (Ill. T. & S. Bank v. Pac. Ry., 115 Cal. 285, 296, 47 Pac. 60; McDougald v. Hulet, 132 Cal. 154, 159, 64 Pac. 278; Beardsley v. Clem, 137 Cal. 328, 332, 70 Pac. 175), although the rule may be different where such a presumption would result in the reversal of the judgment (Rudel v. Los Angeles Co., 118 Cal. 281, 50 Pac. 400).

This rule however is based upon the theory of waiver or estoppel, and can have no operation where it appears from the record that objection to the sufficiency of a pleading to raise a particular issue was seasonably urged in the court below either at the trial upon the introduction of evidence, or by demurrer, as in the case at bar. When the sufficiency of a pleading has been questioned by demurrer, the pleading must, upon appeal on the judgment roll, be judged by itself alone and the doctrine of aider by findings or verdict does not apply. Pittsburg, etc., Ry. Co. v. Moore, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638; 31 Cyc. 765. It follows that it must be held that the judgment is not supported by the pleadings.

The judgment is reversed, with instructions to the court below to sustain the demurrer to the third defense of defendant's answer, with leave to the defendant to amend, if he be so advised.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LAWLOR, J.; SLOANE, J.; WILBUR, J.

OLNEY, J. I concur in ordering a reversal of the judgment, but do not concur in directing further proceedings in the trial

court. I believe judgment should be entered for the plaintiff upon the findings. Every fact necessary for that purpose is found, and the only reason for not doing so that is or can be given is the finding of the trial court upon the point of accord and satisfaction. Even if further proceedings were necessary for a determination of this point, the further proceedings should certainly be confined to a determination of this issue alone. But in truth there is no occasion for retrying even this issue. The main opinion says that the finding as to accord and satisfaction was in effect that there was executed accord, in that defendant's promise to pay was accepted in satisfaction of the claim sued on. I do not think this construction should be put upon the finding. It reads:

"That prior to the beginning of this action, to wit, on the 17th day of February, 1916, as set out in defendant's amended answer under the title 'Third and Separate Defense,' the defendant gave to plaintiff his promise in writing to pay the sum of $50 in full settlement of all claims for damages plaintiff held against the defendant by reason of that certain accident sued upon and set out in plaintiff's complaint herein, and that said plaintiff then and there accepted said promise in writing in full settlement and satisfaction thereof."

This finding must be construed in connection with, and in the light of, the third and separate defense to which it refers, and the issues presented which it was designed to meet. It seems to me plain enough that all that was intended by the finding was to find an accord and satisfaction "as set out in defendant's amended answer under the title 'Third and Separate Defense.'" It should be borne in mind that the court had previously overruled a demurrer to this portion of the answer, holding that it stated a good defense. I do not think it occurred to counsel or to the court that there was any difference whatever between the facts found and those pleaded. The facts pleaded, as the main opinion shows, were wholly insufficient to constitute accord and satisfaction. They, in fact, showed affirmatively that there was none.

Furthermore, I think it plain enough that the defendant cannot amend his answer, so as truthfully to allege accord and satisfaction, and that he could not prove his answer if he did amend. The supposed accord and satisfaction were carried into a writing which constitutes the final memorial of the transaction. That writing is pleaded, and is set out in the main opinion, and by its terms it not only does not show that the plaintiff gave a release in reliance upon the defendant's promise, or accepted the defendant's promise, to pay $50, as distinguished from the actual payment of the $50, as a final settlement, but does show just the contrary. It declares in so many words that the plaintiff agrees to—that is, will—give a release in consideration of the defendant's promise to pay $50; that is, when he pays the $50. The release and the payment were plainly to be concurrent, and there was to be no release unless the money were paid. If there were to be a release—that is, a final settlement by the plaintiff, then and there, in consideration of the plaintiff's promise alone—there was no sense in making the writing in the form in which it was made. The plaintiff would have made a release at the time, instead of an agreement merely to make one.

Summing the matter up, the only reasonable interpretation of the writing is that the matter was not to be closed out between the parties, and the plaintiff's claim settled, until the sum agreed upon was actually paid. Such an agreement is an accord, but not a satisfaction; and, finally, it is not open to the defendant to show any different arrangement, because to do so would be to vary the terms of the writing, which is the final memorial of the arrangement, and is alone competent evidence of what the arrangement was.

This being the case, there is no reason for permitting the defendant further to litigate the point, and judgment should be directed against him.

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LAFARGUE v. UNITED RAILROADS OF SAN FRANCISCO. (S. F. 8732.)

(Supreme Court of California. Sept. 21, 1920. Rehearing Denied Oct. 21, 1920.)

1. Appeal and error ⊜978(2) — Conclusion that misconduct of attorney did not necessitate new trial not to be disturbed.

Conclusion of the trial court that statements made by counsel for plaintiff in an action for personal injuries, though improper, were not such as to vitiate verdict and necessitate new trial, *held* not to be disturbed by the appellate court, in view of the circumstances, as trial court is in better position to determine whether verdict was affected by the misconduct.

2. Street railroads ⊜113(1)—Whether company refused to maintain injured person at hospital immaterial.

Question whether defendant street railway refused further to maintain plaintiff at a hospital, so that he was forced to leave, *held* a matter not material, and inadmissible, except possibly on cross-examination of witnesses from the hospital, who might testify that plaintiff, when discharged, was recovered so as to no longer require hospital treatment.

3. New trial ⊜44(2) — Misconduct of juror not such as to necessitate new trial.

In an action for personal injuries against a street railroad, misconduct of juror, in ask-

ing questions as to why plaintiff was discharged from a hospital where he had been maintained by defendant during examination of plaintiff, and in making statements thereon, *held* not to have so prejudiced the case with the jurors as to call for new trial.

4. Appeal and error ⊂⊃1048(6)—Cross-examination held harmless.

In an action against a street railroad for injuries to plaintiff wagon driver collided with, cross-examination of defendant's witness, eliciting the fact that the particular car in question was one of a line which went further before reaching its destination, and traveled faster than ordinary cars, *held* harmless to defendant.

Olney, Wilbur, and Lennon, JJ., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Louis Lafargue against the United Railroads of San Francisco, a corporation. From judgment for plaintiff, defendant appeals. Affirmed.

Wm. M. Abbott and Wm. M. Cannon, both of San Francisco (Kingsley Cannon, of San Francisco, of counsel), for appellant.

Daniel A. Ryan, of San Francisco, for respondent.

ANGELLOTTI, C. J. This action is one brought to recover damages for personal injuries alleged to have been sustained by plaintiff in a collision between a wagon driven by him and one of defendant's cars, said collision being alleged to have been due to the negligent operation of the car by defendant's motorman. There was a trial by jury, which rendered a verdict for plaintiff in the sum of $2,000. Defendant appeals from the judgment entered on such verdict.

Upon all material issues, including that of contributory negligence, there was a substantial conflict in the evidence, and no claim is made that the evidence was insufficient as matter of law to sustain the verdict.

The claim apparently principally relied upon by learned counsel for appellant for a reversal is alleged misconduct on the part of plaintiff's attorney during the trial, by reason of which, it is urged, the defendant's case was prejudiced in the minds of the jurors. Many instances of such alleged misconduct were specified in the affidavits presented on motion for new trial. Of these the most important is the matter relative to the discharge of plaintiff from St. Luke's Hospital, after being there some six weeks, having been taken to that hospital immediately after the accident. Some two or three weeks after being discharged he went to the French Hospital, where he remained for about five months. The St. Luke's Hospital bill for care and maintenance was being paid by defendant. The extent of his injuries was a matter of serious dispute, concerning which there was a great deal of conflicting testimony. He was claiming disability and suffering covering the whole time up to his leaving the French Hospital, and even later, while defendant was claiming that he had practically recovered from the effect of his injuries when discharged from St. Luke's Hospital. Apparently feeling that the unexplained departure of plaintiff from St. Luke's Hospital might prejudice plaintiff's case on that question, by reason of the inference that might be drawn by jurors from the fact of such discharge that he was then practically recovered, plaintiff's attorney sought to show why he left, and that "it was not because he was cured." He was allowed to show by plaintiff that he (plaintiff) was told to leave by the hospital authorities. He then asked plaintiff who paid the bill there, and this being objected to, said the object was to show "why he was put out of the hospital." The objection was sustained, but the statement of counsel was assigned as misconduct. Nothing further occurred with reference to this matter until some time later, when a medical witness for plaintiff was testifying as to the condition of plaintiff and as to what was shown by certain X-ray pictures, when a juror intervened with the question, "Why is it that he was at the St. Luke's and thrown out and goes to the French Hospital and was there 60 days?" The controversy that immediately ensued includes the principal assignments of misconduct. Plaintiff's attorney said: "I want to show that the railroad was paying for him, and they wouldn't pay any longer for him." After some further discussion, the court asked the juror whether there was any subject upon which he wanted any testimony, and the juror answered: "Well it strikes me that the St. Luke's people must have been terribly off to let him go away without treatment." The court then asked him if he wanted some evidence as to why St. Luke's Hospital discharged the patient, and he answered, "Yes," and the court saying that he thought the request should be complied with, the medical witness was withdrawn and the plaintiff recalled for examination on that subject. Plaintiff's attorney said that the juror came to the conclusion that "they put him out of there (the hospital) because he was well," and asked the juror if that was his idea. This was assigned as misconduct. Plaintiff's attorney then said, substantially, that if the juror made a criticism he had the right to inquire as to what it was, and he had asked the juror if that (meaning, evidently, that plaintiff was discharged because he was thought to have recovered) was his idea, and the juror had shaken his head affirmatively. The court then said that the

juror had asked why the plaintiff was discharged from the hospital when, as he (plaintiff) stated, he was not entirely well, and plaintiff's attorney said, "But the gentleman had his criticism; he says it looked bad for them;" and this was assigned as misconduct. An altercation between counsel followed, the court finally saying that he would permit no further question except that the juror's question might be asked any witness. Plaintiff's attorney said that was what he was trying to do, and asked plaintiff, "What reason did they give you for sending you out of the St. Luke's Hospital?" An objection that this was hearsay was sustained. Plaintiff's attorney then asked, "What can I do?" and was told by defendant's counsel, "You can call the St. Luke's people themselves," to which plaintiff's attorney answered, "Your people, eh?" This was assigned as misconduct. He then asked him who paid his bills at the hospital, and an objection to the question was sustained. Plaintiff's attorney then said: "That is all; step down sir. If you cover it up, it will remain covered up." And this statement was assigned as misconduct. The court admonished the jury to disregard the statement. Plaintiff's attorney said: "I have been trying these cases for some time, and I never got into any trouble, but I am not going to have it clouded and besmirched if I can bring out the truth." And this statement was assigned as misconduct. The court then said:

"I do not care to be repeating to the jury time and time again. Statements of this kind are not evidence, and you will not take them as the truth or as any evidence of any fact or the lack of fact or the existence or nonexistence of any fact; they are not evidence at all, gentlemen. They will be eliminated entirely from your mind."

Subsequently it was shown, without objection, that the defendant paid to St. Luke's Hospital the bill of the hospital for plaintiff's care and maintenance at that place. There was also given testimony on the part of the surgeon of St. Luke's Hospital substantially to the effect that from his examination of plaintiff and the data concerning him he had concluded that plaintiff did not need any further hospital treatment, and suggested that he go home or to a free hospital where he could rest longer if he desired. This was apparently the general view of the St. Luke's Hospital people at the time of plaintiff's discharge.

[1, 2] The trial court denied a motion for a new trial based upon the ground, among others, of misconduct of plaintiff's attorney. In doing this the court must be deemed to have concluded that no prejudice was suffered by defendant by reason of any of the matters to which we have referred. Conceding some of the statements made by counsel, whatever the provocation thought by him to exist therefor, were improper, we are satisfied that this conclusion of the trial judge should not be disturbed by an appellate court. The trial judge is in a much better position than an appellate court to determine whether the verdict in a case is probably due wholly or in part to such alleged misconduct as we have here, and his conclusion in the matter should not be disturbed unless, under all the circumstances appearing, it is plainly wrong. This, we think, may not fairly be said here. We certainly cannot say that there was any intent on the part of counsel to get before the jury matters which he knew were inadmissible. It seems to us from the record that he was acting in perfect good faith upon the theory that he was entitled to rebut the inference of recovery which might be drawn by jurors from plaintiff's discharge from St. Luke's Hospital, by showing that he (plaintiff) was discharged because defendant was not willing to be further responsible to the hospital for the cost of plaintiff's care and maintenance there. This apparently was the main purpose of counsel, and in so far as any possible prejudicial effect on the jury with relation to defendant was concerned, the only basis of any reasonable claim of possible injury. We are satisfied that the question whether defendant refused to further maintain plaintiff at the hospital was not a matter material to the issues being tried, and was not admissible in evidence, except possibly on cross-examination of witnesses from the hospital, who might testify that plaintiff at the time of his discharge was sufficiently recovered to no longer require hospital treatment. But we can well see how, under the circumstances, counsel for plaintiff might have felt that he was entitled to show that this was the real reason for the discharge, to rebut the possible inference of complete recovery which might be drawn from the fact of discharge. As to the matter of prejudice to the defendant it may well be claimed that it is difficult to conceive how defendant could be prejudiced by a showing that, notwithstanding its absolute disclaimer of all responsibility for the accident it charitably bore the cost of plaintiff's maintenance at a hospital until such time as it was advised by the hospital authorities that he no longer needed hospital treatment, when it refused to be further responsible therefor. Assuming that certain statements of counsel for plaintiff reflected unfavorably upon the hospital, counsel for defendant urge that counsel for plaintiff endeavored to create the impression that defendant owned the same or had some voice in its management, but we fail to find any good basis in the record for this claim, or for a conclusion that any juror could have come to any such conclusion. It is true that counsel for plaintiff on one occasion, when he was advised by counsel for defendant that he could call "the St. Luke's people themselves," very improperly retorted, "Your people, eh?"

but this hasty and ill-advised remark, made in the heat of contest and with the apparent desire to have the last word in a conflict with opposing counsel, cannot fairly be said to show any such design or to have created any such impression. At most, it was an improper insinuation that the St. Luke's people were, in this case, friendly to defendant, and might color their testimony accordingly, a very improper insinuation it is true, but one which the trial judge was amply justified in concluding in no way affected the verdict. We have considered all of the many assignments of misconduct, and we find therein no justification for overruling the decision of the trial judge in denying the motion for a new trial in so far as the same was based thereon.

[3] The motion for a new trial was also based upon the alleged misconduct of the juror who asked the questions and made the statements set forth in our discussion of the question of the misconduct of plaintiff's attorney, the idea being that he thus openly prejudiced the case and expressed his criticism to his fellow jurors. The question and expression of criticism referred to an entirely immaterial matter, and the hasty criticism was of the hospital, and not of the defendant, induced doubtless by testimony then being given for plaintiff tending to show that when he was discharged from the hospital he was suffering from a fractured rib or ribs. Upon this matter the District Court of Appeal in deciding this case said:

"We are willing to concede that the juror was guilty of a violation of the instruction of the court and of his duty as a juror in making the statements. But we cannot go with appellant's learned counsel to the extent of holding that the statements necessarily showed a prejudiced mind. Neither can we concede that the incident could have ultimately affected the minds of intelligent jurors, as we must assume the jurors who heard the statements to have been, to the prejudice of defendant's cause. The whole matter was passed on by the trial court on motion for a new trial, and it was warranted in holding that the conclusion of the juror thus hastily reached and expressed, based as it was upon an absolutely irrelevant fact, could not have operated to affect the juror's mind in reaching a verdict."

In this we entirely concur.

[4] Upon the only remaining point made by defendant we are satisfied with what was said by the District Court of Appeal in its decision, the same being as follows:

"A witness for defendant, who was a passenger on the car which struck plaintiff's wagon, testified that the car was moving at a 'moderate speed.' On cross-examination of this witness plaintiff, over the objections of defendant, developed the fact that the particular car in question was one of a line which went further before reaching its destination, and traveled faster than the ordinary car that ran on Mission street. Plaintiff had testified that 'the car was going slowly' at the time his wagon was struck, and there appears to be no contradiction of this statement. Other testimony corroborating plaintiff showed that the car came to a stop within a very few feet after the occurrence of the collision. It is appellant's contention that the only possible effect that evidence as to the speed of the cars at other times and places could have produced on the minds of the jury was prejudicial, and calculated to create the impression that defendants were habitually reckless and careless in the operation of their cars without regard to human safety. We do not find that the witness fixed any definite rate of speed at which the car in question was proceeding at the time of the accident, or at which any of the cars of defendant usually ran. What he meant by the term 'moderate speed,' as applied to the car in question in comparison to the speed of other cars on the same line, was never developed. The trial court allowed the cross-examination on the theory that plaintiff had the right to ascertain what the witness meant when he was allowed to say on direct examination that the car was proceeding at a moderate speed. While the rate of speed at which the car was going was never an issue in the case, either by reason of the pleadings, or from any testimony, and the cross-examination may have been on an immaterial matter, no harm was done. 'In view of the other evidence in the case it does not seem at all probable that the jury were influenced by the testimony.' Spear v. United Railroads, 16 Cal. App. 637, 645, 117 Pac. 956."

The judgment is affirmed.

We concur: SHAW, J.; SLOANE, J.; LAWLOR, J.

We dissent. It seems to us that an entirely false quantity was injected into the case by plaintiff's counsel, over the repeated admonitions of the court, and that the false quantity so introduced was of a character so prejudicial to the defendant as to have prevented the jury from considering the case fairly upon its real merits. To sustain the verdict under these circumstances will, it seems to us, have the effect of encouraging similar conduct in other cases, when it should be discouraged strongly. Primarily the relief in such a case should be given by the trial judge by granting a new trial, and his right to do this should be exercised freely whenever he feels that the trial has not been fairly had. In the present case, it seems to us that the trial judge refrained from exercising this right in a case in which he should have done so. OLNEY, J.; WILBUR, J.; LENNON, J.

183 Cal. 705

MOONEY v. SUPERIOR COURT IN AND FOR KERN COUNTY et al. (L. A. 6466.)

(Supreme Court of California. Sept. 15, 1920.)

1. Prohibition ⟸3(3) — Error in dismissing will contest reviewable only on appeal.

Granting of motion to dismiss a will contest on a ground erroneous in law was simply error in the exercise of jurisdiction, reviewable only on appeal, and did not render the judgment void, to lay it open to attack by writ of prohibition.

2. Wills ⟸307—Dismissal of contest on death of contestant not void, though representative not substituted.

Judgment of dismissal of will contest on death of contestant *held* not void for want of formal substitution of the personal representative of the deceased contestant.

3. Prohibition ⟸5(3)—Wills ⟸307—Vacation or modification of dismissal of will contest, which had become a final judgment, unauthorized and prohibited.

Where no appeal was taken from judgment dismissing a will contest, on death of the contestant without substituting his personal representative, and such judgment had become final years before any motion to vacate it was made, it was beyond the power of the superior court to vacate or modify, which threatened action will be restrained by prohibition.

In Bank.

Application for writ of prohibition by Edward Mooney, executor of the last will and testament of Margaret Mooney, deceased, against the Superior Court of the State of California, in and for the County of Kern, and Howard A. Peairs, Judge thereof, to restrain further proceedings in the matter of the contest of a will. Writ granted.

Thos. Scott and J. W. Wiley, both of Bakersfield, for petitioner.

E. J. Emmons and Kaye & Siemon, all of Bakersfield, for respondents.

ANGELLOTTI, C. J. The object of this proceeding is to obtain a writ of prohibition restraining respondents from further proceeding in the matter of a contest of a will instituted in the superior court of Kern county. An alternative writ was issued. The matter was submitted for decision upon the petition and an answer, which admitted the truth of most of the allegations of the petition. There is no dispute as to any of the material facts.

Mary O'Donnell died July 6, 1909, leaving estate and a purported will. By the terms of this will Margaret McNally, who had married Edward Mooney, was the sole beneficiary and executrix. The will was filed for probate. On July 23, 1909, the surviving husband of deceased, Edward O'Donnell, filed his opposition to the probate of the will. On September 30, 1912, while the contest thus instituted was pending undetermined, said Edward O'Donnell died testate. On October 21, 1912, his wife, Elizabeth O'Donnell, was appointed executrix of his will and letters testamentary were issued to her thereon. On October 28, 1912, Margaret Mooney gave to said Elizabeth O'Donnell, as executrix of the will of said Edward O'Donnell, and her attorneys, notice of a motion to be made for the dismissal of the written opposition and contest to the probate of the will of Mary O'Donnell, on the ground, substantially, that, the contestant having died, the contest abated. In response to this notice, Elizabeth O'Donnell, as executrix of the will of Edward O'Donnell, appeared at the hearing of the motion and opposed the granting of the same on the merits. The matter was fully heard, and submitted for decision, and on February 27, 1913, an order was made and entered granting the motion and dismissing the contest. No appeal was ever taken from this judgment of dismissal.

There was never any formal substitution in the contest proceeding of any party in place of the deceased Edward O'Donnell. On March 19, 1913, after due and legal notice, an order was made admitting the Mary O'Donnell will to probate and appointing Margaret Mooney executrix thereof, and letters testamentary were issued to her. No valid appeal was ever perfected from this order. Margaret Mooney, as executrix, proceeded with the administration of the estate of Mary O'Donnell, with the result that on July 12, 1915, her accounts as executrix were finally settled and a decree of final distribution made, distributing to Margaret Mooney all of the residue of the estate, of all of which she was thenceforth possessed to the time of her death, September 19, 1917. No appeal was ever taken from this decree. On April 24, 1916, over 3 years after such judgment of dismissal had been made and entered, Elizabeth O'Donnell, as executrix of the will of Edward O'Donnell, deceased, gave notice of a motion for an order vacating the judgment of dismissal of the contest of the will of Mary O'Donnell, and for an order substituting her as such executrix in place of Edward O'Donnell as contestant. The ground of the motion was that at the time of the judgment of dismissal the contestant was dead, and neither she nor any one else had been substituted in his place, and that, consequently, such judgment of dismissal was a nullity, with the result that the contest was still pending undetermined. This motion came regularly on for hearing, and on August 8, 1916, an order was made granting the motion and purporting to vacate the judgment of dismissal, to substitute said Elizabeth O'Donnell, as executrix, as contestant,

and to allow her to prosecute such contest. No appeal was ever taken from this order, The court is about to proceed with the trial of said contest. Margaret Mooney died testate September 19, 1917, and petitioner, Edward Mooney, is the sole devisee and executor under her will.

[1] The only reason suggested in support of the attempted vacating of the judgment of dismissal of the will contest and the further prosecution thereof is that, owing to the failure to formally substitute the executrix of the will of the contestant for the deceased contestant as a party, the judgment of dismissal is an absolute nullity, with the result that everything that followed in the administration, including the decree of final distribution, is likewise a nullity. We are not concerned here with any question as to the correctness of the conclusion of the court on the motion to dismiss, to the effect that the will contest abated with the death of the contestant, for, even if such conclusion was erroneous, the granting of the motion to dismiss on that ground was simply error in the exercise of jurisdiction, reviewable only on an appeal. The judgment could not be held to be void for any such reason.

[2] Nor do we think the judgment of dismissal should be held to be void for want of formal substitution of the personal representative of the deceased contestant. It is doubtful whether, under the circumstances, the theory being that, by reason of the death of the contestant the contest was ended, any substitution of a party plaintiff in place of contestant was even technically required before formal dismissal, and it may well be that all that was essential was notice of the proposed motion to the personal representative of the deceased. But, assuming that there should have been a substitution, notice of the motion for dismissal having in fact been served upon his duly qualified personal representative, she appeared and contested the motion upon its merits, thus practically making herself, in her official capacity as executrix of the will of contestant, a party to the proceeding in his place. She was in fact fully authorized to be substituted in his place; she did proceed therein, and was recognized as proceeding therein, as if formally substituted, and at most all that was lacking was the entry of a formal order of substitution. This at best was a mere irregularity in procedure, not affecting any substantial right, which, in view of the circumstances, would hardly warrant a reversal of the judgment of dismissal on appeal. Certainly it did not make the judgment of dismissal void.

[3] The court had full jurisdiction of the subject-matter, and, by reason of the due and legal notice given, of all interested parties. The judgment was in substance not one against a dead man, but one against the personal representative of the dead man. As we have seen, no appeal was taken from this judgment, and it had become final years before any motion to vacate it was made, and therefore was beyond the power of the superior court to vacate or modify.

In view of what we have just said, it is unnecessary to discuss the claim of petitioner with reference to the effect of the decree of final distribution. The will contest was disposed of by the judgment of dismissal, and this judgment having become final long before any motion to vacate was made, the purported order vacating was beyond the power of the court and void, and the threatened action of the court in regard to now proceeding with the trial of the contest is therefore in excess of its jurisdiction. We are not, however, to be understood as conceding that the decree of final distribution has not finally and conclusively settled, as between all heirs, legatees, and devisees, all questions concerning the distribution of the property of Mary O'Donnell, whatever might be the situation as to the will contest.

Let a peremptory writ of prohibition issue as prayed in the petition.

We concur: LENNON, J.; LAWLOR, J.; OLNEY, J.; SLOANE, J.; SHAW, J.; WILBUR, J.

183 Cal. 746

HUNTINGTON v. DONOVAN et al.
(L. A. 4988.)

(Supreme Court of California. Sept. 22, 1920. Rehearing Denied Oct. 21, 1920.)

1. Evidence ⟸34 — Judicial notice taken of invalidity of grant by government to railway.

The court will take judicial notice of the invalidity of the part of the grant by the United States to the Southern Pacific Railroad Company in 1871 (16 Stat. 573) which overlaps the grant to the Atlantic & Pacific Railway in 1866 (14 Stat. 292).

2. Public lands ⟸117 — Patents subject to collateral attack.

The general rule is that government patents to land cannot be collaterally attacked, but the patent of land to the Southern Pacific Railroad Company in 1871 (16 Stat. 573) was void and subject to collateral attack, as far as it overlapped the grant to the Atlantic & Pacific Railway in 1866 (14 Stat. 292).

3. Public lands ⟸120—Five-year limitation for suing to cancel patents did not protect grantees of small portions of land patented.

Acts Cong. March 3, 1891 (U. S. Comp. St. § 5113), and March 2, 1896 (U. S. Comp. St. §§ 4901–4903), providing that no suit could be brought to determine invalidity of patents to government land after March 2, 1901, were not intended to protect grantees of small portions of lands patented, as far as the five-year period

for bringing actions was concerned, where the patent was attacked in time and decreed invalid, although bona fide purchasers are protected.

4. Public lands ⊂=120, 122—Grantee of patentee under void patent has burden of showing that he was bona fide purchaser.

The grantee of a patentee of government land claiming under a void patent has the burden of showing that he is a bona fide purchaser in order to claim the benefit of Acts March 3, 1891 (U. S. Comp. St. § 5113), and March 2, 1896 (U. S. Comp. St. §§ 4901–4903), which protect bona fide purchasers, whether attacked by the government or a private party.

5. Public lands ⊂=138—Purchaser of tax title obtained rights of prior owner in action to quiet title.

A purchaser of a tax title could not be considered a bona fide purchaser under Acts Cong. March 3, 1891 (U. S. Comp. St. § 5113), and March 2, 1896 (U. S. Comp. St. §§ 4901–4903), which protect bona fide purchasers of land claimed under void government patents, where at the time of purchase the Land Office records showed a valid desert land entry thereon, and the patent under which he claims had been declared void by decree of a federal court.

6. Evidence ⊂=353(5)—Recitals as to consideration not evidence against third person.

Recitals in conveyances of land as to consideration paid are not competent evidence against third persons not parties or privies thereto, on the issue as to whether grantees were bona fide purchasers.

7. Judgment ⊂=729—Decree in proceeding to cancel patent not evidence that prevailing party was bona fide purchaser of land expressly excluded.

A decree in a proceeding by the government to cancel a land patent in favor of a grantee, declaring the latter to be a bona fide purchaser of certain lands covered by the patent, had no tendency to prove that he was a bona fide purchaser as to other lands in the patent, especially where the validity of his title to the other lands was expressly reserved by the decision.

8. Evidence ⊂=353(5)—Statutes did not render competent recitals in deeds to show grantee to be bona fide purchaser.

Code Civ. Proc. § 1962, subd. 2, section 1963, subd. 39, and Civ. Code, §§ 1614, 1615, merely relate to the sufficiency of the consideration to sustain a deed, and do not render recitals in conveyances competent evidence against third persons not parties or privies thereto, on the issue as to whether or not grantees were bona fide purchasers.

9. Public lands ⊂=120—Cancellation of prior patent does not pass title to subsequent patentee.

The rule that where a grantor acquires title subsequent to his grant it passes to the grantee (Civ. Code, § 1106) does not apply to a government patent, and hence title did not pass to a subsequent patentee by reason of the fact that the government subsequently acquired title to the lands by forfeiture of a prior patent.

In Bank.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by Benjamin F. Huntington against Joseph G. Donovan and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Cedric E. Johnson and F. E. Dunlap, both of Los Angeles, for appellant.

Frank C. Prescott and Prescott & Prescott, all of Los Angeles, for respondents.

WILBUR, J. This is an action to quiet title to a quarter section of land near Del Sur, Los Angeles county, within the overlapping United States land grant to the Atlantic & Pacific Railway, made by Congress in 1866 (14 U. S. Stat. 292) in aid of its proposed railroad from the Colorado river to the Pacific Ocean, and the grant made in 1871 (16 U. S. Stat. 573) to the Southern Pacific Railroad Company for its "branch line" from Tehachapi to Yuma via Los Angeles. The latter grant was void as to lands in the overlapping grants, and in 1886 the rights of the former reverted to the United States, and the land was restored to the public domain (24 U. S. Stat. 123). United States v. Southern Pacific R. R. Co., 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091; United States v. Colton Marble & Lime Co., 146 U. S. 615, 13 Sup. Ct. 163, 36 L. Ed. 1104; Southern Pacific R. R. Co. v. United States, 183 U. S. 521, 22 Sup. Ct. 154, 46 L. Ed. 307; United States v. Southern Pacific R. R. Co., 184 U. S. 49, 22 Sup. Ct. 285, 46 L. Ed. 425.

Plaintiff claims under the grant to the Southern Pacific Railroad Company, and the defendant under a desert land entry made in 1910. A patent was issued to this company on January 9, 1885, in pursuance of the grant of 1871, for 33,249 acres of land, including the land in controversy. On January 28, 1890, the company by a grant deed conveyed 1,280 acres, including the land in controversy, to Nathan Cole, Jr. The latter, by deed dated February 8, 1890, recorded March 13, 1890, conveyed the land in question to C. A. Sargent. On March 17, 1890, a suit was brought by the United States against the Southern Pacific Railroad Company, Nathan Cole, and other grantees and mortgagees of that company, to cancel the patent of January 9, 1885, and other similar patents. This suit was twice appealed to the Supreme Court of the United States. Southern Pacific R. R. Co. v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355; Id., 184 U. S. 49, 22 Sup. Ct. 285, 46 L. Ed. 425. The patents were canceled.

Plaintiff claims that he is not bound by this cancellation, because C. A. Sargent, his predecessor, was not a party to the suit, although he was the record owner, and for the further reason that the final decree excluded the land in controversy. It is true that Sargent was not bound by the decree, or by the cancellation of the patent upon which his title depends, as by an adjudication; but plaintiff's rights, so far as they are affected by the law therein declared, must be determined in accordance therewith. The Supreme Court of the United States in that case determined the effect of certain acts of Congress, and we must give to them the same construction in this case. That case turned, in part, upon the question as to whether the Atlantic & Pacific Railroad had made an effective location of its line of railroad, so as to vest in it the title of the lands along such line in such overlap.

[1] So far as this question of fact is concerned it is not open to litigation between the parties here, as we take judicial notice of the invalidity of this grant to the Southern Pacific Railroad Company. Southern Pacific R. R. Co. v. Painter, 113 Cal. 251, 45 Pac. 320. And where it appears that the land is within this overlapping grant we have held the patent to the company void. Owen v. Pomona Land & Water Co., 6 Cal. Unrep. Cas. 438, 61 Pac. 472. This court has frequently taken notice of the invalidity of these patents. S. P. R. R. Co. v. Wood, 124 Cal. 475, 57 Pac. 388; S. P. R. R. Co. v. Lipman, 148 Cal. 480, 491, 83 Pac. 445; Wilson v. S. P. R. R. Co., 150 Cal. 731, 89 Pac. 1089.

[2] Plaintiff claims that, as he holds under a United States patent to the Southern Pacific Railroad Company, that patent cannot be collaterally attacked. The general rule is that patents cannot be so attacked (U. S. v. Stone, 69 U. S. [2 Wall.] 525, 17 L. Ed. 765; Michigan L. & L. Co. v. Rust, 168 U. S. 589, 593, 18 Sup. Ct. 208, 42 L. Ed. 591); but a void patent can be so attacked (Marsh v. Nichols, etc., Co., 128 U. S. 610, 9 Sup. Ct. 168, 32 L. Ed. 538; Steel v. St. Louis, etc., Co., 106 U. S. 452, 1 Sup. Ct. 389, 27 L. Ed. 226, cited in Klauber v. Higgins, 117 Cal. 451, 465, 49 Pac. 466). That this patent is void and subject to collateral attack is clear, for its invalidity results from the fact that the lands covered thereby had been previously granted by act of Congress to the Atlantic & Pacific Railroad, and the title thereto was in such railroad when the patent was issued (1885) to the Southern Pacific Railroad Company. Marsh v. Nichols, supra; S. P. R. R. Co. v. U. S., 168 U. S. 1, 41, 18 Sup. Ct. 18, 42 L. Ed. 355.

Plaintiff also claims that, even if the patent is invalid, Congress has declared by acts passed in 1891 (26 U. S. Stat. 1093 [U. S. Comp. St. § 4992]), and in 1896 (29 U. S. Stats. 42 [U. S. Comp. St. §§ 4901–4903]) that no suit can be brought to determine such invalidity after March 2, 1901 (five years after the act of March 2, 1896), and that the effect of this limitation is to validate the patent after that date. In this connection appellant calls attention to the decision of the Supreme Court of the United States in U. S. v. Chandler-Dunbar Water Power Co., 209 U. S. 447, 28 Sup. Ct. 579, 52 L. Ed. 881, in which it was held that the failure of the United States to bring a suit to cancel a void patent results in confirming title in the patentee. The court said:

"We can see no reason for doubting that the statute (26 Stat. 1099, c. 561, § 8), which is the voice of the United States, had that effect. It is said that the instrument was void and hence was no patent. But the statute presupposes an instrument that might be declared void. When it refers to 'any patent heretofore issued,' it describes the purport and source of the document, not its legal effect. If the act were confined to valid patents, it would be almost or quite without use. Leffingwell v. Warren, 2 Black, 599."

[3] In the case at bar, however, the patent relied upon by appellant was attacked by the government in 1890, and in that suit was decreed to be void and canceled. It is evident from the act itself that this 5-year period for the bringing of actions to cancel patents was not intended to protect grantees of small portions of the lands patented, where the patent was attacked in time and decreed invalid. If such grantees are bona fide purchasers, they were protected by elaborate provisions of the act by which they could secure title from the government.

No case has been called to our attention, and we have discovered none, in which the federal courts have been called upon to determine the effect of the 5-year limitation upon the rights of a grantee of a portion of the patented premises where the patent itself has been canceled in an action between the government and the patentee, and the grantee is not made a party to the action in which the patent was canceled. In the case of United States v. Norris, 222 Fed. 14, 19, 137 C. C. A. 552, an action had been commenced against the patentee to cancel the patent within the 5-year period. After the expiration of that period the grantee of the patentee was made a party and it was held that he was protected by the 5-year limitation, and that, not having been made a party until after the expiration of that period, the suit as to him must fail because begun too late. In that case, however, the patent had not been canceled at the time the grantee was made a party and the action failed because the grantee had taken the title to the entire tract.

The Supreme Court of the United States has construed with strictness the 5-year lim-

itation upon the power of the government to bring suit to annul a patent. United States v. New Orleans Pac. Ry. Co. et al., 248 U. S. 507, 39 Sup. Ct. 175, 63 L. Ed. 388. The rule is thus stated in United States v. St. P., M. & M. Ry. Co., 247 U. S. 310, 313, 38 Sup. Ct. 525, 526 (62 L. Ed. 1130):

"Laying aside other questions raised by the government, we have reached the conclusion that, having regard to the general principle which requires a strict construction to be given to legislation in derogation of the public right, and in view of the legislative history of this particular enactment, the proviso must be given the effect of a curative measure confined to lands theretofore patented, and not granting dispensation for frauds or mistakes thereafter occurring. It will be observed that the proviso is not a mere statute of limitation, but an absolute bar of suits by the United States; not merely of suits to vacate and annul patents, but of suits to recover either the land or the value thereof; not merely in favor of bona fide purchasers, but also of the immediate recipient of an unlawful certification or patent. The general principle of public policy applicable to all governments, that the public interest should not be prejudiced by the negligence or default of public officers, which underlies the rule of strict construction for statutes of limitation, applies with peculiar force to a statute of this character. United States v. Knight, 14 Pet. 301, 315; Gibson v. Chouteau, 13 Wall. 92, 99; United States v. Thompson, 98 U. S. 486, 489; Fink v. O'Neil, 106 U. S. 272, 281; United States v. Nashville, Chattanooga & St. Louis Ry. Co., 118 U. S. 120, 125; United States v. Whited & Wheless, 246 U. S. 552."

[4] The purpose of this remedial legislation fixing a limitation within which patents may be attacked and exempting a bona fide purchaser from the results of the invalidity of the patent is fully accomplished as to plaintiff if he is allowed in this action to prove that he is in fact a bona fide purchaser and thus show title. It remains to be determined whether he is protected as a bona fide purchaser under acts of Congress passed for that purpose. The law of March 2, 1896, confirmed the title of bona fide purchasers from the railroad company. United States v. Southern Pacific R. R. Co. (C. C.) 117 Fed. 544, affirmed 200 U. S. 341, 26 Sup. Ct. 296, 50 L. Ed. 507, supra; U. S. v. Winona, etc., R. R., 165 U. S. 463, 477, 17 Sup. Ct. 368, 41 L. Ed. 789. Under the previous acts of 1887 and 1891, for the protection of a bona fide purchaser, it was necessary for the purchaser to take some affirmative action to secure a patent in order to fully protect himself (San Jose Land and Water Co. v. San Jose Ranch Co., 129 Cal. 673, 62 Pac. 269, affirmed 189 U. S. 777, 23 Sup. Ct. 487, 47 L. Ed. 765); but this was unnecessary under the act of March 2, 1896, supra. Without some such affirmative action, however, it is necessary for the grantee of the patentee to show that he is a bona fide purchaser in order to claim the benefit of this remedial legislation. The burden of proof of his good faith is on such purchaser when attacked by the government (Wright-Blodgett Co. v. United States, 236 U. S. 397, 35 Sup. Ct. 339, 59 L. Ed. 637), or by a private party (Great Northern Ry. Co. v. Hower, 236 U. S. 702, 35 Sup. Ct. 465, 59 L. Ed. 798; Code Civ. Proc., §§ 1869, 2061, subd. 5).

[5-9] Is the plaintiff shown to be a bona fide purchaser or grantee thereof? By mesne conveyances from C. A. Sargent title was in Susana and Isabel Schell from and after 1892. If they were bona fide purchasers their title was confirmed by Congress the first Monday in March, 1896 (March 2). The land was assessed for state and county taxes for the year 1896, which became a lien on the first Monday in March of that year. Previous thereto it had not been taxable. People v. Shearer, 30 Cal. 645; San Jose Land & Water Co. v. San Jose Ranch Co., supra. The land was sold to the state for these taxes (1897), and deeded to the state July 3, 1902, and sold by the state to C. W. Eastman February 21, 1912, and by the latter to the plaintiff July 31, 1912. The plaintiff on June 13, 1913, secured a decree quieting his title against Susana and Isabel Schell, in whom by mesne conveyances the title of the railroad company had vested, and still remained subject to such tax deed. Defendants' vendors made a desert land entry of the land at the United States land office at Los Angeles on June 2, 1910, and thereafter proof of annual work was filed. Margaret G. McCartney assigned her rights to the defendant November 8, 1913. He has made final proof.

Plaintiff claims as a bona fide purchaser of the tax title. Although such title was purchased for a valuable consideration, he cannot be considered a bona fide purchaser within the meaning of the act of 1896 for two reasons: First, at the time of his purchase the United States land office records showed a valid desert land entry thereon; second, at that time the patent under which he claims had been declared null and void, and the decree was of record in the office of the clerk of the United States district court of Los Angeles. Plaintiff visited the land and found no evidence of occupation; but this did not make him a bona fide purchaser. His rights, then, must depend upon the decree to quiet title, in which, in effect, he secured the title of the Schells, but not by a bona fide purchase. If they had title plaintiff should prevail in this case. To establish this it was necessary for plaintiff to prove that they or their predecessors were purchasers in good faith.

The only evidence on that subject is the recitals of consideration in the various conveyances and the fact that in the suit to invalidate the patent Nathan Cole, Jr., was held to be a bona fide purchaser as to certain

other land in the grant to him. Recitals in these conveyances are not competent evidence against third persons, not parties or privies thereto. Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 437, 12 Sup. Ct. 239, 35 L. Ed. 1063; Long v. Dollarhide, 24 Cal. 218; 4 Ency. of Ev. 188, § 12; 22 C. J. 859, § 1028. The decree in favor of Nathan Cole, Jr., declaring him to be a bona fide purchaser of land other than that in his deed to Sargent, plaintiff's predecessor, has no tendency to prove he was such purchaser as to other land. Moreover, the validity of his title to the land involved here was expressly reserved by the decision. Plaintiff relies on certain sections of our code. Section 1962, subd. 2, Code Civ. Proc.; sections 1614, 1615, Civ. Code. See, also, section 1963, subd. 39, Code Civ. Proc. But these sections merely relate to the sufficiency of the consideration to sustain the deed. It follows that plaintiff failed in an essential particular to establish his title.

Appellant also claims title because the United States, having acquired title to the lands by forfeiture in 1886, the title passed under its previous patent of 1885 to the Southern Pacific Railroad under the rule of our Civil Code, to the effect that where a grantor acquires title subsequent to his grant it passes to the grantee. Civ. Code, § 1106. This rule does not apply to a government patent. If so, all the decisions in the litigation between the United States and the Southern Pacific Railroad Company were erroneous.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; LAWLOR, J.

OLNEY, J. (concurring). I concur for the following reasons: The plaintiff and the defendants claim under conflicting rights from the United States. The plaintiff's chain of title runs back to a patent by the government to the Southern Pacific Railroad Company. That patent was void, but by the act of Congress of March 2, 1896 (29 U. S. Stats. 42), the title of any bona fide purchaser for value from the railroad company was confirmed to him. This act was in effect a grant to bona fide purchasers for value of such portions of the land as they had purchased from the railroad company. All other lands covered by the patent were public lands open to entry.

The defendants claim under entry upon the particular lands in question here as public lands open to entry, the entry being made in 1910. No question is made but that, if these lands were in fact public lands when entry was so made, the entry was valid and the defendants have the superior right. It is evident that whether or not they were public lands open to entry turns on whether or not at that time the title or claim of title of the railroad company had come into the hands of a bona fide purchaser for value. The plaintiff purchased subsequently, so that whether he purchased for value or not is immaterial. Unless some predecessor of his in his chain of title prior to 1910 was a bona fide purchaser for value, the lands were public lands when the defendants' entry was made. The burden of showing this rested on the plaintiff. No evidence whatever was introduced upon the point, unless the deeds of mesne conveyance from the railroad company down may be so considered. They each recite a consideration, and a consideration would also be presumed for the purpose of supporting them.

But, as the main opinion states, neither the presumption for that limited purpose nor a recital of consideration can operate to prove that the grantees were bona fide purchasers for value. The result is that it must be held that the lands were public lands open to entry at the time of the entry under which the defendants claim, and that the plaintiff has no interest therein.

I concur: SHAW, J.

49 Cal. App. 44

Ex parte TIFFANY. (Cr. 737.)

(District Court of Appeal, Second District, Division 2, California. Aug. 10, 1920.)

Habeas corpus ⊂=94—Recitals of service and appearance by parent in juvenile court cannot be impeached.

Recitals, in a judgment of the juvenile court declaring a minor to be a ward of the court, that the citation was served on the parent as required by Juvenile Court Act, and that the parent appeared, cannot be impeached on collateral attack by habeas corpus proceedings to secure the release of the minor.

Application by James E. Tiffany for a writ of habeas corpus, directed to May C. Sprague, as Matron of the Maude Booth Home, to secure release of William McFarland Tiffany from the custody of the juvenile court. Writ discharged.

W. W. Judd, of Los Angeles, for petitioner.
Paul Schenck and Richard Kittrelle, both of Los Angeles, for respondent.

WELLER, J. The petition recites that James E. Tiffany is the father and proper guardian of William McFarland Tiffany, who is restrained of his liberty by the judge of the juvenile court of Los Angeles county, the referee, probation officer, and May C. Sprague, matron of Maude Booth Home in

Los Angeles. The detention is alleged to be illegal, in that a petition under the provisions of the Juvenile Court Act was filed on August 28, 1919, and the boy found by the referee to be a ward of the juvenile court, without the knowledge of this petitioner, and that no citation was served upon the father as required by law.

The respondent May C. Sprague, matron of the Maude Booth Home, answered to the writ, stating that the boy was in her custody by virtue of a judgment entered in the juvenile court on September 5, 1919. Attached to her answer is a certified copy of the judgment, which recites that notice was served on James E. Tiffany more than 24 hours before the hearing, and that he was present at the time specified in the citation. By the judgment the boy is declared a ward of the court and ordered committed to the Maude Booth Home, in custody of the probation officer.

The Juvenile Court Act (Stats. 1915, p. 1225) provides that upon the filing of a petition, stating that any person under the age of 21 years has no parent or guardian willing to exercise or capable of exercising proper parental control over him, a citation shall issue and be served on the parent or guardian having custody of the child at least 24 hours before the time therein specified for a hearing. Service of citation may be waived by voluntary appearance, and entry thereof made in the minutes of the court, or by written waiver filed with the clerk. On the hearing, the child may be declared a ward of the court and committed to the custody of the probation officer as in the act provided, subject to be returned to the court for further proceedings whenever deemed necessary or desirable. Any order so made by the court may be changed, modified, or set aside, as to the judgment of the court may seem proper.

The judgment in this case recites that the steps prerequisite to jurisdiction were taken, and on collateral attack the recitals are conclusive on this court. The petitioner in this proceeding is not permitted to prove that any statement contained in the judgment is false, and no evidence can be received to contradict the judgment, except it be in a proceeding in the superior court, brought directly for that purpose. Ex parte Sternes, 77 Cal. 156, 19 Pac. 275, 11 Am. St. Rep. 251. The judgment being valid on its face, it cannot be impeached in this proceeding.

Writ discharged.

We concur: FINLAYSON, P. J.; THOMAS, J.

49 Cal. App. 795

Ex parte TIFFANY. (Cr. 738.)

(District Court of Appeal, Second District, Division 2, California. Aug. 10, 1920.)

Application by James E. Tiffany for a writ of habeas corpus, directed to May C. Sprague, as Matron of the Maude Booth Home, to secure the release of Milo James Tiffany from the custody of the juvenile court. Writ discharged.

W. W. Judd, of Los Angeles, for petitioner.
Paul W. Schenck and Richard Kittrelle, both of Los Angeles, for respondent.

PER CURIAM. The facts in this proceeding are in all material respects the same as in the Matter of William McFarland Tiffany (Crim. No. 737) 192 Pac. 547, this day decided.

For reasons there given, the writ is discharged.

49 Cal. App. 795

Ex parte TIFFANY. (Cr. 736.)

(District Court of Appeal, Second District, Division 2, California. Aug. 10, 1920.)

Application by James E. Tiffany for a writ of habeas corpus, directed to May C. Sprague, as Matron of the Maude Booth Home, to secure the release of Gertrude Arline Tiffany from the custody of the juvenile court. Writ discharged.

W. W. Judd, of Los Angeles, for petitioner.
Paul W. Schenck and Richard Kittrelle, both of Los Angeles, for respondent.

PER CURIAM. The facts in this proceeding are in all material respects the same as in the Matter of William McFarland Tiffany (Crim. No. 737) 192 Pac. 547, this day decided.

For reasons there given, the writ is discharged.

49 Cal. App. 50

BLANEY v. CLINE, Sheriff. (Civ. 3390.)

(District Court of Appeal, Second District, Division 2, California. Aug. 10, 1920.)

Appeal and error ⊜622—Time for filing transcript not expired, where proceeding for settlement of exceptions pending.

Under rule 2 of the Supreme Court and District Court of appeal (176 Pac. vii), where appellant's proceeding for settlement of the bill of exceptions is pending in the superior court, the time for filing transcript has not expired; counsel for appellant having been reasonably diligent in pressing hearing on the settlement, and any delay having been occasioned by the absence of respondent's attorney from the county.

Action by Hattie F. Blaney against John C. Cline, Sheriff of Los Angeles County. From a judgment for defendant, plaintiff appealed, and defendant moves to dismiss. Motion denied.

Harold Ide Cruzan, of San Francisco, and Moote & Patterson, of Los Angeles, for appellant.

H. L. Sacks, of San Francisco, for respondent.

WELLER, J. Motion to dismiss appeal. The notice of motion was served on appellant June 30, 1920, and was heard on July 12, 1920. Attached to the notice is a certificate of the clerk of the superior court, stating that the notice of appeal was filed March 3, 1919, that an order granting five days additional time to prepare a bill of exceptions was filed March 13, 1919, and that no further action was taken.

Counsel for appellant presented an affidavit setting forth that his proposed bill of exceptions, and amendments thereto, suggested by respondent, was filed with the clerk of the court in which the action was tried on April 7, 1919, and that no date has been set by the judge for settling the bill. The affidavit states that at one time affiant appeared in court with Joseph Pacht, who claimed to represent respondent's attorney, and requested the judge to settle the bill, whereupon the court was informed by Pacht that he was going to San Francisco, where respondent's attorney was then living, and would there secure sufficient information upon which to act. On two subsequent occasions affiant communicated with Pacht regarding the matter, and was finally informed that respondent's attorney was expected to return to Los Angeles soon. The affidavit states that respondent's attorney returned to the city several months prior to the filing of the notice of motion, but that affiant was not aware of his return until about June 1, 1920, when affiant met him on the street and requested that he take up the matter in court. This counsel refused to do, informing affiant that he intended to move to dismiss the appeal. No affidavit in opposition to the statements of appellant's attorney was filed.

The ground of the motion is that the appeal has not been perfected by filing the transcript within the time provided by law. Rule 2 of the Supreme Court and District Courts of Appeal Rules (176 Pac. vii) provides that appellant, within 40 days after perfecting his appeal, shall file his transcript, but that, if a proceeding for the settlement of a bill of exceptions which may be used in support of the appeal is pending, the time shall not begin to run until the settled and authenticated bill of exceptions has been filed. The record here shows that appellant has complied with the terms of section 650 of the Code of Civil Procedure, by filing with the clerk the proposed bill and amendments, and that the delay in presenting the same to the judge for settlement was occasioned by the absence of respondent's attorney from the county. Counsel for appellant appears to have been reasonably diligent in pressing a hearing on the settlement, having more than once requested action from the other side. It is true that he might have insisted on the settlement of the bill, or compelled the judge to act, by mandate; but under the circumstances of the case we do not deem that he was guilty of negligence in failing to take such steps. As the proceeding for settlement of the bill is still pending in the superior court, the time for filing the transcript has not expired.

Motion denied.

We concur: FINLAYSON, P. J.; THOMAS, J.

49 Cal. App. 52

COLE v. WOLFSKILL et al. (Civ. 3179.)

(District Court of Appeal, Second District, Division 2, California. Aug. 10, 1920. Hearing Denied by Supreme Court Oct. 7, 1920.)

1. Physicians and surgeons ⊜12—Relation to patient is confidential, and transactions will be scrutinized.

The relation between physician and patient is confidential, and the law demands the strict good faith in all transactions arising therefrom, and will scrutinize closely all dealings between the parties; but, if it is satisfactorily shown that the patient has freely and voluntarily disposed of his property in accordance with his wishes, and his capacity is apparent, the existence of the confidential relation will not prevent a disposition to the physician.

2. Contracts ⊜88—Mere fact of confidential relationship does not overcome presumption of consideration.

Under Civ. Code, § 2235, creating a presumption that transactions by which a trustee

obtains any advantage from his beneficiary are without consideration and under undue influence, the mere fact that a confidential relationship existed between the parties is not sufficient to overcome the presumption of consideration for a written instrument created by Civ. Code, §§ 1614, 1615, but it must also be made to appear that the relationship was used to obtain an unfair advantage, or that the confidence was violated.

3. Physicians and surgeons ⊂=24(4)—Witnesses ⊂=139(14)—Instructed verdict, in action on patient's note, proper; plaintiff incompetent to testify in action on decedent's note for fees.

In an action on a note for physician's fees brought against the executors of the maker, the physician's testimony as to the transaction is excluded by Code Civ. Proc. § 1880, and, although it does not appear that the physician disclosed to the patient the amounts which he paid to his assistants for the services, an instructed verdict for plaintiff is proper, where it appears that the patient was in full possession of her faculties, acting freely and voluntarily.

4. Physicians and surgeons ⊂=21—Where no undue influence, adequacy of consideration for patient's note immaterial.

In the absence of undue influence, the adequacy of consideration for a patient's note to her physician in payment of his account is immaterial.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by George L. Cole against Matt A. Wolfskill and another as executors of the will of Susanne B. Wolfskill, deceased. Judgment for plaintiff on instructed verdict and defendants appeal. Affirmed.

Davis & Rush, G. Harold Janeway, Hunsaker & Britt, and Le Roy M. Edwards, all of Los Angeles, for appellants.

Wheaton A. Gray, William Alvin Bowen, and E. S. Williams, all of Los Angeles, for respondent.

WELLER, J. This appeal is from a judgment entered on an instructed verdict. The complaint alleged that the decedent in her lifetime executed to plaintiff her promissory note for the sum of $12,500, and that a claim based on such note was presented to the defendants, as executors, and rejected. In the answer defendants pleaded the relationship of physician and patient between the decedent and plaintiff, and that the execution of the note was procured by undue influence and without adequate consideration.

From the testimony of witnesses at the trial, it appears that decedent was a widow, about 71 years of age, and without business experience until after her husband's death, when she administered his large estate, with the assistance of agents and attorneys. She was of a confiding and generous disposition, possessed of a strong will, and was bright, capable, and clear-headed. The plaintiff had been for many years her family physician and a neighbor; but though their relations were very friendly, there was nothing of a business nature between them prior to the execution of the note in question, except with regard to his fees, which she had paid. In May, 1915, the doctor amputated one of decedent's legs with the assistance of three other physicians, whom he called for the purpose. Mrs. Wolfskill recovered sufficiently from the effect of the operation to make a trip to the Orient, accompanied by a servant, returning some time in December, 1915. Subsequent to her return she contracted the illness which resulted in her death in January, 1916. During her convalescence after the operation, and in the month of July, 1915, the doctor visited decedent one day, and, in the presence of the nurse, jokingly inquired of Mrs. Wolfskill how much he owed her for his visits, to which she responded by inquiring how much she owed him. At this point the nurse left the room, and did not hear the conversation that ensued. Several days later the doctor again called, bringing with him the note, which Mrs. Wolfskill signed. At the time of the signing of the note decedent offered to secure payment thereof by a mortgage on her Pasadena home, which offer, however, the doctor rejected, stating that her signature would be sufficient and that she should keep her home clear. The doctor also informed Mrs. Wolfskill that he had paid the other physicians, and on delivery of the note to him, gave her a receipt for $12,500 for professional services, which, by its terms included payment of the three assistants. After his departure Mrs. Wolfskill remarked to the nurse that she thought the charge reasonable, that she would not have been surprised if it had been $20,000, and expressed appreciation of what the doctor had done for her.

The two sons of the decedent, executors of her will, testified that their mother had a clear, strong mind, a positive character and that she was a good house manager. She had administered her husband's estate, which was appraised at $2,600,000, in a satisfactory manner and no criticism was made of the conduct of any of her business affairs. From this undisputed testimony it is sufficiently established that Mrs. Wolfskill was fully capable of contracting, that the plaintiff had rendered her valuable services, and that the note was voluntarily executed by her in settlement therefor, in the belief that the charge was reasonable. There was no evidence introduced tending to show any incapacity or weakness of mind on the part of Mrs. Wolf-

skill, or that she was unduly influenced by the doctor in making the note.

It is contended by appellants that, by reason of the proof that the note was executed by a patient to her physician during such relationship, the presumption arose that it was obtained by undue influence and without sufficient consideration, and that the burden then shifted to plaintiff to prove that the transaction was voluntary and based upon an adequate consideration.

[1] It undoubtedly is the established rule that the relation of physician and patient is confidential, and the law demands the strictest good faith and fair dealing in all transactions arising from that relationship. Once this relation is shown to exist, all dealings between the parties will be closely scrutinized, to ascertain if the confidence of the trusting party has been betrayed, or his mind unduly influenced to his prejudice. But when satisfactory proof has been made that a person has freely and voluntarily disposed of his property in accordance with his wishes, and his capacity and volition are apparent, the existence of the confidential relation will not prevent the consummation of his desires. Estate of Wickes, 139 Cal. 195, 72 Pac. 902.

[2] Under the provisions of section 2235 of the Civil Code, all transactions by which a trustee obtains any advantage from his beneficiary are presumed to be entered into by the latter without sufficient consideration and under undue influence. It has been held that the fact must be alleged and proved that the client has suffered some injury through the abuse of confidence by his attorney. If it were enough to show that a contract was entered into during the relationship, and that thereupon the presumption would arise that it was fraudulent, it would follow either that all contracts between an attorney and client or physician and patient are voidable, or that a party is entitled to relief on the ground of fraud without showing that damage resulted from the fraud. Kisling v. Shaw, 33 Cal. 425, 91 Am. Dec. 644. A written instrument is presumptive evidence of consideration (section 1614, Civ. Code), and the burden of showing want of consideration to support an instrument lies with the party seeking to invalidate or avoid it (section 1615, Civ. Code). To overcome the presumption of consideration evidenced by a writing, it is not sufficient to show merely that the confidential relation existed, but it must be made to appear that the relationship was used to obtain an unfair advantage, or that the confidence was violated. Dimond v. Sanderson, 103 Cal. 97, 37 Pac. 189. The rule is less stringent where it appears that the trustee was not advising the beneficiary in the conduct of business, but assumes a hostile attitude, and is urging the payment of a debt due himself. Johnson v. Fesemeyer, 3 DeG. & J. 22.

The result of a drastic application of the rule invoked here would be to preclude a physician from bargaining with a patient in regard to his fees, and to deprive persons occupying confidential relations of the power of contracting with each other for compensation, which, in all cases, would of necessity be fixed by a court or jury regardless of the circumstances under which the parties arrived at an agreement between themselves.

[3] Counsel argues that it does not appear in this case that Mrs. Wolfskill was informed as to the amounts paid to other physicians or what services were performed by the plaintiff, although peculiarly within his knowledge. It must be borne in mind that this is an action to recover a debt due from an estate; and the lips of the plaintiff are sealed as effectually by the terms of section 1880, Code of Civil Procedure, as the voice of the decedent is stilled by the Grim Reaper. What he knows can never be revealed to an earthly tribunal; and what occurred between the parties must ever remain undisclosed to mortal judge.

[4] But it does appear by the undisputed evidence that the decedent was in full possession of all her faculties, acting freely and voluntarily, with knowledge of all the doctor had done for her during her illness, and in grateful appreciation of his services she executed the note in payment of his account, believing it to be a reasonable charge. In the absence of undue influence, the adequacy of the consideration is immaterial. Silveria v. Alexander, 25 Cal. App. 506, 144 Pac. 303.

Under the circumstances, we are of the opinion that the trial court was justified in its instruction to the jury to find for the plaintiff.

Judgment affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

49 Cal. App. 56

BAKER v. SLOCUM. (Civ. 3268.)

(District Court of Appeal, Second District, Division 2, California. Aug. 13, 1920.)

Appeal and error ⊂=373(1)—Under the alternative method, notice of appeal need not be accompanied by the undertaking, regardless of how the transcript is made up.

Under Code Civ. Proc. § 941b, the filing of a notice of appeal without the undertaking required by section 940, gives the appellate court jurisdiction, and after the jurisdiction has thus vested appellant may elect to prepare his transcript under section 950, instead of by the alternative method authorized by section 953a, without affecting the validity of his appeal.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by S. A. Baker against Thos. A. Slocum. Judgment for the plaintiff, and

defendant appeals. Motion to dismiss the appeal denied.

James R. Jaffray, of Los Angeles, for appellant.

Arthur H. Blanchard, of Santa Paulo, for respondent.

WELLER, J. Respondent moves to dismiss the appeal because of the failure of appellant to file the undertaking for costs required by section 940 of the Code of Civil Procedure.

Notice of appeal was filed with the clerk of the superior court November 16, 1919, and the printed transcript, containing the judgment roll and two bills of exceptions, was filed in this court on December 24, 1919.

The filing of the notice of appeal without an undertaking complied with the provisions of section 941b of the Code of Civil Procedure, and thereupon this court acquired jurisdiction of the appeal. After jurisdiction is thus vested in this court, the appellant may elect to prepare his transcript under section 950, Code of Civil Procedure, instead of adopting the alternative method permitted by section 953a of the same Code, without affecting the validity of his appeal. Lang v. Lilley & Thurston Co., 161 Cal. 295, 119 Pac. 100.

Motion denied.

We concur: FINLAYSON, P. J.; THOMAS, J.

49 Cal. App. 4

PEOPLE v. FUSKI. (Cr. 525, 2333.)

(District Court of Appeal, Third District, California. July 31, 1920. Opinion of Supreme Court in Bank Denying Hearing, Sept. 29, 1920.)

1. Prostitution ⊂=1—Elements of offense of "pimping" stated.

To constitute the offense of "pimping," under St. 1911, p. 10, the defendant must be a male person, have knowledge that a certain female person is a prostitute, and there must be earnings from her prostitution, and defendant must derive his support and maintenance in whole or in part from such earnings, knowing them to have been the proceeds from prostitution.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Pimp.]

2. Indictment and Information ⊂=60—Indictment must enable accused to suitably prepare defense.

The main purpose of requiring the various elements of a crime to be set out in an indictment or information is to enable the defendant to suitably prepare his defense, being presumed to be innocent, and therefore to have no independent knowledge of the facts that constitute the offense.

3. Indictment and information ⊂=101—Sex of subject of crime must be alleged, if necessary element.

If a crime be of such character that it can be committed only against the person of a male being, or of a female, the sex of such third person must plainly appear in an indictment or information.

4. Prostitution ⊂=3—Sex of accused need not be alleged in indictment for pimping.

In a prosecution for pimping, under St. 1911, p. 10, an allegation that accused is a male person would be of no aid to him, and it is not necessary to so allege, being a matter peculiarly within his own knowledge.

5. Criminal law ⊂=742(1)—Credibility of witnesses for jury.

The truth or falsity of testimony of men of loathsome character is for the jury.

6. Criminal law ⊂=1032(7)—Objection of variance should be made on trial.

Where there was no objection at the trial that there was a variance between the proof and averments of the indictment, and no request to instruct the jury to acquit on such ground, it is too late to make such point on appeal.

7. Prostitution ⊂=3 — That one accused of pimping was manager of house mere incident, not necessary to be alleged.

In a prosecution for pimping, under St. 1911, p. 10, the gist of the offense was in receiving money from a prostitute for defendant's support, knowing the source from which it came, and the fact, if it existed, that defendant was the keeper or manager of the house, was a mere additional incident, not necessary to be alleged.

8. Criminal law ⊂=404(1)—Sex could be determined by jury from appearance.

In a prosecution for pimping, under St. 1911, p. 10, a claim that there was no evidence that defendant was a male person, or that the alleged prostitute was a female person, was of no merit, where the jurors had the parties before them.

9. Criminal law ⊂=306(1)—Court not required to indulge in repetitions in directing jury.

The court cannot be expected to indulge in vain repetitions in directing the jury in a criminal case.

10. Criminal law ⊂=834(2)—Instructions need not be in exact language of request.

If an accused proposes an appropriate instruction, it should be given, but not necessarily in the exact language as proposed.

11. Criminal law ⊂=1158(3)—For trial court to determine whether juror having opinion was qualified.

Where a juror in a criminal case stated that he had a definite opinion which it would take evidence to remove, but declared very clearly that he would entirely disregard such opinion and be guided solely by the evidence in the case, it was for the trial court to determine whether he was qualified juror.

12. Criminal law ⊜126(2)—Refusal of change of venue justified.

Where, in refusing a motion for a change of venue in a prosecution for pimping, the court stated that it would be overruled temporarily, and a right to renew would be given at any time after it should appear that the defendant could not have a fair and impartial trial, and the record of the impanelment of the jury shows beyond question that no greater difficulty than ordinarily occurs was encountered, and that a fair and impartial jury was selected, the court was justified in denying the motion.

13. Criminal law ⊜627½ — Official reporter not required to deliver to accused transcript of statements made in district attorney's office.

In a criminal prosecution, there was no error in refusing to require the official reporter to deliver to accused's counsel a transcript of his notes of statements made by the prosecuting witness in the office of the district attorney.

On Hearing in Supreme Court.

14. Prostitution ⊜3—Indictment for pimping need not allege that accused wholly or in part derived support from prostitute.

In a prosecution for pimping, under St. 1911, p. 10, it was entirely unnecessary to allege in the indictment whether the defendant "wholly" or "in part" derived support and maintenance from the prostitution of the woman named; it being entirely sufficient to allege that the defendant "did then and there willfully and unlawfully, feloniously, and knowingly derive support and maintenance from the earnings and proceeds," etc.

15. Prostitution ⊜3—Allegations as to knowledge by one accused of pimping held not fatally defective.

Allegation in an indictment, under St. 1911, p. 10, that accused, "knowing one E., a female person, to be a prostitute, did then and there willfully and unlawfully, feloniously, and knowingly derive support and maintenance from earnings and proceeds of the prostitution of said E.," etc., on the question of the knowledge of the defendant as to the source of the moneys, was at most only an imperfect allegation of a material fact, rather than of a total failure to set forth an essential element.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Joe Fuski was convicted of an offense, and from the judgment, and an order denying his motion for new trial, appealed. Affirmed in the District Court of Appeal, and hearing denied in the Supreme Court.

Martin I. Welsh, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones Deputy Atty. Gen., for the People.

BURNETT, J. Appellant was convicted of the crime denounced by an act of the Legislature passed in 1911 (Stats. 1911, p. 10). The charging part of the indictment is as follows:

"The said Joe Fuski on the —— day of November, A. D. 1919, at the county of Sacramento, in the state of California, and before the finding of this indictment, did then and there knowing one Esther Greely, a female person, to be a prostitute, did then and there willfully and unlawfully, feloniously, and knowingly derive support and maintenance from the earnings and proceeds of the prostitution of said Esther Greely; she, the said Esther Greely, being then and there a prostitute."

There was no demurrer to the indictment, but a motion was made in arrest of judgment on the ground that the indictment is fatally defective. The points made on the appeal from the judgment and the order denying the motion for a new trial are:

"(1) That the matters alleged in the indictment do not constitute a crime or public offense. (2) That the evidence does not sustain or justify the verdict of conviction. (3) That the trial court erred in denying the defendant's motion for change of venue. (4) That the trial court erred in overruling the defendant's challenge to the talesman Benning. (5) That the court erred in refusing to permit Joseph E. Piepher, court reporter, to furnish defendant for the purpose of cross-examination, a transcript of the statements made by the prosecuting witness in the office of the district attorney. (6) The court erred in its instructions to the jury. (7) The court erred in refusing instructions requested by defendant."

[1] As stated by appellant, the elements or conditions that must exist to constitute the offense are: (1) The defendant must be a male person; (2) he must have knowledge that a certain female person is a prostitute; (3) there must be earnings from her prostitution; (4) the defendant must derive his support or maintenance in whole or in part from such earnings, knowing them to have been the proceeds from prostitution. These essentials, it is claimed, should, by suitable averment, appear in the indictment. Herein the first objection is that it is not alleged that defendant is a male person. The Attorney General answers that the fact is sufficiently implied in the use of the name "Joe." The authorities, though, including at least two decisions in this state, are generally opposed to that view. Ellis v. State, 65 Tex. Cr. R. 480, 145 S. W. 339; People v. Martin, 180 Ill. App. 578; People v. Carroll, 1 Cal. App. 2, 81 Pac. 680; People v. Allison, 25 Cal. App. 746, 145 Pac. 539; 22 Cyc. 343.

[2-4] It is manifest, however, that there is a distinction as to the importance and necessity of such allegation between the case of the defendant himself and that of a third party. The main purpose of requiring the various elements of a crime to be set out

in an indictment or information is to enable him to suitably prepare his defense. He is presumed to be innocent, and therefore to have no independent knowledge of the facts that constitute the offense. For instance, if the crime be of such character that it can be committed only against the person of a male being or of a female, of course the sex of said third party must plainly appear. But herein the allegation that the defendant is a male person would be of no aid to him, since that is a matter peculiarly within his own knowledge, and, whether guilty or innocent, he is equally apprised of his sex. From a practical standpoint it would be just as important to inform him that he is a human being as to allege that he is a male person. No doubt, indeed, he would be quick to resent the imputation that he is not a human being or that he is a female.

The other objections to the indictment are that it fails—

"to allege whether the defendant in whole or in part lived or derived his support or maintenance from the earnings or proceeds of the prostitution; also what sum or sums of money were received by him from such source for such purpose; and also that defendant knew, when he applied the money to his support and maintenance, that it was derived from the earnings and proceeds of the prostitution."

It may be conceded that the indictment is somewhat defective in all these respects, and that more care should have been exercised in its construction; but we are satisfied that is not fatally objectionable, and that no prejudice resulted to appellant from any of the imperfections in said pleading. We may add that the absence of a specific allegation as to whether defendant was wholly, or only partially, supported by said earnings, and as to what sum of money he thus received, constitutes the ground simply for a special demurrer, and was therefore waived. As to his knowledge that the money he obtained was derived from said source, while it is true that an explicit allegation to that effect would be desirable, yet no one would have any difficulty in understanding from the indictment as a whole that such was the intended charge of the pleader. The case is one of an imperfect allegation of a material fact rather than of a total failure to set forth an essential element. People v. Griesheimer, 176 Cal. 44, 167 Pac. 521.

Finally, as to all the criticisms of the indictment, the suggestion may be made that any defect therein was rendered innocuous and is shown to have been without prejudice by the evidence at the trial. People v. Bonfanti, 181 Pac. 80; Reid v. Superior Court, 186 Pac. 634.

It is not an unfair inference from the evidence that appellant derived his support, in part at least, from the illicit earnings of said prostitute. Various circumstances detailed by the witnesses indicate such to be the fact. There is also the positive testimony of one Joe Costello, as follows:

"Q. What, if anything, did Esther do when Joe and she and you went together in the front room? A. Well, one time she set down there on the bed and played with the dog, and another time she came in and gave him 50 cents. Q. Gave who 50 cents? A. Joe Fuski. Q. That is the defendant here? A. Yes, sir. Q. What did Joe Fuski do with the 50-cent piece? A. Put it in his pocket."

It also appears from the testimony of this same witness that a portion of said earnings was placed in a certain trunk and a part of that money was delivered to appellant, who "spent it buying something to eat and gambling."

[5] True, appellant claims that Costello was an accomplice, and that his testimony, therefore, required corroboration. But it cannot be said as a matter of law that he participated or was concerned in the commission of the particular offense charged against appellant. At least, it was a debatable question, and proper to be submitted to the jury. People v. Lawlor, 21 Cal. App. 63, 131 Pac. 63. Unquestionably the witness appeared in rather an unenviable light. He would not be selected as a model for a Sunday school class, but even men of the most loathsome character sometimes tell the truth, and we can see nothing incredible in his statements. The jury undoubtedly believed him, and they were apparently justified in doing so. In this connection, we may state that the court was warranted in declining to give an instruction that Costello was an accomplice, but properly left it for the jury to determine under the general instructions given on the subject.

Another claim of appellant is that "the evidence in the case, taken most strongly against defendant, goes no further than to show that the money paid to him by the prosecuting witness, Esther Greely, was money charged her by the keeper and manager of a house or place where prostitution was practiced and allowed," and that this is an entirely distinct offense from that charged in the indictment. Appellant concludes that there was a fatal variance between the proof and the averments of the pleading, and the judgment must be reversed for that reason.

[6, 7] As to this contention it may be said that no such objection was made at the trial, nor was the court requested to instruct the jury to acquit on said ground. In fact, the case was tried upon the theory that this particular condition was covered by the indictment, and it is now too late to make the point. Moreover, the evidence introduced by the defendant was to the effect that he was not the manager or keeper of the house, and hence there was a conflict as to that question. Besides, the gist of the of-

fense was in receiving such money for his support, knowing the source from which it came, and the fact, if it existed, that he was the keeper or manager of the house, was a mere additional incident not necessary to be alleged.

[8] Appellant is clearly in error in the claim that "there is no evidence that defendant is a male person, nor that Esther Greely is a female person." In the first place, the jurors had before them these parties, and from their appearance, no doubt, their sex could be determined. People v. Goldenson, 76 Cal. 328, 19 Pac. 161. Moreover, it does appear very clearly, from the use of pronouns and otherwise, that Joe was and is a male, and Esther a female. Counsel for appellant will not resent the kindly suggestion that his talents might be better employed than in urging a point of so little merit.

[9, 10] Appellant complains of the action of the court in refusing to give certain proposed instructions, but after an examination of the charge we are satisfied that every principle of law necessary for the enlightenment and guidance of the jury was clearly and accurately presented by the trial judge. The court could not be expected to indulge in "vain repetitions" in directing the jury. If the defendant proposes an appropriate instruction, it should be given, of course, but not necessarily in the exact language as proposed. To show how insubstantial is the criticism of appellant in this respect, we notice that he complains because of the court's refusal to instruct that the prosecution must prove that the defendant was a male person, and that he derived support in whole or in part from money received from said Esther Greely, and yet we find this direction to the jury:

"The court therefore instructs you that, before you can find the defendant guilty of the crime charged in the indictment herein, you must be satisfied to a moral certainty and beyond a reasonable doubt: (1) That the defendant is a male person, and that Esther Greely is a female person; (2) that the said Esther Greely was at the time and place as charged in the indictment a prostitute; (3) that the defendant, at the time and place as charged in the indictment, knew of his own personal knowledge that the said Esther Greely was then and there a prostitute; (4) that the said defendant did, as charged in the indictment, derive support or maintenance in whole or in part from the earnings or proceeds of the prostitution of such prostitute, and that the defendant knew, as charged in the indictment, that such earnings or proceeds so received by him from her were the earnings or proceeds of the prostitution of such prostitute; and (5) that the defendant used the same for his own support or maintenance, either in whole or in part, all as charged in the indictment herein. Should you entertain a reasonable doubt as to all or any of the matters set forth in the indictment, or in this instruction set forth, then you will return a verdict of not guilty."

[11] The court committed no error in overruling the challenge to the juror Benning. While he at first stated that he had a definite opinion in the case, which it would take evidence to remove, he subsequently declared very clearly that he would entirely disregard said opinion, and be guided solely by the evidence in the case. It was for the trial court to determine whether he was a qualified juror. People v. Ryan, 152 Cal. 371, 92 Pac. 853.

[12] There is no reason to hold that the court abused its discretion in denying the motion for a change of venue. In making its ruling the court said:

"Now, the motion will be overruled temporarily, and the right to renew will be given at any time, if, during the subsequent impanelment of the jurors, it should appear that the defendant cannot have a fair and impartial trial in this county."

It may be stated that a large number of affidavits and of counter affidavits was filed on the hearing of the motion, upon which conflicting opinions might be based as to the probability of securing a fair jury for the trial. But the record of the impanelment of the jury shows beyond question that no greater difficulty than ordinarily occurs was encountered and that a fair and impartial jury was selected. In view of all the circumstances, the court was entirely justified in denying the motion. People v. Kromphold, 172 Cal. 512, 157 Pac. 599.

[13] The last point made by appellant is that the court should have required the official reporter to deliver to defendant's counsel the transcript of his notes of certain statements made in the district attorney's office by said Esther Greely. The situation is similar to that discussed in People v. Glaze, 139 Cal. 158, 72 Pac. 965, and People v. Emmons, 7 Cal. App. 690, 95 Pac. 1032, and it is sufficient to refer to those decisions for an answer to appellant's contention.

Finally, it may be said that the importance of a careful examination of the record to ascertain if the defendant was justly convicted is emphasized by the nature of the charge made against him. The crime itself bespeaks such bestial depravity that even a formal accusation by a grand jury is likely to excite the aversion of the community against the person thus accused, and to make it difficult for him to secure a fair trial. With this possibility in view, we have given the proceedings very earnest attention, and we have no hesitation in saying that no right to which defendant is entitled under the law was invaded, that the trial was conducted decorously and legally, and that the verdict of the jury is amply supported.

The judgment and order denying the motion for a new trial are affirmed.

We concur: NICOL, Judge pro tem.; HART, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal of the Third Appellate District is denied.

[14, 15] We desire to say, in addition to what is said in the opinion, that we think that it was entirely unnecessary to allege in the indictment whether the defendant "wholly" or "in part" derived support and maintenance from the prostitution of the woman named therein, and that it was entirely sufficient in this regard to allege that the defendant "did then and there willfully and unlawfully, feloniously, and knowingly derive support and maintenance from the earnings and proceeds," etc. On the question of the knowledge of the defendant as to the source of the moneys, we entirely agree with the District Court of Appeal that the case at most is one of an imperfect allegation of a material fact, rather than of a total failure to set forth an essential element.

All concur.

48 Cal. App. 545

PEOPLE v. KENNEDY. (Cr. 715.)

(District Court of Appeal, Second District, Division 2, California. July 16, 1920.)

1. Criminal law ⊂688—Reopening of case for further evidence after motion to direct acquittal discretionary.

The reopening of a case for further evidence, even after motion by defendant to advise the jury to acquit, is within the trial court's discretion.

2. Criminal law ⊂687(2)—Reopening to permit state to introduce evidence not abuse of discretion.

In a prosecution for rape, action of the trial court in permitting the district attorney, after he had concluded his opening argument to the jury, to reopen the case to introduce direct evidence that prosecutrix was not defendant's wife, *held* not an abuse of discretion.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

R. W. Kennedy was convicted of rape, and from the judgment, and an order denying his motion for new trial, he appeals. Affirmed.

J. Morgan Marmaduke, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and Thomas A. Wood, of Los Angeles, for the People.

FINLAYSON, J. Upon an information charging him therewith, defendant was convicted of rape, alleged to have been committed upon a female, a young girl of the age of 14 years, who was not his wife. From the judgment, and an order denying his motion for a new trial, defendant appeals.

[1] It is urged that the trial court committed prejudicial error in permitting the district attorney, after he had concluded his opening argument to the jury, to reopen the case for the purpose of introducing direct evidence that the prosecutrix was not the wife of defendant. The reopening of a case for further evidence, even after a motion by defendant to advise the jury to acquit, is within the discretion of the trial court. State v. Meister, 60 Or. 469, 120 Pac. 406; State v. Hornaday, 67 Wash. 660, 122 Pac. 322; Froman v. Com., 19 Ky. Law Rep. 948; 42 S. W. 728; State v. Murphy, 9 Nev. 394; 16 C. J. 871–873. See, also, Cousins v. Partridge, 79 Cal. 228, 21 Pac. 745; People v. Benc, 130 Cal. 165, 62 Pac. 404; People v. Lewis, 124 Cal. 553, 57 Pac. 470, 45 L. R. A. 783; People v. McPherson, 6 Cal. App. 265, 91 Pac. 1098.

[2] The record here discloses no abuse of the trial court's discretion. The witnesses, it is true, had been dismissed, but defendant made no request for a reasonable continuance in order that he might recall any witness to refute the evidence that the prosecutrix was not his wife. Moreover, defendant's own testimony, while a witness in his own behalf, so far precludes any idea that the relation of husband and wife existed between himself and the prosecutrix, that we feel satisfied that had the court voluntarily suggested to him that he recall his witnesses, he would have put none of them upon the stand to testify that the prosecutrix was his wife. He testified that he knew nothing whatever of any of the members of the family of the prosecutrix, except that she was the sister of a married woman with whom he admitted having had illicit relations. Asked why, when he went to his room in the hotel where he was living, he left the prosecutrix outside to tramp around the street alone, his reply was: "She did not belong to me." All the circumstances of the case preclude the existence of the relationship of husband and wife. By no possibility could defendant have been prejudiced by the reopening of the case, that direct evidence might be given that the girl was not his wife.

There is no merit whatever in the appeal. The judgment and order denying defendant's motion for a new trial are affirmed.

We concur: THOMAS, J.; WELLER, J.

⊂For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

49 Cal. App. 18

PEOPLE v. TINNEN. (Cr. 530, 2334.)

(District Court of Appeal, Third District, California. Aug. 3, 1920. Opinion of Supreme Court in Bank, Denying Hearing Oct. 1, 1920.)

1. Homicide ⟸141(2)—Word "murder" may or may not be used in indictment for administering poison with intent to kill.

It is wholly unnecessary to use the word "murder" in charging the offense of administering poison with intent to kill under Pen. Code § 216, but if used in an indictment it could not change the offense to that of assault to commit murder, if the accusatory pleading otherwise charged the offense defined by section 216.

2. Criminal law ⟸241—Commitment held one for administering poison with intent to kill, and not assault with intent to commit murder.

The words in a commitment, "assault with intent to commit murder," *held* merely an ineffectual or futile attempt on the part of the magistrate to characterize generically the character or nature of the crime charged in the complaint, which was that of administering poison with intent to kill.

3. Criminal law ⟸241 — Commitment and complaint to be read together.

A commitment and a complaint, on which it is indorsed, must be read together to ascertain for what offense accused is committed, where the commitment itself does not attempt to define the crime for which the accused is held, but merely in general language states that the accused is held for the crime charged in the complaint.

4. Homicide ⟸141(2) — Information for administering poison with intent to kill need not expressly allege that subject did not die.

An information, charging the offense defined by Pen. Code, § 216, of administering poison with intent to kill, need not allege that the act of administering the poison did not cause death, the very statement that the poison was administered "with the intent to kill" of necessity implying that death was not caused by the act.

5. Homicide ⟸141(2)—Information charged administering of poison with intent to kill and not assault to murder.

An information, charging administering of poison with intent to kill, "and murder," *held* to charge the crime of administering poison with intent to kill under Pen. Code, § 216, and not the crime of assault with intent to commit murder as defined by section 217; the word "assault" not being used.

6. Indictment and information ⟸63—Ultimate facts to be pleaded and nothing left to implication.

Sufficient facts must be directly alleged in a criminal pleading from which it can be determined that the acts complained of are wrongful and unlawful, and in construing an indictment or information nothing must be left to implication, intendment, or conclusion, and none but ultimate facts are to be pleaded, but when ultimate facts are alleged from which but one conclusion can follow, and which conclusion irresistibly follows from the facts so alleged, the pleading is not in violation of the rule if the conclusion is not expressly or directly alleged.

7. Criminal law ⟸1166½(8) — Overruling challenges for cause not reversible error, unless peremptory challenges were exhausted.

Errors committed in overruling challenges for cause are not grounds of reversal in a criminal case, unless it is shown that an objectionable juror has been forced upon the challenging party after he had exhausted his peremptory challenges.

8. Homicide ⟸257(1)—Evidence supporting conviction of administering poison with intent to kill.

In a prosecution for administering poison maliciously and with intent to kill, by the use of chloroform, under Pen. Code, § 216, evidence *held* sufficient to sustain conviction.

9. Criminal law ⟸761(8)—Instruction sufficiently left to jury question whether chloroform was poison.

In a prosecution for administering poison with intent to kill under Pen. Code, § 216, an instruction, "If you are satisfied beyond a reasonable doubt that the defendant did * * * administer chloroform to one C. by causing her to inhale the same, with the intent to kill said C., and that chloroform is a poison, then I instruct that it is your duty to find a verdict of guilty," *held* to sufficiently leave it to the jury to determine whether chloroform was a poison.

10. Homicide ⟸89(1)—Causing one to inhale chloroform was "administering poison" with intent to kill.

One causing another to inhale chloroform with intent to maliciously kill such person was guilty of "administering poison" to another within the meaning of Pen. Code, § 216, relating to administering poison with intent to kill.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Administer.]

11. Criminal law ⟸304(3)—Common knowledge that inhalation of certain narcotics will result in death.

It is a matter of common knowledge that there are narcotics which, through the process of inhalation, will produce sleep or a morbid condition of the nervous system, and which, in certain doses, will produce death.

12. Homicide ⟸292(2)—Not necessary to instruct jury to trace action of chloroform in prosecution for "administering poison."

In a prosecution under Pen. Code, § 216, for administering chloroform with intent to kill, it was not necessary to instruct the jury that they were required to trace the action of the chloroform in its effect upon specific organs of the body or the channels into or through which it was necessary to pass to produce death, since if the evidence showed that the chloroform was given in the usual mode of giving that narcotic, then it was "administered" by the defendant within the meaning of the statute.

13. Criminal law ⇐829(1)—No error in refusing instruction substantially covered.

There was no error in refusing to give a requested instruction, where the court in another instruction charged the jury on the matter covered substantially in the language of the requested instruction.

On Hearing in Supreme Court.

14. Criminal law ⇐1166½(3)—Disallowance of challenge forced objectionable juror upon accused.

Where subsequent to disallowance of challenge to juror for cause accused exhausted his peremptories, it cannot be said that a juror objectionable to him was not forced on him.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Albert Tinnen was convicted of administering poison maliciously and with intent to kill. From the judgment of conviction and an order denying his motion for a new trial, he appealed. Affirmed in the District Court of Appeals, and hearing denied in the Supreme Court.

James T. Matlock, of Red Bluff, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was informed against by the district attorney of Tehama county, in the superior court thereof, for the crime of administering poison to another person maliciously and with intent to kill said person. He was tried upon and convicted by a jury under said information, and he brings this appeal to this court from the judgment and the order denying his motion for a new trial.

The point first made by the appellant is that the court below erred in denying his motion to set aside the information on the ground that he had not been legally committed by a magistrate, and that he had not been committed by the magistrate for the offense charged in the information.

The information is founded on section 216 of the Penal Code, which is in language as follows:

"Every person who, with intent to kill, administers, or causes or procures to be administered, to another, any poison or other noxious or destructive substance or liquid, but by which death is not caused, is punishable by imprisonment in the state prison not less than ten years."

The point that the accused was not legally committed is founded upon the theory that there is a variance between the offense for which the defendant was committed and the offense set forth in the information. In fact, both of the two grounds upon which the motion to set aside the information was based involve practically the same question, to wit, whether the information states a different offense from that for which the defendant was committed by the magistrate.

Preliminarily, we may consider the point made by the Attorney General on the threshold of his discussion of the question now in hand, that there is not presented here a properly authenticated record upon the motion to set aside the information, and that therefore this court cannot review that question. The contention is that the complaint filed before the magistrate and the commitment issued are not authenticated according to the requirements of the law, and the rule respecting such records on appeal; hence, so it is argued, it does not appear from or in this record whether the court below, in hearing and deciding the motion to set aside the information, had before it and considered the document named. The record discloses that, in the proceeding on the motion, the complaint and the commitment were introduced in evidence, and we think it is sufficiently made to appear that the court considered said documents at the hearing and in the decision of the motion. But if it were necessary to concede that there is some doubt whether the record upon the motion to set aside the information fully complies with the rule, we shall nevertheless consider the merits of the question growing out of said motion and urged here on the order of the court denying the same.

The commitment is indorsed on the back of the complaint or deposition upon which the warrant of arrest was issued and the charge examined, and therefore, as will later be better understood, the decision of the question in hand will require a consideration of said complaint or deposition. That document reads:

"That said John Doe on the 6th day of February, 1918, and before the filing of this complaint at and in the city of Corning in the said county of Tehama, state of California, did willfully, unlawfully and feloniously and with malice aforethought, administer to one Margery Cockcroft a certain deadly poison, to wit, chloroform, with the unlawful and felonious intent then and there and thereby to willfully and with malice aforethought to kill and murder the said Margery Cockcroft, all of which is contrary to the statute in such cases made and provided, and against the peace and dignity of the people of the state of California."

The commitment is in the following words, the same being indorsed on the back of the complaint:

"It appearing to me that the offense of assault with intent to commit murder as charged in the within complaint has been committed, and that there is sufficient cause to believe the within named Albert Tinnen charged as John Doe in the within complaint is guilty thereof, I order that he be held to answer the same, and

committed to the sheriff of the county of Tehama, and that he be admitted to bail in the sum of $5,000, and he is committed to the sheriff of Tehama County, until he give such bail."

[1-3] It will be observed that the complaint or deposition charges the crime of administering poison to one Margery Cockcroft with the intent to "kill and murder" said Margery Cockcroft. This is substantially in the language of section 216 of the Penal Code. The word "murder," it is true, is not in the section, and it is wholly unnecessary to use that word in charging the offense, but if used even in an indictment or an information, it could not change the offense from that denounced by section 216 to that of assault with the intent to commit murder if the accusatory pleading otherwise charged the offense defined by section 216. The commitment, however, specifically declared that the accused was held for trial for the crime charged in the "within complaint." This was sufficient as a commitment for the crime so charged. The words in the commitment immediately preceding that language, to wit, "assault with intent to commit murder," merely involved an ineffectual or a futile attempt on the part of the magistrate to characterize generically the character or nature of the crime charged in the complaint, and for which he had committed the accused. If a complaint or deposition filed before a magistrate were to charge, in legally appropriate language, a person with murder, and, that crime having been shown, the magistrate should in his commitment state, "It appearing to me that the crime of assault with intent to commit murder has been committed, as charged in the within complaint," etc., no one would for a moment contend that the commitment was not for murder, and that the erroneous designation in the commitment by the magistrate of the crime so charged would control or modify the general words indicating the crime for which the accused was held or justify the conclusion that the commitment was not for the crime specifically charged in the complaint on which the commitment was indorsed. The commitment and the so-called complaint on which it is indorsed must be read together to ascertain for what offense the accused is committed where the commitment itself does not attempt to define the crime for which the accused is held, but merely in general language states that the accused is held for the crime as it is charged in the complaint. In other words, in such case, the complaint itself becomes an essential part of the commitment, and necessarily we must look to the complaint to ascertain for what specific offense the accused has been committed. The information in this case is, as the counsel for the defendant concedes, substantially in the language of the complaint or deposition, on the back of which the order of commitment is indorsed. It, therefore, follows that, since the said complaint is made a part of the commitment or is by virtue of the language of the order of commitment an essential part thereof, the information sets forth the crime for which the defendant was committed.

It is next contended that the information does not state the offense defined by section 216 of the Penal Code, and that, therefore, it was error to overrule the demurrer thereto. It is further contended, in this connection, that the information is ambiguous and uncertain in that it cannot be ascertained therefrom whether therein it is sought to charge the crime defined by section 216 or that defined by section 217 of the Penal Code.

[4, 5] The attack upon the information on the general ground is based upon the proposition that that pleading fails or omits to state that death was not caused by the alleged act of administering poison to the complaining witness. There can be no doubt that the crime denounced by section 216 would not be committed if death followed from and as a result of the act of administering the poison as indicated by said section, and that the charge, when set up against a person in an indictment or an information, should, to state the offense as accurately as the statute describes it, allege that the act of administering the poison had not or did not cause death. But we think that, notwithstanding the failure to allege that fact, the information here nevertheless sufficiently shows that it was founded on section 216, and that it was not the intention therein to charge the offense of assault with intent to commit murder, as defined by section 217. In charging the last-named offense, it is not requisite to allege that death has not followed the assault as a result thereof. The mere allegation that the assault was made with the intent to kill and murder the assaulted person has always been held sufficient to state the offense, the very language of the accusatory pleading being itself sufficient to show by necessary implication that the death was not produced by the assault. And so in the case of an indictment or an information charging the offense defined by section 216, where there has been an omission to allege that the act of administering the poison did not cause death. The very statement that the poison was administered "with the intent to kill" the person to whom the poison was administered would of necessity imply that death was not caused by or was not the result of the act of administering the poison as so charged. The information here does not specifically charge an assault. It follows the language of section 216, except that it alleges that the poison was administered with the intent to kill "and murder" Margery Cockcroft, the words, "and murder," not being used in the section. The information could not well or reasonably be construed as attempting to charge the crime

of assault with intent to commit murder as defined by section 217, because, as shown, the word "assault" is not therein used. To have stated the crime of assault with intent to commit murder, it would have been necessary to use the word "assault," but unnecessary to use the words "administer a certain poison," unless the act of administering the poison was itself committed in such manner as to have constituted it an assault.

[6] In thus construing the information, we have not been unmindful of the rule that sufficient facts must be directly alleged in a criminal pleading from which it can be determined upon inspecting or examining it that the acts complained of are wrongful and unlawful, and that, in construing an indictment or an information, nothing must be left to implication, intendment, or conclusion. None but ultimate facts are to be pleaded in such a pleading, a rule which applies to all kinds of pleading, whether criminal or civil, but when ultimate facts are alleged in an indictment or an information from which but one conclusion can follow, and which conclusion irresistibly follows from the facts so alleged, it is not in violation of the rule above stated if the conclusion is not expressly or directly alleged. Where the averment in a criminal pleading is that a certain named human being was killed and murdered by the accused, it is not necessary to allege the obvious fact following from such averment that the person so killed and murdered had died, as the result of being killed and murdered. As we have pointed out, where an indictment charges that a person has assaulted another with the intent to kill and murder the latter, the obvious fact follows that death did not follow from said assault as a result thereof. This is the only conclusion that could logically follow from such an averment; hence it is not necessary to allege that the intent to murder was not fully carried out. But, without further discussion or illustration of our position, we feel well justified in concluding that the information in the present case states the offense defined by section 216 of the Penal Code in such manner as to render it reasonably free from the objections urged against it on either the general or special grounds specified in the demurrer.

[7] It is complained that errors were committed by the trial court in its action disallowing challenges of Jurors Greiner and Wilcox for cause or implied bias. While an examination of the answers returned by those persons to questions propounded to them on their voir dire examination touching their qualifications to serve as jurors in the case has convinced us that the rulings of the court denying the challenges could not be disturbed on the ground that either of the jurors was disqualified to sit in the case by reason of having read about and discussed the case with other persons prior to the date of the trial, still a conclusive reply to the contention that the court erred in the instances named is that, at the time said challenges were interposed, the defendant still had left to him two peremptory challenges, by means of which he could have removed from the jury box both of the jurors named. The record shows that the defendant used one of the two peremptory challenges on Greiner and retained or accepted Wilcox. It is the settled rule that errors committed in overruling challenges for cause are not grounds of reversal, unless it be shown that an objectionable juror has been forced upon the challenging party after he had exhausted his peremptory challenges. In other words, "if his peremptory challenges remain unexhausted, so that he might have excluded the objectionable juror by that means he has no ground of complaint." Thompson on Trials, § 120; People v. Durrant, 116 Cal. 196, 48 Pac. 78. Indeed, the rule has even been extended further than as restricted by Judge Thompson, for, referring to the rule as it has just been stated, the Supreme Court, in People v. Schafer, 161 Cal. 573, 577, 119 Pac. 920, 921, by Chief Justice Angellotti, says:

"It is true that in People v. Durrant, 116 Cal. 196, 48 Pac. 78, the defendant had not exhausted his peremptory challenges when the jury was completed, but the fact that he does exhaust them does not preclude the application of the rule above quoted. The important thing is that it does not appear that an objectionable juror was forced upon the defendant."

Here it is not shown that an objectionable juror was forced upon the defendant. Indeed, the contrary is affirmatively made to appear, since he had the opportunity of excusing Wilcox, as he had excused Greiner, but did not take advantage of that opportunity. We must presume, therefore, that Wilcox was perfectly satisfactory to him. At any rate, we cannot, after judgment, presume to the contrary. People v. Schafer, supra.

[8] The contention that the verdict is without sufficient support from the evidence cannot be sustained. There is no necessity for an extended review herein of the evidence to show this. It will suffice to state the facts briefly and in a general way.

In August, 1918, Mrs. Helen Kincaid, mother of the complaining witness, residing in Corning, and another daughter, Helen S. Kincaid, residing in the city of San Francisco, died in Corning, leaving estate, of which she disposed by will, in and by which she left the larger part thereof to Mrs. Cockcroft. Helen S. Kincaid, the other daughter, instituted proceedings in the superior court of Tehama county contesting the probate of the will, and the trial of the contest was set down for trial on the 6th day of February, 1918. The ground upon which the probate of the will was thus resisted was that the testatrix was induced to execute the testament

through undue influence practiced upon her by her daughter, Mrs. Cockcroft, the complaining witness in this case.

On the 5th day of February, 1918, the defendant appeared at a hotel in Corning. It is not necessary to go into details with regard to his movements from the time he arrived in Corning until the crime charged against him was committed on the day following that of his appearance in said town, evidence as to said movements going only to his identity and his presence in Corning when the alleged offense was committed, and we will therefore take up the immediate circumstances of the alleged crime as they were given by Mrs. Cockcroft, who testified for the people as follows, summarizing her testimony: That on the morning of the 6th of February, 1918, the defendant appeared at her residence. She was alone in the house at this time, her husband, engaged in the garage business in Corning, being then at his place of business. The defendant had sounded the doorbell, and Mrs. Cockcroft responded, and, opening the door, she was confronted and asked by defendant if she was Miss Kincaid, to which she replied that she was now Mrs. Cockcroft. The defendant then stated that he was the fiancé of Miss Helen S. Kincaid, Mrs. Cockcroft's sister; that he was one of the latter's attorneys in the will contest, and that he had "come to" Corning to talk to her (Mrs. Cockcroft) about the case. The latter at first said that she did not desire to talk about the case, but he was insistent, and she then said, "I will talk with you to-morrow," she desiring to arrange to have some other person present at the interview. Defendant replied, "There will be no to-morrow," whereupon Mrs. Cockcroft said, "I will go to the telephone and phone my husband," and he replied: "No, you don't need to." She thereupon started towards the telephone, which was in an adjoining room, and the defendant followed and ran up behind her and placed his hands around her neck, at the same time saying, "Now, I have got you at last." He then placed his handkerchief, saturated with chloroform, over her nose and mouth, and a struggle between them thereupon ensued. The placing of his handkerchief over and about her face did not appear to work as effectually as he desired and he emptied a bottle filled with chloroform on her face. Mrs. Cockcroft tried to call for help while the struggle was in progress, but without result. She was finally rendered unconscious. This struggle, it will be noted, occurred in the front room of the house. When she regained consciousness, which was about an hour after the act of chloroforming was committed, as above explained, she was lying prone upon the floor with a handkerchief over her face, in the kitchen, her head lying near the kitchen stove, which at the time had a very hot fire in it. The chloroform had burned her eyes and face, and she found herself very weak. A short while after recovering consciousness, however, she succeeded in gathering enough strength to go to the telephone and call her husband. Upon the latter's arrival at his house and his discovery of his wife's condition, he called Dr. Case, a physician of Corning, who immediately went to the Cockcroft home and treated Mrs. Cockcroft. The doctor testified that when he first saw Mrs. Cockcroft her face bore a deathly pallor, and that she was very weak. He also testified that he detected the odor of chloroform on her person. The doctor testified that her condition, when he first saw her, was very serious; that her face was swollen and her heart beating "more than 120 to the minute."

The doctor testified that the use of chloroform may be fatal, and that the chances for its being fatal are increased where one to whom it has been administered is placed near a stove with a fire in it.

The above is a sufficient statement of the evidence to show that, so far as the crime charged is concerned, the verdict is thus so far supported as that this court is precluded from holding, as a matter of law, that it is not sufficiently buttressed by probative facts. As to the proof of the commission of the act by the defendant, it is to be remarked that, in addition to the testimony of Mrs. Cockcroft, who positively identified the accused as the man who committed the act, there is the testimony of other witnesses who recognized or identified the defendant as a person they saw in Corning at the time the crime was committed, one witness testifying that, in the early morning of the day on which the crime was committed, he called at her house and inquired whether she (the witness) knew a Miss Helen Kincaid, and where said Miss Kincaid resided in Corning. There were many circumstances proved which strongly tended to show that the defendant was Mrs. Cockcroft's assailant.

[9-12] It is lastly contended that the court committed prejudicial errors in the giving and the disallowance of certain instructions. In the brief of counsel for the defendant it is stated that the court, in one of the instructions (No. 2), took from the jury the determination of the question whether chloroform was a poison. It is further contended that instructions Nos. 2 and 9 are contradictory of each other. The criticisms of the court's charge in the particulars stated are without force or merit. The initial portion of instruction No. 2 merely involves a statement of the facts set forth in the information upon which the defendant was tried. By instruction No. 9, the jury were told that—

"If you are satisfied beyond a reasonable doubt that the defendant did * * * adminis-

ter chloroform to one Margery Cockcroft by causing her to inhale the same, with the intent to kill said Margery Cockcroft, and that chloroform is a poison, then I instruct you that it is your duty to find a verdict of guilty against the defendant."

Thus it will be observed that the court directly and in unmistakable language declared to the jury that whether chloroform was a poison was a question for them to determine. But counsel in another particular attacks instruction No. 9, and declares it to be unsound because, as is the claim, the mere causing of one to "inhale" a poison is not to "administer" poison to another, within the meaning of the term "administer" as it is used in section 216. The argument is that the actual entrance of the poison into the stomach must be shown. Some authorities are cited to support this proposition, but we have not taken the pains to examine them. We do not think the point possesses the slightest merit in so far as this case is concerned. There are certain kinds of poison which, of course, must be taken into the stomach to work fatal or serious results. The mere inhalation through the nostrils of strychnine, for instance, would not produce death or any serious derangement of the vital organs of the human body. We know as a matter of very common knowledge that there are narcotics which, through the process of inhalation, will produce sleep or a morbid condition of the nervous system and which, in certain doses, will produce death. From Dr. Case's description of chloroform it is clear that chloroform is such a narcotic, and therefore it was not necessary to instruct the jury in this case that they were required to trace the action of the chloroform in its effect upon specific organs of the body or the channels into or through which it was necessary for it to pass to produce unconsciousness or death. If the evidence showed, as it does tend to show, that the chloroform was given to Mrs. Cockcroft in the usual mode of giving that narcotic, then it was "administered" to her by the defendant within the meaning of that word as it is used in the statute.

[13] The complaint that the court erred in refusing to give defendant's requested instruction to the effect that the fact that the accused did not take the witness stand in his own behalf could not be considered by the jury as a circumstance against him is without just cause. The defendant did not become a witness in the case, and the court, in instruction No. 7, instructed the jury upon that fact substantially in the language of the instruction requested by the defendant, but disallowed by the court.

The record discloses no justification for the conclusion that the defendant was not given a fair and legal trial or was not justly convicted.

The judgment and the order are affirmed.

We concur: NICOL, Presiding Judge, pro tem.; BURNETT, J.

Opinion of Supreme Court in Bank, Denying Hearing.

PER CURIAM. [14] We are not satisfied with the statement of the District Court of Appeal substantially to the effect that the record does not show that a juror objectionable to defendant was not forced on him. He did exhaust his peremptories, and Juror Wilcox remained on the jury. If he had peremptorily excused Wilcox, he could not have excused the last juror peremptorily challenged. But, as is held by the District Court of Appeal, there was no error in disallowing the challenge for actual bias to Juror Wilcox.

The application for a hearing in this court after decision by the District Court of Appeal of the Third Appellate District is denied.

All concur.

183 Cal. 734

MULVILLE v. CITY OF SAN DIEGO et al.
(L. A. 5565.)

(Supreme Court of California. Sept. 22, 1920.)

1. Municipal corporations ⟸57—Municipality can act beyond boundaries only when empowered.

A municipality is competent to act beyond its boundaries only in cases in which it is so empowered by the Legislature, either expressly or by necessary and fair implication, which rule applies in determining whether or not bonds of an improvement district may be issued for expenditure of the proceeds outside of the district.

2. Municipal corporations ⟸277 — Improvement statute denies power to district to construct improvement beyond its boundaries; "therein" defined.

St. 1915, p. 99, providing for the formation of districts within municipalities for the acquisition or construction of public improvements "therein," denies power to construct or acquire such an improvement beyond the boundaries of the district, "therein" meaning in that place.

[Ed. Note.—For other definitions, see Words and Phrases, Therein.]

3. Statutes ⟸184—Act must be construed by attributing ordinary sense to words used.

Intent of the Legislature must be determined primarily by attributing the ordinary and popular sense to the words of the statute, where they are free from ambiguity, and the result is not absurd, though it appears probable that a different object was in the mind of the Legislature.

4. Statutes ⟸174, 175—Liberal construction does not mean enlargement of plain provisions.

Liberal construction of a statute does not mean enlargement of its plain provisions.

5. Municipal corporations ⟸450(1)—Grant of power to form improvement district closely construed.

Grant of power to municipality to form within it an improvement district, which is nothing more than a taxing district, being a delegation of control of assessment proceedings, must be closely construed, as the power of special taxation is restricted to the plain language of the statute.

Olney, Lawlor, and Sloane, JJ., dissenting.

In Bank.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Martin Mulville against the City of San Diego and others. From judgment for defendants, plaintiff appeals. Reversed.

Sweet, Stearns & Forward, of San Diego, for appellant.

T. B. Cosgrove, of Los Angeles, and M. R. Thorp, of San Diego, for respondents.

LENNON, J. Plaintiff, as a resident, voter and taxpayer in municipal improvement district No. 1, of the city of San Diego, instituted this action for the purpose of enjoining the issuance and sale of certain bonds of said improvement district and of having all proceedings in relation to the organization of the district and the issuance of the bonds canceled and declared null and void.

Proceeding under the provisions of chapter 79 of the statutes of California of 1915, the common council of the city of San Diego organized the district above referred to and the qualified electors therein voted to authorize, and the city council proceeded to issue and sell, bonds of said district to the amount of $125,000 for the purpose of paying the costs and expenses of the acquisition and construction of certain improvements. These certain contemplated improvements are to be located on the water front of the city of San Diego and a large portion of them will, when constructed, be situated outside of the described boundaries of municipal improvement district No. 1. According to the findings of the trial court the improvements in question consist of a pleasure pier and loose rock jetty, each lying within the exterior boundaries of the district for a distance of about 50 feet and extending approximately 750 feet beyond the exterior boundary lines of said district; a second loose rock jetty, 100 feet of which will be located within and 1,900 feet without the said exterior boundary lines; eight groins, all of which will commence at the exterior boundary lines of the improvement district and lie entirely outside of said exterior boundary lines; and certain other improvements located wholly within the district. The trial court rendered a judgment holding the proceedings and issuance of the bonds to be valid and according to law, from which judgment plaintiff appeals.

The first question to be determined is whether improvements must be physically within the boundaries of the improvement district which assumes the indebtedness for the construction thereof, or whether such public works may be situated partially or wholly outside of the exterior boundary lines of the district, provided that, as the trial court found to be the case here, the benefits to result from said improvements accrue wholly or principally to the district or the property within said district.

In support of the judgment, counsel for respondent cite cases illustrative of the principle that a particular structure is not transformed and deprived of its "public" or "municipal" character merely by reason of the fact that it is constructed outside of the boundary lines of the municipality which

it benefits. People v. Kelly, 76 N. Y. 475; In re Mayor, 99 N. Y. 569, 2 N. E. 642. Such cases are inapplicable to the case at bar, for the public nature of the improvements in question here is not in dispute. The mere fact that a structure erected outside of a municipal improvement district may be a "public improvement" is not determinative of the question of the existence of the power to form such a district for the purpose of raising funds for the erection of such a "public improvement" outside of the district. That is to say, while it is not and cannot be questioned that an amusement pier is an improvement of a public nature, nevertheless, the point is made that, obviously, there must be some limit beyond which a municipal improvement district cannot acquire or construct improvements, however public the improvements may be, and if the operations of such district are restricted by law to the territory within the described boundaries of the district, then such a district, whether bordering on the sea or not, cannot be formed for the acquisition, construction, or maintenance of those public improvements which are of such a character that they must, by their very nature, extend beyond the physical area of the district.

[1] In general, a municipality is competent to act beyond its boundaries only in those cases in which it is so empowered by legislative authority, and it is necessary, in passing upon the validity of acts of a municipality performed beyond its boundaries, to look to the general laws and municipal charter for the requisite authority. In certain instances, owing to the urgency of extreme expediency or necessity, express authority is dispensed with and the power of the municipality to perform certain acts beyond its boundary is implied as incidental to the existence of other powers expressly granted. Thus, it has been held that, where a municipality has power to construct sewers, it may, as an implied incident to such power, extend the same beyond its boundaries when necessary or manifestly desirable. McBean v. City of Fresno, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191; City of Coldwater v. Tucker, 36 Mich. 474; Cochran v. Village of Park Ridge, 138 Ill. 295, 27 N. E. 939; McQuillin on Municipal Corporations, vol. 4, § 1434. McQuillin, in his work on Municipal Corporations, states the rule as follows:

"The general rule is that without legislative grant the authority of the municipal corporation is confined to its own area; hence its acts and ordinances have no force beyond its corporate limits. Thus, in the absence of such grant the municipality cannot open a street, repair a highway, grade an avenue, or aid in the construction of a plank road or bridge beyond its boundaries. Sometimes authority to act outside of the municipal boundaries may be implied on the ground of necessity, as, for example, to obtain outlets for sewers and drains. * * * Likewise a municipality, possessing power to supply its inhabitants with water, may acquire for that purpose a water supply without its territory. Certain municipalities have been held to be authorized to supply light and water to points beyond their limits." McQuillin on Municipal Corporations, vol. 4, § 1824.

Therefore, in a case of a municipality, power to act outside of the boundaries of the municipality is dependent entirely upon legislative grant; it does not exist unless expressly granted, necessarily or fairly implied in or incident to the powers expressly granted, or essential to the declared objects and purposes of the corporation. Hyatt v. Williams, 148 Cal. 585, 587, 84 Pac. 41; South Pasadena v. Pasadena Land, etc., Co., 152 Cal. 579, 590, 93 Pac. 490. By analogy the same rule applies in determining whether or not bonds of a municipal improvement district may be issued, the proceeds of which are to be used in the construction of public works outside of the boundaries of the district.

The proceedings attacked in the instant case were taken under a statute (Stats. 1915, c. 79, p. 99) entitled "An act to provide for the formation of districts within municipalities for the acquisition or constructon of public improvements, works and public utilities *therein;* for the issuance, sale and payment of bonds of such districts to meet the cost of such improvements; and for the acquisition or construction of such improvements." Section 1 of this act provides:

"Any portion of a municipality incorporated under the laws of this state may be formed into a municipal improvement district for the purpose of creating an indebtedness, to be represented by bonds of said district, the proceeds from the sale of which shall be used for the acquisition or construction *therein* of any public improvement work or public utility which such municipality is authorized by law to acquire or construct."

Section 2 of the same act provides that the ordinance of intention, required by the act, shall contain, in addition to other information, a description of the exterior boundaries of the proposed municipal improvement district, and "a general description of the improvement work or public utility proposed to be acquired or constructed *therein.*" (Italics ours.)

[2, 3] The statute does not expressly grant the power to form an improvement district for the purpose of erecting or acquiring public works or utilities outside of the district, nor does the construction of a pleasure pier come within the rule applicable to the construction of outlets for sewers or sources of supply of light and water, for it cannot be classified as a matter of necessity or extreme expediency. We are of the opinion

that the statute in question goes further and, in effect, denies the power to construct or acquire such an improvement beyond the boundaries of the district, thus preventing the application of the doctrine of implied power to act beyond those boundaries, assuming that that doctrine could be extended to improvements of the nature here contemplated. In construing a legislative enactment the intent of the Legislature must be determined primarily by attributing the ordinary and popular sense to the words of the statute where they are free from ambiguity and the result is not absurd, and this must be done even though it appear probable that a different object was in the mind of the Legislature. Eureka v. Diaz, 89 Cal. 467, 469, 26 Pac. 961; Smith v. Union Oil Co., 166 Cal. 217, 224, 135 Pac. 966; Sacramento v. Glann, 14 Cal. App. 780, 789, 113 Pac. 360.

[4] A liberal construction does not mean enlargement of the plain provisions of the law. In re Jessup, 81 Cal. 408, 419, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594. It is clear that the words "public improvement work" and "public utility" as used in the statute do not refer to intangible benefits to be derived from a public work, but they obviously designate a material structure which is to be constructed or acquired. The act thrice mentions that these public works or utilities are to be "therein," the accepted meaning of which is "in that place" (Webster's Dictionary; Standard Dictionary), and this word appears in such context as to compel the conclusion that the "place" to which it refers is the improvement district provided for by the act. The term "therein" was judicially interpreted in the case of In re Streets and Alleys in Borough of Parkersburg, 124 Pa. 511, 17 Atl. 27, where a general borough law gave the authorities of the boroughs power to enact and ordain streets and alleys "therein." The court there said:

"By streets, alleys, etc., 'therein,' is meant such only as begin and end within the limits of the municipality. This exclusive provision does not extend to public roads, laid out through or to a point within the limits of a borough, of which only a part is within the borough lines."

The statute now under consideration therefore provides that an improvement district can be formed for the construction or acquisition of public works or utilities within the limits of the district, that is to say, which begin and end within the boundaries of the district. A structure physically without the district, in whole or in part, may be an improvement *thereto*, but it is not an improvement *therein*.

[5] Our conviction of the correctness of the above construction is reinforced by the fact that we are not dealing with a municipality or quasi public corporation, for the municipal improvement district authorized by the statute is nothing more than a taxing district within a municipality. The power of a municipality, to form such a district arises solely from the legislative grant. This grant, being a delegation to municipalities of control over local assessment proceedings, must be closely construed, for it is well settled that the power of special taxation is restricted to and can extend no further than the plain language of the legislative enactment upon which it is based. In re Unger, 22 Okl. 755, 98 Pac. 999, 132 Am. St. Rep. 670; Hyatt v. Williams, 148 Cal. 585, 84 Pac. 41; McQuillin on Municipal Corporations, vol. 5, § 2052. The necessity of firmness and strictness on the part of the judiciary in cases involving the exercise of the power of special taxation was expressed as follows in the case of Washington Avenue, 69 Pa. 352, 364 (8 Am. Rep. 255):

"The examination I have just made into the power of special taxation, it seems to me, tends to confirm and strengthen what was so well reasoned in Hammett v. City [65 Pa. St. 146]. Indeed I consider it a fortunate circumstance that that case came up, for it led to an inquiry into the power of special taxation, which was in danger of running wild by insensible degrees, and leading, before we had become aware of it, into the exercise of a bastard power, dangerous to the right of private property, and violative of the provisions in the Bill of Rights, placed there for its protection. In questions of power exercised by agents, it is sometimes the misfortune of communities to be carried, step by step, into the exercise of illegitimate powers without perceiving the progression, until the usurpations become so firmly fixed by precedents, it seems to be impossible to recede or to break through them."

The case of Moulton v. Parks, 64 Cal. 166, 30 Pac. 613, affords a good illustration of the rule of strict construction which must be applied to legislative enactments permitting proceedings which are in their nature in invitum. In that case the act under consideration was "an act to provide for the protection of certain lands in the county of Sutter from overflow," and by its terms it conferred power on the board of supervisors of the county of Sutter to establish levee districts within that county. The act also provided that the board of supervisors of Sutter county were authorized to adopt a plan for the protection of any levee district created under the act. In construing the act the court said:

"The power to adopt a plan is not in terms limited to the adoption of a plan which shall provide for the construction of levees or other works only within Sutter county, nor is the power conferred upon the board to contract for the construction of levees without the county, unless such power is conferred by the general terms of the grant. * * * The eighth section of the act empowers the board to take possession of any land within the district that

may be necessary for any levee or work of reclamation. It also empowers the board to take possession of any land outside the district and within the county that may be necessary or proper to furnish material for the construction of a levee, or other work of protection, within a district. * * * The act imposes the duty of keeping the levees and other works in repair, and of levying and collecting taxes upon all the property within the district for the purpose of raising funds to keep them in repair. If the supervisors of Sutter have power to cause to be erected and kept in repair a levee, or part of a levee, in Colusa, they have power to erect and keep in repair levees, all but one of which shall be in other counties than Sutter. * * * Our conclusion is that the officers of the county of Sutter had no power to cause a levee to be built in the county of Colusa."

It has been suggested that in the instant case the authority conferred by the act to establish an amusement pier within the designated district is but an idle grant of power in that respect if the pier must be constructed wholly within the district. In other words, that no effective plan for the establishment of an amusement pier could be put into operation and effect which did not provide for the construction of such a pier beyond and outside the limits of the improvement district. The answer to this suggestion is found in the case of Moulton v. Parks, supra, where it was said:

"It may be that, in the opinion of the board of supervisors of Sutter county, no efficient plan for the protection of levee district No. 5 could be carried into effect which did not provide for the construction of a levee outside of the district and outside of the county, and it may be argued that such a condition of things must have been anticipated by the members of the Legislature, when the general power of adopting plans, and constructing works in accordance therewith, was given to the board. But the board of supervisors of Sutter county had the right to employ only such power, with respect to the adoption of plans and construction of works, as was conferred by the act of the Legislature, and in inquiring whether the grant is limited we should consider as well the whole act as the nature of the official powers, under the Constitutions and laws, of the supervisors, as legislative and executive public agents."

It is quite conceivable that, in the instant case, the Legislature, in placing a new method of local improvement assessment within the field of municipal control, intended the restriction as to the location of the improvements as a precautionary limitation upon the delegation of the taxing power. At any rate, whatever the legislative purpose, it is apparent that the formation of a district and issuance and sale of bonds thereof with the purpose of using the proceeds for the construction of public works outside of the boundaries of the district is a proceeding wholly without the terms of the statute embodying the legislative grant.

Appellant also contends that the city of San Diego itself lacks the power to construct a pleasure pier in the Pacific Ocean at the particular point where the improvements now in question were to be constructed. The argument is therefore advanced that the proceedings are invalid for the further reason that the statute permits the organization of a municipal improvement district for the purpose of the acquisition or construction of only such improvements as the municipality itself is authorized by law to acquire or construct. Inasmuch as we hold that there was no authority to organize the district for the purpose of constructing public works outside of the district, it is unnecessary to determine the question of whether or not the city itself has power to construct the improvements.

In view of the fact that by far the greater part of the improvements (i. e., over nine-tenths of the pleasure pier and loose rock jetties and all the eight groins) would lie outside of the boundaries of the improvement district, the relief prayed for must be granted, because, as we hold, the act provides for and permits only such public improvements as may be constructed wholly within the district.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SHAW, J.

OLNEY, J. (dissenting). I dissent. The facts are that a part of the city of San Diego bordering on the ocean was organized into a municipal improvement district. The city was authorized by statute to issue bonds of the district for the purpose of supplying the funds with which to construct "therein" an improvement of the character of that involved here, to wit, a wharf or pier. The city sought to issue bonds of the district for the purpose of making this improvement, and its action is now nullified solely because the pier projects out into the ocean beyond the legal boundary of the improvement district, so that it is not physically wholly "therein" with respect to the district. I cannot agree with such a narrow and absolutely literal construction of the statute. The main opinion concedes that if the improvement had been a sewer instead of a pier it might have projected without the limits of the district, into the ocean, for instance, and still would have been an improvement within the district within the meaning of the statute. Why the difference?

In Cochran v. Village of Park Ridge, 138 Ill. 295, 300, 27 N. E. 939, 940, the court, in overruling the objection to a village constructing a sewer extending beyond its limits, said:

"But what is the object and true scope of the improvement under consideration? Is it one within or outside of the incorporated limits of the village? The object was to furnish sewerage for the inhabitants of the village. The improvement was for the benefit of those residing within the incorporated limits of the village, and for them alone. But in order to make the sewer a success, in order to make the improvement of any benefit to any person in the village, it must have an outlet. No outlet could be found within the incorporated limits. It became, therefore, absolutely necessary to extend the sewer a short distance outside of the incorporated limits in order to allow an outlet. In order to carry out the true scope and object of the ordinance providing for the improvement, it became necessary to expend money outside of the incorporated limits of the village. But it does not follow because that is the case that the assessment here is made for an improvement outside of the village. The construction of the sewer from the incorporated limits of the village to the Desplaines river is not an improvement in that territory, but is one for the village, rendered a necessity from the geographical condition of the land upon which the village is located."

The construction of the pier from the dry land within the district out into the ocean is not an improvement of the ocean or the land beneath it, but is one for the district, and is one whose projection beyond the shore line which is the legal limit of the district is necessary if its object is to be accomplished and if it is to be of any benefit to the district. In every sense but a most technical one, a pier or wharf projecting out into the ocean over no man's land is a part of and within the territory on the shore from which it starts.

The main opinion proceeds on the hypothesis that if the legal limits of the district had been extended out into the ocean to or beyond the end of the pier, the proceedings under attack would have been valid. But requiring the limits of the district to be so extended is a wholly futile thing. The district is in effect nothing more than an assessment district. The extension of its limits out into the ocean would mean merely the inclusion within the district of lands beneath the ocean, belonging to the state and incapable of private ownership, and upon which no assessment could by any possibility be laid. For the purposes of assessment, and that is the real purpose of the district, the situation would not be changed one iota by the inclusion of these lands.

LAWLOR, J. (dissenting). I concur in the dissenting opinion of Mr. Justice OLNEY. It is not to be questioned that within the purview of the act a district bordering on the ocean may be formed for an amusement pier. Manifestly, the authority to create such an improvement is barren if the structure may not project beyond the shore line, provided, of course, it be limited to the boundaries of the city of San Diego. Stats. 1889, p. 644. The fact that the pier is erected over the water instead of above the shore line would not, in any true sense, constitute an additional burden on the taxpayers. It would be more in keeping with the legislation to connote the term "therein" according to the character of the particular improvement so that in such a case as this, or of sewers or water supply systems, it may extend beyond, and in the case of streets, alleys, parks, museums, auditoriums, or the like, be confined to the physical area of the district.

SLOANE, J. (dissenting). I concur in the dissenting opinion of Mr. Justice OLNEY. The only point in dispute is as to the power of the district to vote bonds for an improvement that is not wholly confined in its physical location within the boundaries of the district. The right of this district to incur an indebtedness for a pleasure pier within its boundaries is not disputed. It appears from the record that in order to project this pier beyond the dry sands of the beach it was necessary to extend it into the ocean beyond the district boundaries. This extension is not upon other taxable territory, but into the tidewaters held in trust by the state for just such uses. For all beneficial purposes and use and control it is within the prescribed territory. It is conceded that in the construction of a sewer by such a municipal district the outlet might be lawfully carried to such a distance beyond the corporate boundaries as the necessities of its use requires. This case presents no difference in principle. The extension of the wharf beyond the boundary of the district is absolutely essential to any beneficial purpose for which it is intended. The limitation of the statute applies as much to the one improvement as the other, and the courts may not draw a distinction upon their own estimate of the relative importance of sewers and pleasure piers.

183 Cal. 755

VAN NOSTRAND et al. v. COLLINS et al. (S. F. 9600.)

(Supreme Court of California. Sept. 23, 1920.)

Elections ⟸173 — Majority candidates not entitled to be segregated on ballot.

Under Direct Primary Act, § 23, providing that the number of majority candidates, if less than the number of persons to be elected to the office, together with additional names of other candidates equal to twice the difference between the number of majority candidates and the number to be elected, shall be printed on the ballot, the majority candidates are not entitled to be segregated as such candidates on the ballot.

In Bank.

Application by John J. Van Nostrand and others against Charles J. Collins and others for writ of mandate against the respondents as the board of election commissioners and registrar of voters of the city and county of San Francisco, requiring them to segregate as majority candidates the names of petitioners on ballot. Writ denied.

Harry I. Stafford, of San Francisco, for petitioners.

I. Harris, of San Francisco, for respondents.

PER CURIAM. The language of the Direct Primary Act (St. 1913, p. 1379) material on this application (section 23) is such as, beyond any question whatever, to sustain the position of the board of election commissioners and registrar. It is declared that—

"If the number of such 'majority candidates' falls short of the number of persons to be elected to such office, the names of said 'majority candidates' shall be printed on the ballot at the ensuing November election, together with such number of additional names only of such other candidates receiving the next highest number of votes for nomination to such office as may make the number of such additional names equal to twice the difference between the number of such 'majority candidates' and the number to be elected, or a smaller number, if the list of said other candidates is exhausted." (Italics are ours.)

The language is clear and unambiguous, and the courts, as well as the respondents, are bound thereby.

The application is denied.

All concur.

(183 Cal. 775)

PUCCINELLI v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 9606.)

(Supreme Court of California. Sept. 30, 1920.)

Elections ⟸154(2) — Primary law confines contest to recount and excludes evidence of fraud.

Under Direct Primary Law, § 28, on contest of nomination for the Republican candidate for assemblyman, the court is limited to the recount of the ballots cast at the precincts as to which recount may be sought, and cannot receive evidence to sustain contestant's allegations of fraud and misconduct on the part of election officers and the reception of illegal votes.

In Bank.

Application for writ of mandate by Rinaldo Puccinelli against the Superior Court of the State of California, in and for the City and County of San Francisco, and Frank J. Murasky, Judge thereof, to compel respondents to receive certain evidence in an election contest. Application denied.

Leo R. Friedman, R. M. J. Armstrong, and Jos. O'Rourke, all of San Francisco, for appellant.

Leon Samuels, Jos. Taaffe and Chas. McDonnell, all of San Francisco, for respondents.

PER CURIAM. Petitioner, a candidate at the primary election of August 30, 1920, for the Republican nomination for assemblyman from the Thirty-third assembly district, instituted a contest of the nomination of one Badaracco as the Republican candidate for said office at said election, under the provisions of section 28 of the primary law. In addition to demanding a recount of all the Republican votes cast in the various precincts of said assembly district, he alleged many irregularities on the part of election officers in certain precincts, which he claims should cause the votes from the precincts to be excluded, and also that eight named persons, registered as voters in one of the precincts, were allowed to vote therein, although they were not then residents therein, and that they voted for Badaracco. The contest is now on trial in the superior court of San Francisco before Judge Murasky. The Republican ballots have all been recounted by the court, such count showing a majority of 43 votes for Badaracco. Thereupon petitioner sought to introduce evidence to sustain his allegations of fraud and misconduct on the part of election officers and the reception of illegal votes. The contestee objected to the introduction of any such evidence on the ground that such matters may not be inquired into in a contest under the direct primary law. The court sustained such objection. This is an application for mandate to compel the superior court to hear and receive such evidence as may be offered in support of his allegations of fraud and misconduct, and claim of illegal votes.

Assuming but not deciding that mandate will lie in such a situation, we are nevertheless of the opinion that the position of the learned judge of the trial court is correct. Section 28 of the direct primary law (St. 1913, p. 1409), the only provision of law rela-

tive to a contest of nomination, is, to our minds, entirely plain in this regard. It provides only for "a recount of the ballots cast" in the precincts as to which a recount may be sought. This is as far, apparently, as the Legislature saw fit to go in providing a judicial review of the returns of the election officers of a primary election, possibly deeming that in the brief time afforded for any review between the declaration of the result of the official canvass and the printing of the ballot for the general election a more extended inquiry would be impracticable. In any event, we think it clear that they so limited the subject-matter of the inquiry.

The application is denied.

All concur.

183 Cal. 756

MARCH v. BOARD OF SUP'RS OF SACRAMENTO COUNTY et al. (Sac. 3151.)

(Supreme Court of California. Sept. 27, 1920.)

Elections ⟸126(1)—Names of candidates who received majority vote at primary only ones that may be printed on ballots.

Where there were three judges of the superior court of a county to be elected at a general election, and each of three of the candidates at the primary election received the votes of a majority of those participating, and no other candidate received a majority vote, the names of such three candidates are the only names of candidates for the office that may lawfully be printed on the ballot for the general election, under Direct Primary Law, § 23, excluding names of two other candidates whose names were printed on primary ballot and name of a write-in candidate, none of whom received majority vote.

In Bank.

Application for writ of mandate by John C. March against the Board of Supervisors of Sacramento County and Henry W. Hall, County Clerk of said County, to require respondent to place the name of petitioner on the ballot. Application denied.

Martin I. Welch, of Sacramento, for petitioner.

PER CURIAM. The petition shows that, there being three judges of the superior court of Sacramento county to be elected at the general election to be held November 2, 1920, each of three of the candidates for such office at the primary election held on August 30, 1920, received the votes of a majority of those participating in such primary election. No other candidate received a majority vote. This being the situation, the names of these three candidates are the only names of candidates for such office that may lawfully be printed on the ballot for the general election (section 23, Direct Primary Law [St. 1913, p. 1404]), with the result that the names of the other two candidates whose names were printed on the primary ballot and the name of petitioner, a "write-in" candidate not receiving a majority vote, may not be printed on such ballot.

The application is denied.

All concur.

183 Cal. 767

GARCIA v. CALIFORNIA TRUCK CO. (L. A. 5158.)

(Supreme Court of California. Sept. 29, 1920. Rehearing Denied Oct. 26, 1920.)

1. Pleading ⟸291(2)—Though due execution was admitted by failure to deny, other defenses available.

While the genuineness and due execution of a release annexed to defendant's answer was admitted by the failure of plaintiff to serve and file an affidavit denying the same, in accordance with Code Civ. Proc. § 448, yet it was open to plaintiff on trial without further pleading to introduce evidence to sustain any legitimate defense, except want of genuineness or due execution.

2. Release ⟸24(2)—Release cannot be rescinded without return of amount paid.

Civ. Code, § 1691, requiring as a condition of rescission of contract the restoration of anything of value received thereunder, applies to a release for personal injuries claimed to have been obtained as a result of fraud, and in such case the party injured cannot retain the amounts paid and at the same time rescind the release; it not being void ab initio.

3. Release ⟸24(2) — Sums paid under rescinded release cannot be retained because of recovery of greater sum.

A sum paid as consideration for a release of a claim for personal injuries cannot be retained by the party injured, who at the same time sought on the ground of fraud to rescind the release, because he recovered a greater amount; the principle that a party is not required to restore that which in any event he would be entitled to retain, having no application.

4. Release ⟸57(2)—Evidence held insufficient to show that release was procured by fraud.

In an action for personal injuries, where defendant relied on release, evidence *held* to show that the release not only was not void ab initio, but the evidence was insufficient to support finding that it was procured through the defendant's fraud; it appearing that defendant acted fairly throughout, making no misrepresentations.

In Bank.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Felix Garcia against the California Truck Company. From a judgment for plaintiff, defendant appeals. Reversed.

Edwin A. Meserve and Shirley E. Meserve, both of Los Angeles (Meserve & Meserve and Harold G. Ferguson, all of Los Angeles, of counsel), for appellant.

W. Ona Morton, of Los Angeles, and J. F. Moriarity, for respondent.

ANGELLOTTI, C. J. This action was initiated April 19, 1915, by plaintiff to recover damages for personal injuries sustained by plaintiff when, while upon a public street in Los Angeles on April 20, 1914, he was struck and run over by a horse belonging to defendant, which through defendant's alleged negligence was permitted to run away at large upon such street. In its answer, in addition to denying the allegations of the complaint as to negligence and damage, defendant set up an absolute release of "any and all causes of action, costs, charges, claims, or demands of whatever name or nature, in any way arising or growing out of" the accident, executed by plaintiff in writing on July 20, 1914, in consideration of the sum of $350 then paid to him by defendant. It was stated therein that it was intended to cover, not only all injuries or sickness occasioned by said accident of which plaintiff was then cognizant, but any sickness or injury which might thereafter develop, that the instrument had been read to him and translated from English into Spanish, his native language, and that he knew the contents thereof, and accepted the same "in compromise of my claim against said California Truck Company."

[1] The genuineness and due execution of this instrument, a copy thereof being annexed to the answer, was admitted by the failure of the plaintiff to serve and file an affidavit denying the same, as provided in section 448, Code of Civil Procedure. Under our system of pleading, it was, however, open to plaintiff on the trial, without further pleading, to introduce evidence to sustain any legitimate defense, except want of genuineness or due execution, to the new matter relative to the release set up in the answer. Baird v. Pacific Electric Railway Co. (App.) 179 Pac. 449. He did introduce evidence in support of a theory that the release was obtained by fraud. The trial court, finding against the release and in favor of plaintiff with regard to the allegations of injury from negligence of defendant, and that he had suffered damage in the sum of $1,510, also found that he had received from defendant $710 ($350 paid him upon the execution of the release and $360 theretofore paid him, partly in cash and partly for his care and maintenance while disabled), which it deducted from the amount of damage found, giving judgment for the balance, $800. This is an appeal by defendant from the judgment.

[2] The only questions upon this appeal are in relation to the contract of release, which, of course, unless avoided in some legitimate way, constitutes an insuperable bar to recovery in this action for damages for injuries caused by the negligence of defendant. At no time prior to the commencement of the action did plaintiff attempt to rescind this contract of release, and his complaint in this action for damage for the original tort was altogether silent regarding it. At no time has he restored or offered to restore to defendant any part of the consideration paid by defendant therefor, or attempted to show any reason why he should not be compelled to do this as a condition precedent to rescission. The claim of defendant is that plaintiff cannot maintain this action for damages in the absence of a rescission of the contract of release, and that the facts just stated are fatal to any claim of rescission. If there was a valid contract of release, it would seem, notwithstanding that it was voidable because the consent of the plaintiff thereto was obtained by a fraudulent representation, that rescission was essential to its extinguishment, and that there could be no rescission without restoration of the consideration. Our statute is explicit on the subject of rescission. Section 1691, Civil Code, provides that rescission of a contract, when not affected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with certain specified rules, one of which is that "he must rescind promptly, upon discovering the facts which entitle him to rescind," if free from duress, etc., and aware of his rights, and the other of which is stated as follows:

"He must restore to the other party everything of value which he has received from him under the contract, or must offer to restore the same," etc.

We are aware of no good reason why this express statutory provision is not as fully applicable to a contract of release of claim for damages for personal injuries as to any other contract. Notwithstanding expressions in some of the many decisions on this question which might be taken as intimating a contrary view, an examination of the cases shows that this is generally accepted as true, especially in the presence of such a statutory provision as we have in this state. We are speaking, of course, of contracts of release that are not absolutely void from the beginning for illegality, or total want of competency to contract on the part of the party purporting to release, or any other cause warranting a conclusion that the purported contract was never an executed contract, but a mere "scrap of paper," without binding force, that could be entirely disregarded without any rescission. There are decisions in this state which include in the class of cases where recission is not essential a case where by fraud or deceit the party has been induced to execute a release of his cause of action upon the understanding and belief that the written instrument was a release of something

other than the cause of action sued on, and that it was not a release of such cause of action.

Such was the situation in Meyer v. Haas, 126 Cal. 560, 58 Pac. 1042, where the plaintiff was so induced to execute for $25 a release of all claims on account of his injuries, being made by fraud to believe and believing that he was discharging only such claim as he might have for loss of time. It was held that in such a case "the contract * * * will be held to be what the maker of it intended it should be, and not what it was made to appear by the deception practiced," and that consequently there was no release of the cause of action involved in the action, which as the complaint was framed did not include any claim for loss of time, with the result that no rescission or restoration of the money received was essential. The plaintiff there, it was said, was "not attempting to avoid a contract which he has made, but is showing that he did not make the contract which he apparently made." In such a case the written instrument, in so far as it purports to release causes of action not understood by the party executing it to be included, is held to be void ab initio, and so to come within the class of cases where the doctrine of rescission and restoration has no application.

But the doctrine of Meyer v. Haas, supra, has no application where the party releasing thoroughly understood that the release he was executing was what it purports to be, a release of the very cause of action he seeks to enforce by action, notwithstanding a misconception on his part induced by fraud as to some other statements in the writing. In other words, if the situation is such that reforming the release to make it read as it would have read except for the fraud upon the plaintiff, the release would still purport to be a bar to the plaintiff's cause of action, then in order to maintain his action he must rescind and avoid the release, and for rescission an offer of restoration is necessary.

In the case at bar we have a lawful contract executed by competent parties, which at most is voidable only by reason of the party releasing and intending by the instrument to release all causes of action, having been induced to enter into the same by a fraudulent representation that the instrument contained a provision as to his employment by the defendant, which would have in no degree made the instrument anything other than an absolute release of all causes of action. Such is the case before us. We are saying this, notwithstanding the finding of the trial court on this subject, to which we shall refer later. In such a case the contract stands, unless extinguished in some mode allowed by law, and to accomplish a rescission thereof the statutory provisions relative to rescission must be complied with.

[3] It is claimed to be thoroughly settled that a party is not required to restore that which in any event he would be entitled to retain. This is a well-recognized rule (see Matteson v. Wagoner, 147 Cal. 739, 744, 82 Pac. 436, and cases there cited), but the difficulty is that it is not applicable under the facts of this case. As stated in the case of Kley v. Healy, 127 N. Y. 555, 561, 28 N. E. 593, 595, cited approvingly in Matteson v. Wagoner, supra, the rule is as follows:

"A more satisfactory answer, however, may be found in the principle that one who attempts to rescind a transaction on the ground of fraud is not required to restore that which in any event he would be entitled to retain *either by virtue of the contract sought to be set aside, or of the original liability.*"

The action was one for the rescission of a release of judgment given upon the payment of an amount smaller than that to which "she was concededly entitled" under the judgment. The court said:

"In any event, therefore, she had only that which, *without dispute*, belonged to her." (Italics are ours.)

This case well illustrates the meaning of the rule. The money received by the party belonged absolutely to her at the time of the commencement of the action, whether received as the consideration for the release of the judgment or retained as part payment on the original judgment. It was hers by right in either event. The situation was practically the same in Matteson v. Wagoner, supra, an action for the cancellation of certain notes and a mortgage given plaintiff and a recovery of the money loaned thereon, where, as shown by the opinion, if the plaintiffs failed in their action they would be entitled to retain the $165 paid as a payment of interest on the notes. The money was theirs at the commencement of the action in either event, received as interest on the notes if they failed, retained as partial restoration of the money loaned if they succeeded. In discussing this rule the Court of Appeals of Kentucky said in Fox v. Hudson, 150 Ky. 115, 150 S. W. 49, Ann. Cas. 1914A, 832:

"Where the claim is for unliquidated damages, or when the settlement is made to adjust a matter in dispute, or where there is a controversy as to the amount owing, and the parties agree upon a sum that shall be paid in settlement, the amount so paid must be returned, if the party settled with seeks to avoid the settlement on the ground of fraud. But when there is no dispute as to the sum due, and the creditor is induced by fraud to accept a less amount than his whole debt, he may attack the settlement without returning what he has received."

See, also, Brocklehurst, etc., Co. v. Marsch, 225 Mass. 3, 10, 113 N. E. 646.

These cases show the true meaning of the rule. In the case at bar the plaintiff originally had a claim for unliquidated damages for personal injuries. Solely in consideration of the settlement and release of this claim,

which he now seeks to avoid, he received $350 from defendant. The simple rescission of the contract of release would leave him with a disputed claim for damages, and with no right whatever to retain this money paid him for an abandonment of all claim for damages. This was the situation at the time of the commencement of the action. The money paid was not his in any event, but was his only in the event that there had been a valid release of the claim for damages that he was then endeavoring to assert, and which would constitute a complete bar to his action. It seems clear to us that the rule relied on has no application to such a case as this, and that if in this case there was a voidable contract of release, as distinguished from a contract void ad initio, plaintiff could not avoid the same on the ground of fraudulent representations, without rescinding promptly upon the discovery of the fraud and restoring the money paid as a consideration.

[4] That the contract of release was at most a mere voidable contract on account of fraudulent representation, as distinguished from one void ab initio, seems to us to be beyond question in view of the evidence. The finding of the trial court was substantially to the effect that while the plaintiff, who was a Mexican and could neither read nor write English, signed this release, which was written in the English language, he was misled, tricked, and deceived by an interpreter in the employ of defendant into signing a contract different in its terms and object from the contract which he had made with defendant, and which he then understood he was executing, in that he was led to believe and did believe that the instrument contained an agreement on the part of defendant to employ him for the balance of his natural life at a wage of $2.50 per day, and further that plaintiff did not release or acquit or discharge defendant from or on account of any damage sustained. In view of what we have said, the finding as to the understanding of the plaintiff as to the contents of the instrument is not sufficient to warrant the absolute disregard of the contract of release as void ab initio.

However, after a most careful consideration of the record, we are satisfied that it must be held that the findings on the issue of release are without substantial support in the evidence. There is not even a shred of evidence to show that plaintiff was ever told, or ever believed or understood, that the contract of release contained any provision whatever for his employment by defendant, or that he was in the slightest degree deceived as to the contents of the instrument. Although examined as a witness on his own behalf at the trial, he gave no testimony whatever with relation to this agreement, or as to his understanding as to its contents. His wife, who was present at the execution, was not called as a witness. The son, a boy 13 years old at the time of the release, and whose testimony is the sole reliance of plaintiff in this regard, did not testify as to any misrepresentation being made as to the contents of the instrument. Even according to the boy's testimony, the question of the employment of plaintiff by defendant was a matter not intended to be specified in the contract of release, but was a mere promise of employment for life at $2.50, to be evidenced by a separate "receipt" or "guaranty." Except for the testimony of the boy, the evidence is overwhelming as to the fairness of the dealings of defendant with plaintiff in the matter of the settlement, negotiated at the solicitation of plaintiff several weeks after the accident, and at the office of defendant, to which place he went with his wife and son for the very purpose of effecting a settlement.

According to the testimony of all except the boy, the proposed release was fully read to plaintiff by an interpreter (deceased prior to the trial), who translated it into Spanish for him, and then given to the boy to explain to his father. The boy himself signed a statement, written by himself thereon, that he had read it to his father, but testified that he did not so read it, and wrote and signed the statement because he was told to do so. The boy's testimony as to the reading of the release by the interpreter to his father is exceedingly vague and indefinite, and admits that the interpreter did read "four or five lines," but not all. According to the other testimony, the matter of employment was not mentioned as a condition of the release at all, but after the release was signed the president of the defendant company, which had treated plaintiff with the utmost consideration and generosity from the time of the accident, told him he would give him employment, and had written and given him a paper saying:

"To Felix Garcia: We will put you to work as soon as you are physically able, either in our corral or on our San Fernando ranch.

"California Truck Company,
"By George S. Safford."

The boy's testimony was that this was given to his father before the execution of the release, on the father's request for a "receipt" or "guaranty" for work for life at $2.50 per day. The plaintiff did go to work for defendant for $2.25 per day, and continued in such employment for 6 weeks, when, a reduction in employés becoming necessary, he was discharged. Apparently he never demurred as to rate of wage or discharge until more than 7 months had elapsed from the date of his discharge, when this action for $51,000 damages was instituted. The evidence is such as to indicate very strongly

that there was no promise of permanent employment, and, except for the boy's testimony, that there was no promise of employment as an *inducement to the execution of the contract of release*. However this may be, it is clear to us that there was no substantial testimony to sustain the findings we have referred to. Accepting the testimony of the boy in the light most favorable to plaintiff, we have at best a contract of release, the execution of which was induced by an independent promise of future permanent employment. As we have seen, such a contract cannot be treated as naught in the manner here attempted, and unless extinguished in some mode authorized by law it operates as a bar to plaintiff's action for damages. In so far as the record shows, it has not been so extinguished.

The judgment is reversed.

We concur: SHAW, J.; WILBUR, J.; OLNEY, J.; LENNON, J.; LAWLOR, J.; SLOANE, J.

183 Cal. 757

BAILEY v. CITY OF HERMOSA BEACH et al. (L. A. 5393.)

(Supreme Court of California. Sept. 29, 1920.)

1. Municipal corporations ⟹269(1)—Carrying street across ravine authorized by Vrooman Act.

A street improvement, being for the purpose of carrying a street across a ravine, is authorized by the Vrooman Act, § 2, under the term "bridges in streets," and also any work deemed necessary to improve a street or any portion of it.

2. Municipal corporations ⟹304(2)—That improvement termed a "viaduct" instead of "bridge" immaterial.

So long as an improvement of a street ordered under Vrooman Act, § 2, was in fact a "bridge," it is immaterial that in the proceedings it was termed a "viaduct," which terms are almost exact equivalents.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bridge; Viaduct.]

3. Statutes ⟹181(2) — Construction permitting unjust working can be rejected only where doubtful.

The rule that rejection of a construction may be warranted by the fact that such construction would permit the statute to work unjustly is confined to the case of a statute of doubtful meaning, and does not apply to one of plain intent.

4. Appeal and error ⟹843(2)—Moot question as to bridge assessment not considered.

Where assessment for bridge extending street over ravine is according to benefits, the question whether the statute permits an assessment on a frontage basis, and, if so, is in that respect invalid, is moot.

5. Municipal corporations ⟹474—Omission of property not benefited does not invalidate assessment for street improvement.

An assessment according to benefits for a street improvement is not invalid because all the land in the assessment district is not assessed; such an assessment involving omission of property not benefited.

6. Municipal corporations ⟹437—Statute does not require railroad right of way to be assessed if not benefited.

Provision of the Vrooman Act that the right of way of a railroad within an assessment district shall be assessed in the same manner as other lands in the district merely requires that the land be not omitted because used for railroad right of way, and not that it be assessed, though not benefited.

7. Municipal corporations ⟹444—Assessment not invalidated by delay in filing affidavits of mailing of notices of resolution of intention.

Under Vrooman Act, § 3, requiring the city clerk to mail notices to landowners of resolution of intention to improve, and that their lands would be assessed therefor, and file affidavits of mailing, but providing that failure to mail them shall not invalidate the assessment, it is not invalidated by failure to seasonably file such affidavits where the notices are mailed.

8. Municipal corporations ⟹474—Assessment not invalidated by arrangement that railroad lands be not assessed.

Arrangement between a city and railroad company that a street improvement should be without expense to company does not invalidate assessment of other lands, where it does not have the effect of throwing onto them a portion of the expense which they should not bear, and so not where the company's lands were not benefited.

9. Municipal corporations ⟹519(2) — Assessment warrant held seasonably returned by contractor.

Assessment warrant is returned by contractor for street improvement within 30 days from date, as required by Vrooman Act, § 10, to preserve the lien where it is in fact returned in such time, but on its return, the question as to its original validity having arisen, it was redelivered to the contractor, and again returned by him within 30 days from the second delivery, though more than that time after the first delivery; it having been valid at least at the time of the second delivery.

10. Municipal corporations ⟹519(2)—Failure of return to show demand as to certain lots does not destroy lien as to other lots.

The return by the contractor for street improvement of the assessment warrant required by the Vrooman Act, § 10, to show the contractor's demand for payment, does not destroy the lien of the assessment as to lots for which it shows the demand made, because not showing it as to lots of others.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Bruce C. Bailey against the City of Hermosa Beach and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Newlin & Ashburn, of Los Angeles, for appellant.

W. W. Phelps, Arthur M. Ellis, Crouch & Crouch, and Paul S. Honberger, all of Los Angeles, for respondents.

OLNEY, J. This is an action by the owner of certain lots in the city of Hermosa Beach to enjoin the issuance by the city of certain street improvement bonds which, if issued, would purport to be a lien upon the plaintiff's lots. The defendants are the city and certain of its officials and the assignee of the contractor who did the work in payment for which the bonds were to be issued. Judgment went against the plaintiff, who appeals. His contentions on appeal are that the assessment pursuant to which the bonds were to be issued is void for several different reasons, and also that even if the assessment were originally valid, the lien securing it has been lost for certain failures in procedure subsequent to the levy of the assessment.

[1, 2] The first and most fundamental contention of the plaintiff is that the assessment is invalid because levied for work not authorized by the act under which the assessment proceedings were taken. The work was the building of a viaduct with its approaches over the right of way and tracks of a railroad company which enters the city, and the act under which proceedings were taken was the street improvement act known as the Vrooman Act. Stats. 1885, p. 147; Deering's General Laws, Act 3930. It seems that the continuity of Eighth street of the city was broken by the right of way of the railroad company, whose tracks at this point are in a cut or ravine some distance below the ground and grade of the street on each side. The city arranged with the railroad company for the right to extend the street across the latter's right of way and tracks by the viaduct mentioned, without expense to the railroad company, and, pursuant to this plan and arrangement, the proceedings under attack were taken and the viaduct built.

The section of the Vrooman Act which specifies the kind of work which may be authorized by proceedings under it is section 2. Its material portions, as amended in 1915 (Stats. of 1915, p. 1400), read as follows:

"Whenever the public interest or convenience may require, the city council is hereby authorized and empowered to order (1) the whole or any portion * * * of any one * * * of the streets * * * of any such city graded or regraded to the official grade, planked or replanked, paved or repaved, macadamized or remacadamized, graveled or regraveled, piled or repiled, capped or recapped, oiled or reoiled, and (2) to order the construction or reconstruction therein of sidewalks, crosswalks, culverts, *bridges*, gutters, curbs, steps, parkings and parkways, sewers, ditches, drains, conduits and channels for sanitary and drainage purposes or either or both thereof, * * * tunnels, *viaducts*, conduits, * * * to protect the same from overflow or injury by water, * * * and (3) the construction or reconstruction in, over or through property or rights of way owned by such city, of tunnels, sewers, ditches, drains, conduits and channels for sanitary and drainage purposes or either or both thereof, * * * and (4) to order any work to be done which shall be deemed necessary to improve the whole or any portion of such streets. * * *"

The numerals in parentheses are not found in the act, but are inserted by us in the quotation for the purpose of distinguishing what appear to us to be clearly the leading subdivisions of the section. Subdivision 1 covers such work in general as grading or paving. Subdivision 2 covers the construction in the street being improved of such things as sidewalks, bridges, etc. Subdivision 3 covers the doing, other than in the street itself, of such work as tunnels, etc., for sanitary or drainage purposes, necessary or convenient in connection with the street or its improvement, and also the doing of other work the enumeration of which we have here omitted from the quotation as immaterial to the present case, but which likewise is necessary or convenient in connection with the street or its improvement. Subdivision 4 is, of course, a general provision covering by its terms all work necessary to improve the street. It was undoubtedly intended to cover by it any work of that character which had failed of previous specific enumeration.

It will be noted that subdivision 2 specifically enumerates bridges as one of the structures, the construction of which in the street may be ordered under the act. It will also be noted that the words "for sanitary and drainage purposes," which occur at the end of the subdivision, and of necessity operate to limit the purposes for which the structures referred to by them may be ordered, refer back only to "sewers, drains, conduits and channels," and do not refer back to "bridges." This is clear, since between the enumeration of bridges and the specification of the limited purposes of sanitation and drainage there occurs the enumeration of "steps, parkings and parkways," to which plainly the requirement that the structure be for sanitary and drainage purposes is not applicable. The act, then, authorizes the construction of bridges in the streets of a city without any limitation other than the general implied one that the bridges be for street purposes.

The structure ordered by the city council in this case, while it might be thought to be

a bridge, was not so called in the proceedings authorizing it, but was termed a "viaduct." Upon this designation the plaintiff's first contention turns. It is that the only viaducts enumerated in section 2 of the act are enumerated in conjunction with "tunnels," that it was held in Thompson v. Hance, 174 Cal. 572, 163 Pac. 1021, that the purposes for which tunnels could be built under the Vrooman Act were limited by the subsequent words "to protect the same [the street] from overflow or injury by water," and that it follows that the same limitations must be placed upon the purposes for which viaducts may be constructed. The present viaduct was, of course, not for protection against water.

But the conclusion urged by the plaintiff does not follow from his premise. It is true the word "viaducts" as used in the act must be held to authorize only structures for protection against water, and, if it were this word alone that had to be looked to for authority to order such a structure as the one here involved, it would follow that such a structure was authorized only when required for that particular purpose. But the word "viaduct" is not the only word that can be looked to for authority. There is also: First, the word "bridges"; and, second, the general grant of subdivision 4 authorizing the ordering of any work deemed necessary to improve the street.

It is wholly unimportant that the proceedings ordering the structure call it a viaduct, and not a bridge. The only material question is: Does the structure in fact come within the designation "bridge" as used in the act, no matter by what term it may be designated in the proceedings of the city? If it is in fact a bridge, its construction is authorized by the statute under that designation. The two terms "viaduct" and "bridge" are almost exact equivalents. There are slight shades of difference in their common use, one of which is that a structure for carrying water above the surface of the ground is more generally spoken of as a viaduct than as a bridge. This probably accounts for the act designating such structures as vidaucts. But in designating structures for carrying roadways, such as the present, either word may be aptly used, although the word "viaduct," probably because of its Latin origin, is, when applied to such structures, rather confined to those of some size or to those of the Roman type of brick, masonry, or concrete arches. But its synonym of more humble Anglo-Saxon origin, "bridge," covers all such structures, great or small, whatever their type of construction, and the present structure comes squarely within its usual meaning.

The structure in question was also authorized under the general grant of subdivision 4. That the bridge or viaduct was an improvement of the street would seem to be plain. The tunnel involved in Thompson v. Hance, was held not to be such an improvement because, while it carried the traffic of the street, it was considered that it acted as a substitute for the street and in lieu of it. Here the viaduct is not a substitute for the street, or in lieu of it; it is for the purpose of carrying the street across the ravine which it spans, and is in truth the very street itself at that point. Our conclusion as to the first contention of the plaintiff is that the strucure was authorized by section 2 of the act, both because it comes within the specific enumeration of "bridges," and because it comes within the general grant of authority to order an improvement of the street.

[3, 4] Before concluding our discussion of this subject, however, there is a further argument of counsel which perhaps should be noticed. It is that, if such a structure as that involved here may be ordered by proceedings under the Vrooman Act, it would follow that the assessment for paying for it might be levied on a frontage basis, since the act provides that work authorized under it may be paid for by assessment levied in that manner. Such an assessment in such a case as this would be manifestly most unjust, but the question as to its validity is moot, since the assessment in question is not of that character. It is true that, in construing a statute, the fact that a certain contruction will permit of the statute working in an extreme and unjust manner may well warrant the rejection of that construction. But that rule is confined to cases of construction where the meaning of the statute is doubtful. It has no application to such a case as the present, where the intent of the act to authorize such work as the bridge under consideration is plain. It may be that the statute does not in fact authorize a frontage assessment in such a case as this, where the work is of more than local benefit, or that, if it does, it is in that respect invalid; but these questions are not presented. The act does plainly authorize the work, and the objection that the assessment to pay for the work might have been on a frontage basis cannot be made, since the assessment was not of that character.

[5, 6] The second objection of the plaintiff to the assessment is that it is invalid because the land of the railway company forming its right of way adjoining the bridge was not assessed although within the assessment district. The answer is that this point was determined adversely to the contention of the plaintiff in the recent case of Larsen v. San Francisco, 186 Pac. 757. There, as here, an assessment was levied upon the land within an assessment district to pay for a public improvement, upon the basis of the assessment

being in proportion to the benefits accruing. There, as here, an appeal lay from the action of the subordinate official or officials apportioning the assessment in the first instance to the legislative body of the city. There, as here, some of the property within the assessment district was not assessed, and the point was made that the omission rendered the assessment invalid. It was also urged that the assessment was invalid because not in fact made according to benefits. The two points were answered together, and they are in fact one; for it would seem plain that making an assessment according to benefits involves an omission from assessment of property not benefited. Reclamation District v. Goldman, 65 Cal. 640, 4 Pac. 676. The answer made to these points in Larsen v. San Francisco was that, in the absence of a showing of fraud or mistake, the assessment as levied in the first instance was valid unless appealed from, and, if appealed from, was valid as finally approved by the legislative body of the city. In the present case fraud or mistake was not shown. The trial court found in fact that the omitted land was not benefited, a finding very apparently justified in view of the character of the property omitted and its physical situation with reference to the bridge. The conclusion is that the omission in question did not invalidate the assessment. This conclusion is not affected by the provision of the statute that the right of way of a railroad within an assessment district shall be assessed in the same manner as other lands within the district. All that the statute requires is that such lands be not omitted because they are used for railroad right of way, and that, if benefited, they be assessed like other lands.

[7] The third objection by the plaintiff to the assessment is that the city clerk did not file until long after the termination of the proceedings affidavits of the mailing by him to property owners within the assessment district of notices of the passage of the resolution of intention to do the work and that their lands would be assessed therefor. The objection is trivial. Section 3 of the act requires the city clerk to mail such notices and file affidavits of mailing, but it also provides that the failure of the clerk to mail the notices shall not invalidate the assessment. It is true that it does not provide that a failure to file affidavits of mailing shall not invalidate the assessment, but the substantial thing was the mailing, and if the assessment were valid even if the notices were not mailed, it would certainly not be invalid when they were mailed, but formal proof of that fact merely was lacking. Smith v. Lightston, 186 Pac. 769.

[8] A number of objections to the assessment are made by the plaintiff under different heads which all reduce themselves to the one objection that the lands of the railway company were either omitted from the assessment district entirely or else were not assessed, because of the arrangement between the city and the company that the bridge should be built without expense to the company. That arrangement in itself was a perfectly proper one. It would of course not be permitted, because of such an arrangement, to throw onto the other property owners the portion of the expense properly assessable against the lands of the railway company. If the lands of the railway company would be benefited by the improvement so that a portion of its expense should be assessed against them, then the arrangement would have to be carried out in some other manner than by failing to assess those lands. But, if the lands of the railway company are not benefited by the improvement, then the failure to assess them does not have the effect of throwing onto other property owners a portion of the expense which they should not bear, and this is the only thing of which the other property owners would have the right to complain. As we have said, the trial court found in this case that the lands of the railway company were not benefited. This is a complete answer to the plaintiff's objection.

[9] The contention of the plaintiff that, even if the assessment were valid, the lien of it has been lost, is based upon the alleged facts: (1) That the assessment warrant was not returned by the contractor within 30 days after its date; and (2) that the return of the warrant when made showed a failure to make the necessary demand upon certain property owners. Section 10 of the Vrooman Act provides that the contractor, upon delivery to him of the warrant, shall make demand for its payment, either by personal demand upon the owners of the lands assessed, or by publicly demanding payment on the premises assessed. It also provides that the contractor shall return the warrant to the superintendent of streets within 30 days of its date, with a verified indorsement thereon stating the nature and character of the demand made. It further provides that, if the contractor fails to return the warrant within the time and in the form prescribed, he shall thenceforth have no lien.

In regard to the alleged failure of the contractor to make the return within the prescribed 30 days, it is stated in the brief of plaintiff's counsel that the facts are that the warrant was dated September 19th, and delivered to the contractor on that day, but was not returned until October 20th, or more than 30 days thereafter. If this were all, the lien of the contractor was of course lost. But it is not all. The actual facts would seem to be that, while the warrant was dated September 19th, it was returned on or

before September 27th; that upon its return some question seems to have arisen as to the original validity of the warrant; that thereupon, to avoid any question, it was redelivered to the contractor, new demands were made, and a second return made on October 20th. It is apparent from these facts that, if the warrant was originally valid and validly issued, it was returned on or before September 27th and within the requisite time. On the other hand, if it were not valid until issued the second time, that is, on or after September 27th, then it was returned on October 20th, that is, within 30 days. On either alternative, and there are but the two alternatives, it was returned within the requisite time.

[10] As to the point that the return failed to show the necessary demand, the statement in counsel's brief is that the return shows a failure to make a demand on the owners of certain lots. The natural inference is that among these lots were those of the plaintiff; for it is plain that the lien of the assessment on the plaintiff's lots could not be lost by the failure of the contractor to make demand on the owners of other lots. An examination of the record, however, shows that the lots as to which it is claimed the return shows a failure to demand payment of the assessment are all lots owned by others than the plaintiff. The plaintiff therefore has no right to complain of the defect in the return in this respect, if in fact such defect exists.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; SLOANE, J.; WILBUR, J.; LAWLOR, J.

183 Cal. 783

BROWN v. CITY OF LOS ANGELES. et al. (L. A. 5284.)

(Supreme Court of California. Oct. 1, 1920. Rehearing Denied Oct. 28, 1920.)

1. Constitutional law ⊂⊃86—Undertaking establishments may be controlled and prohibited under police power.

Inasmuch as one of the purposes of the organization of governments is to secure to men the "inalienable right" of "pursuing and obtaining safety and happiness" (Const. art. 1, § 1), the establishment of undertaking parlors in thickly settled communities and residential districts may constitute such an invasion of this inalienable right of the inhabitants thereof as to bring the regulation and control, and if necessary the prohibition thereof, within the well-recognized police power of the state.

2. Municipal corporations ⊂⊃611 — Invalidity of one-lot zone does not invalidate large zone for undertaking parlors.

Assuming that the city of Los Angeles acted arbitrarily in creating one-lot zones outside of a large zone where undertaking parlors could be maintained, and that such one-lot zones were invalid, such fact would not aid one, maintaining an undertaking parlor outside of the large zone, in an attack on the ordinance creating the large zone.

3. Municipal corporations ⊂⊃611—Undertaker maintaining parlor in heart of city could not complain of invalidity of prohibited zone as affecting outlying territory.

An undertaker, having selected a location in the heart of a city for his parlor, cannot complain that an ordinance, creating a zone within which undertaking parlors could only be maintained, is invalid, in that there are vast tracts of uninhabited land in outlying districts, in which the ordinance in effect prohibits the establishment of undertaking parlors.

4. Municipal corporations ⊂⊃625—Ordinance creating zone not void by reason of there being similar districts outside zone.

The mere fact that there is territory outside of a zone in a city in which a business subject to police power is permitted, exactly similar to that inside the district, does not render the ordinance fixing the boundary between these two similar districts void because unreasonable.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by W. A. Brown against the City of Los Angeles and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Haas & Dunnigan and H. L. Dunnigan, all of Los Angeles, for appellant.

Albert Lee Stephens, Wm. P. Mealey, and Erwin W. Widney, all of Los Angeles, for respondents.

WILBUR, J. This action was brought by the proprietor of an undertaking establishment to enjoin the enforcement of an ordinance of the city of Los Angeles, No. 31746, New Series, prohibiting the locating of such establishments at any place in the city of Los Angeles outside of certain zones. The injunction was denied, and plaintiff appeals.

A prior ordinance was enacted, on July 13, 1904, No. 9695, New Series, prohibiting the maintenance of undertaking establishments within the city of Los Angeles, excepting within a certain zone specifically described in the ordinance. This zone has subsequently been enlarged by amendment, until it now contains some 60 blocks, including practically all of the business and some of the semi-business property in the central portion of the city. This district is about 2½ miles long and half a mile wide. In addition to the amendment increasing the size of this zone, which is described in the present ordinance as district No. 1, other amendments to the ordinance were enacted from time to time, creating smaller districts in which the

maintenance of undertaking establishments was permitted. These new zones in other portions of the city, 13 in all, with one exception, have consisted of a single lot described in the amendment to the ordinance in question, and in each instance was enacted for the purpose of permitting an undertaking establishment upon such lot. District No. 2 covered the property of the Highland Park Undertaking Company at 5860 Pasadena avenue. District No. 3 covered the property of Vesper & Harm, 1930 East First street. District No. 4 covered the property of Gates & Crane, 1733 Highland avenue in the Hollywood district. District No. 5 covered the property of W. M. Strother, 6430 Hollywood boulevard. District No. 6 covered the property of Goodrich & Bryant Undertaking Company at San Pedro, the same having been annexed to the city of Los Angeles, the business having been theretofore established. District No. 7 covered a district in Wilmington, upon which an undertaking establishment was being conducted at the time of its annexation to Los Angeles. It is alleged that districts 8, 9, 10, 11, 12, and 13 were each similarly created for the purpose of permitting some particular individual to conduct an undertaking establishment upon his property so described in the ordinance. The appellant had conducted an undertaking establishment within zone No. 1, but, his lease having expired, he sought a new location, and secured a lot immediately south, distant 170 feet, of the southerly boundary of zone No. 1. He applied to the city council for an amendment to the ordinance by which the property he had purchased would be excepted from the operation of the ordinance. Opposition developed in the neighborhood to such an establishment; and, although a favorable report has been made upon plaintiff's application, it was subsequently denied. Notwithstanding such denial, he erected such establishment, and has been conducting his business at the new location. Having been frequently arrested for a violation of this ordinance, he brings an action to enjoin its enforcement.

[1] The first question that arises is as to whether or not the business being conducted by the appellant is such that its regulation properly comes within the police power of the state. No case has been called to our attention in which this matter has been expressly decided, although such an establishment has been abated as a nuisance at the instance of the property holders aggrieved thereby. Densmore v. Evergreen Camp, 61 Wash. 230, 112 Pac. 255, 31 L. R. A. (N. S.) 608, Ann. Cas. 1912B, 1206; Rowland v. Miller, 139 N. Y. 93, 34 N. E. 765, 22 L. R. A. 182; Beisel v. Crosby (Neb.) 178 N. W. 272. The nature and extent of the police power has been so often discussed by the courts of this and other states that we deem it unnecessary to enter into any general discussion thereof, particularly in view of the fact that in his petition for rehearing the appellant concedes that the business of operating an undertaking establishment is subject to police regulation. It has been held that livery stables, laundries, soap and glue factories, carpet-beating establishments, lumber yards, brickyards, billboards, cemeteries, private hospitals for inebriate, insane, and tubercular patients are subject to regulation under the police power, and that in the exercise of such power their maintenance may be prohibited. The same reasoning which would lead to the conclusion that these establishments are subject to police regulation would also point to the conclusion that undertaking establishments are subject to such regulation, and may be prohibited in thickly settled communities and in residential districts. Odd Fellows Cemetery Ass'n v. San Francisco, 140 Cal. 230, 73 Pac. 987; Laurel Hill Cemetery Ass'n v. San Francisco, 152 Cal. 464, 93 Pac. 70, 125 Am. St. Rep. 58, 14 Ann. Cas. 1024; Ex parte Quong Wo, 161 Cal. 220, 118 Pac. 714; In re Montgomery, 163 Cal. 457, 125 Pac. 1070, Ann. Cas. 1914A, 130; Ex parte Hadacheck, 165 Cal. 416, 132 Pac. 584, L. R. A. 1916B, 1248; In re Barmore, 174 Cal. 286, 163 Pac. 50, L. R. A. 1917D, 688; Cusack v. Chicago, 242 U. S. 526, 37 Sup. Ct. 190, 61 L. Ed. 472, L. R. A. 1918A, 136, Ann. Cas. 1917C, 594; Buchanan v. Warley, 245 U. S. 60, 38 Sup. Ct. 16, 62 L. Ed. 149, L. R. A. 1918C, 210, Ann. Cas. 1918A, 1201; St. Louis Poster Advertising Co. v. St. Louis, 249 U. S. 269, 39 Sup. Ct. 274, 63 L. Ed. 599; Shepard v. Seattle, 59 Wash. 363, 109 Pac. 1067, 40 L. R. A. (N. S.) 647; Everett v. Paschall, 61 Wash. 47, 111 Pac. 879, 31 L. R. A. (N. S.) 827, Ann. Cas. 1912B, 1128. Inasmuch as one of the purposes of the organization of our state and federal governments is to secure to men the "inalienable right" of "pursuing and obtaining safety and happiness" (Const. California, art. 1, § 1), we entertain no doubt that the establishment of undertaking parlors in thickly settled communities and residential districts may constitute such an invasion of this inalienable right of the inhabitants thereof as to bring the regulation and control, and, if necessary, the prohibition thereof, within the well-recognized police power of the state.

[2-4] It is claimed, however, in this case that the ordinance is arbitrary, unreasonable, and discriminatory. Appellant thus states the issue in his petition for rehearing:

"The issue in this case upon this appeal is whether or not courts will receive evidence that in a particular case the exercise of police regulation over an acknowledged subject of such power is in fact in the particular case arbitrary and unreasonable."

This question was raised by numerous offers of proof, by allegations in the complaint not denied by the answer, and by calling at-

tention to those facts of which the court takes judicial notice regarding the city of Los Angeles. Varcoe v. Lee, 181 Pac. 223. These numerous points, however, amount in substance to the claim that the location in which the appellant has established his business is no different in character and situation from the southerly portion of zone No. 1, and from the various smaller zones created by amendment to the original ordinance. With reference to these smaller zones created for the express purpose of allowing the maintenance of undertaking establishments by particular individuals, we may assume that the exercise of such authority by the city would amount to a special permit to an individual, and therefore would be an unreasonable exercise of the police power. This assumption, however, does not aid the plaintiff, for the reason that if we assume the invalidity of the amendments to the ordinance permitting the location of particular undertaking establishments outside of zone No. 1, we would still be confronted by the ordinance prohibiting undertaking establishments outside of zone No. 1, which, if valid, is being violated by the appellant in the operation of his establishment outside of this district. The attack upon the ordinance limiting the establishment of such business to zone No. 1 is based upon the proposition that territory outside of this zone is similar in every respect to that around the location selected by the plaintiff. It is also pointed out that there are vast tracts of uninhabited land contained in the annexed districts of Los Angeles city, and that the ordinance in effect prohibits the establishment of undertaking parlors in these localities. If appellant was located in this uninhabited and outlying territory he would be in a position to raise that question, but, having selected a location in the heart of the city, he is not concerned with the validity of the ordinance as affecting such outlying territory. In re Quong Wo, 161 Cal. 222, 118 Pac. 714. The plaintiff's claim, then, results in this, that where there is territory outside of the district in which a business subject to police power is permitted, exactly similar to that inside the district, the ordinance fixing the boundary between these two similar districts is void because unreasonable. This, of course, cannot be the law. In support of his contention he cites Ex parte Throop, 169 Cal. 93, 145 Pac. 1029, and Curtis v. Los Angeles, 172 Cal. 230, 156 Pac. 462, although admitting that in Re Hadacheck, 165 Cal. 416, 132 Pac. 584, L. R. A. 1916B, 1248, this court held that the mere failure to include similar property within a district did not invalidate the ordinance. In Curtis v. Los Angeles, supra, the city had established eight zones in which livery stables were authorized upon the receipt of a permit from the proper city authority. Curtis, who had established a livery stable outside of these districts where they were not prohibited, was subsequently included within a new district, No. 9, and thereafter the livery stable business was prohibited in this one zone, while permitted in the other eight and in the balance of the city. It was upon this discrimination by which in this district alone livery stables were absolutely prohibited, while permitted in eight districts similarly situated, as well as the balance of the city, coupled with the fact that there was no reason in the nature and character of the location which would justify the discrimination, that the court based its conclusion that the ordinance was unreasonable and void. Ex parte Throop, supra, involved the location of a stone crusher. It appeared that the city of South Pasadena had established a small district in the heart of the business and poorer residential district in which stone crushers were permitted, and prohibited them in the balance of the city. The stone crusher in question was located on the petitioner's property in the Arroyo Seco, a property which was only valuable because of the stones and boulders thereon, and such property was comparatively remote from residences. The Chief Justice inspected the premises, in accordance with a stipulation of the parties, and the court came to the conclusion that the ordinance was entirely unreasonable. In the present case, if the original ordinance had permitted the location of undertaking establishments in the entire city, but had required that in zone No. 1 permits should be secured before such business was established, and if the plaintiff had established his business outside of the special district where it was lawful for him so to do, and subsequently a new district had been created surrounding the property in which appellant had located his business, and in this one district alone not dissimilar in character from that in which undertaking establishments were authorized upon securing a permit, and not essentially different from the balance of the city in which the maintenance of such business was entirely unregulated, we would have a case paralleling the Curtis Case. If, on the other hand, the plaintiff had located his undertaking establishment in some remote and comparatively uninhabited part of Los Angeles city, upon property which was only valuable for use as an undertaking establishment, we would have a case paralleling In re Throop, supra. In this case, however, the situation is entirely different, and comes clearly within the principle enunciated in Ex parte Hadacheck, supra. The mere fact that outside of the permissive district there was other property similar in nature and character would not justify the court upon ascertaining that fact to substitute its judgment for the legislative judgment. The boundary line of a district must always be more or less arbitrary, for

the property on one side of the line cannot, in the nature of things, be very different from that immediately on the other side of that line. In a city growing as rapidly as Los Angeles, property is constantly changing its character from residential to apartment house or semibusiness and to business property. No doubt property has been purchased and occupied with a knowledge of the various zones and districts established by the legislative authorities of the city, and property in zone No. 1 is purchased with the knowledge that undertaking establishments may be located therein, and property bought outside of that district with the knowledge that, in the absence of some legislative authority therefor, such establishments cannot be maintained. This fact alone justified the careful consideration of the council in making any modification or extension of the zones in which these establishments would be permitted, and gave weight to the protests of the property holders, which plaintiff claims resulted in the change of attitude of the council upon his application. Appellant also relies upon Dobbins v. City of Los Angeles, 195 U. S. 233, 25 Sup. Ct. 18, 49 L. Ed. 169, and In re Smith, 143 Cal. 368, 77 Pac. 180. In the former case, however, Mrs. Dobbins had secured a permit from the city of Los Angeles for the erection of gas works within a zone in which such works were permitted by the ordinances of the city, and thereafter while the gas plant was being erected the city, as it is admitted, arbitrarily and for the purpose of favoring a competitor, changed the boundaries of the district so as to prohibit the erection of the very building for which they had given a permit, and upon the faith of which the plaintiff had expended large sums of money. It was held that this arbitrary change of attitude on the part of the city was in effect a taking of petitioner's property. No such case is presented here. In re Smith, supra, declared invalid an ordinance of the board of supervisors of Los Angeles county prohibiting the establishment of a gas plant in Arroyo Seco. It appeared from the admitted facts that there was no reason for selecting this particular locality as a district in which the establishment of gasworks was prohibited, while they were permitted everywhere else in the county. This case is not at all similar to the one at bar. Here there apparently has been a reasonable effort to confine such establishments to the business and semibusiness districts of the city, although all of such property is not within the zone wherein they are established. As was said in a similar case involving the establishment of a brickyard (Ex parte Hadacheck, supra):

"The petitioner avers, too, that in other districts of the city there are brickyards which are quite as injurious to their neighbors as is the petitioner's establishment, and that the council has not prohibited the maintenance of such yards in these other districts. But this presents a question which is peculiarly for the determination of the legislative body. Ex parte Quong Wo, 161 Cal. 220, 118 Pac. 714. Granted that there are reasons justifying the prohibition of the business within the area described in the ordinance, the city council, and not this court, is the body charged with the duty of deciding whether the conditions in other parts of the city require like prohibition."

We may assume the truth of the evidence offered by petitioner, that there are places outside of zone No. 1 equally adapted to the establishment of undertaking parlors, but it does not follow that this court should interfere with the discretion of the city council in fixing the boundaries of districts in a city whose population is increasing as rapidly, and whose business and residence districts are changing so constantly, as in the city of Los Angeles. We think that the proper delimitation of the zone in which undertaking parlors may be established has not been violated by so arbitrary and unreasonable exercise of legislative authority, as to justify the interposition of this court.

It is also contended that the ordinance is unreasonable because the prohibited zones constitute a very small part of the semibusiness and semiresidence district. But, as we have already seen, that question is addressed to the legislative body of the city, and we cannot say that the mere omission of similar districts from the permitted zone is unreasonable under all the circumstances.

Judgment affirmed.

We concur: LENNON, J.; LAWLOR, J.; SLOANE, J.

ANGELLOTTI, C. J. I concur. To my mind a very different case would be presented if petitioner were seeking to maintain an undertaking establishment in a different section of the city near one of the smaller permissive "one-lot" zones, and in a place between which and such permissive zone there was no material difference. He might then well complain that the ordinance illegally discriminated against him. But such is not his situation, as is fully shown by the opinion of Justice WILBUR.

We concur: SHAW, J.; OLNEY, J.

183 Cal. 777

ZECHIEL v. LOS ANGELES GAS & ELECTRIC CORPORATION. (L. A. 5271.)

(Supreme Court of California. Oct. 1, 1920.)

1. **Municipal corporations ⟹706(9)—Findings in personal injury case as to negligence and contributory negligence inconsistent.**

In a child's action for injuries through collision with a motortruck while riding a tricycle, finding that it was the negligence of defendant in not giving sufficient warning of its truck's approach that proximately caused the accident, and a finding that infant plaintiff was guilty of contributory negligence because the noise and movement of the truck were such as to give him sufficient warning, *held* inconsistent.

2. **Municipal corporations ⟹705(3)—Failure to give warning of approach of truck held not negligence proximately causing injury to child.**

If the noise and visibility of the autotruck which injured a child were sufficient warning of its approach, failure to give further warning was not negligence proximately causing the injury.

3. **Municipal corporations ⟹706(9)—Findings as to manner of collision between infant plaintiff on tricycle and motortruck in conflict.**

In an infant's action for injuries when struck by defendant's motortruck as he was riding a tricycle, finding, as further ground of the infant plaintiff's contributory negligence, that he rode his tricycle down a driveway and into the street and under and against defendant's truck *held* in conflict with another finding that the truck was backed across the street and collided with plaintiff.

4. **Municipal corporations ⟹706(9)—Ultimate fact of contributory negligence not to be upheld on contradictory findings as to probative facts.**

In an infant plaintiff's action for injuries when collided with on his tricycle by defendant's motortruck, ultimate fact of plaintiff's contributory negligence *held* not to be supported on contradictory findings as to probative facts.

In Bank.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Louis Zechiel, a minor, by Charles H. Zechiel, his guardian ad litem, against the Los Angeles Gas & Electric Corporation. From judgment for defendant, plaintiff appeals. Reversed.

F. McD. Spencer, of Los Angeles, for appellant.

Paul Overton, William A. Cheney, J. H. Powell, S. W. Guthrie, and Herbert J. Goudge, all of Los Angeles, for respondent.

SLOANE, J. This is an action by an infant through his guardian ad litem to recover damages sustained by being run into by an autotruck belonging to and operated by defendant. The infant, a boy 4½ years of age, and crippled by the loss of both legs from about the knee down, was riding a tricycle propelled by his hands, his accustomed mode of locomotion. He was in the yard of a house occupied by his grandmother, and was proceeding on his tricycle to enter upon and cross the street toward the home of his own parents, nearly opposite. The truck of defendant, which had been standing at the curb at a point on the side of the street from which the child started to cross, commenced to back along the curb and then out into the street, and the child, without heeding the movement of the machine, ran his tricycle into the street, and was run over by defendant's truck and suffered the injuries complained of. The appeal is by the plaintiff from a judgment by the court in favor of defendant, and is upon the judgment roll.

The only controverted question in this case arises under the finding of the trial court that the infant plaintiff was guilty of contributory negligence in riding his tricycle from the adjacent yard out on the street in the path of defendant's autotruck, which was at the time being propelled backward from a position near the curb of the sidewalk.

The court found:

"That the said truck then and there collided violently with plaintiff and his tricycle, which latter the said minor Louis Zechiel had brought to a stop at a point several feet before reaching the middle of the street, and thereby caused plaintiff certain bodily injuries and damaged plaintiff's tricycle. * * * That said collision and accident and injuries to plaintiff were caused proximately by the negligence of the defendant in backing said autotruck away from said northerly curb in a westerly and southerly direction in crossing the street, and by the negligence and carelessness of defendant in backing and propelling said autotruck without giving sufficient warning of the approach of said truck to plaintiff, and without looking to ascertain the presence of plaintiff in the street or at or near the path of said truck, and propelling said truck against said tricycle of Louis Zechiel, and by no other negligence on the part of the defendant."

"The court further finds that the said injuries received by plaintiff were caused by his own fault, carelessness, and negligence, in this: That on said 9th day of April, 1915, at the time said truck of defendant was standing on said East Fiftieth street and preparing to back, the plaintiff, seated on said tricycle, was in the yard of a house abutting the south side of said street, and almost directly opposite the position of said truck thereon, being the house and yard of Mrs. Walper, his grandmother; that after defendant's employé had started to back said truck plaintiff suddenly and without giving any warning to defendant, and without giving defendant any opportunity to stop said truck and to avoid said accident, ran down the

private driveway of the premises upon which said tricycle was standing into the street and under and against the defendant's truck, without using any care to avoid striking defendant's truck; that at the time said defendant started the motor of said truck the same made a loud noise, which could have been heard plainly by plaintiff, and that all the time said defendant was backing said truck the same could have been seen by plaintiff, and it was making sufficient noises to have been heard by plaintiff; that at no time while defendant was backing said truck was it moving at a greater speed than four miles an hour; that the speed of said tricycle while moving was slower than that of said truck; that it was carelessness and negligence on the part of plaintiff to run into said street on said tricycle and in the path of said truck when such notice and warning of its approach had been and was being given; that said fault, carelessness, and negligence on the part of plaintiff contributed directly and proximately to his said injuries."

[1, 2] It is contended by appellant that the findings are inconsistent, and for that reason insufficient to support the judgment. It will be observed that the court first finds that the injuries to the child were proximately caused by negligence of the defendant in backing its autotruck "without giving sufficient warning of its approach and without looking to ascertain the presence of the plaintiff in the street or at or near the path of said truck, and propelling said truck against said tricycle of Louis Zechiel." It is also found "that said truck then and there collided violently with plaintiff and his tricycle." On the other hand, the court finds that the infant plaintiff was guilty of contributory negligence for the following express reasons:

"That after defendant's employé started to back said truck plaintiff suddenly and without giving any warning to defendant, and, without giving defendant any opportunity to stop said truck and to avoid said accident, ran down the private driveway of the premises upon which the said tricycle was standing into the street, and under and against the defendant's truck." "That at the time the defendant started the motor of said truck the same made a loud noise, which could have been heard plainly by plaintiff, and that all the time said defendant was backing said truck the same could have been seen by plaintiff, and it was making sufficient noise to be heard by plaintiff."

Clearly, the court predicates the alleged contributory negligence of this child upon the stated facts that the noise and movement of the truck were such as to give plaintiff sufficient warning of its approach in his direction. But the court had already previously found that it was the negligence of the defendant in "not giving sufficient warning of its approach" that proximately caused the accident. These findings are clearly inconsistent. If the noise and visibility of the autotruck were sufficient warning of its approach, then the defendant by reason of failure to give further warning was not guilty of negligence proximately causing the injury. Herzig v. Sandberg, 54 Mont. 538, 172 Pac. 132; Van Dyke v. Johnson, 82 Wash. 377, 144 Pac. 540; Schultz v. Starr, 180 Iowa, 1319, 164 N. W. 163, 165; Priebe v. Crandall (Mo. App.) 187 S. W. 605.

In other words, they could not both be guilty of culpable negligence in this particular. If the movement and noise of the machine were sufficient to give the plaintiff notice of his danger, no obligation rested on the defendant to give further warning, and his failure to do so was not actionable negligence. On the other hand, if, as the court has found, the accident occurred by reason of negligent failure of the defendant to give sufficient warning, it must follow that the movement and noise of the machine did not, and were not sufficient to warn the plaintiff of his danger, and he could not be guilty of negligence in failing to observe or heed the same.

[3] Then again, the court has found as further ground of the plaintiff's contributory negligence that he "rode his tricycle down the driveway and into the street and under and against the defendant's truck." This is certainly a different and prejudicially conflicting finding from the other finding that the said truck was backed "across said street in a westerly and southerly direction," and "then and there collided violently with plaintiff and his tricycle, which latter the said minor, Louis Zechiel, had brought to a stop at a point several feet before reaching the middle of the street," and that defendant "propelled said truck against said tricycle." It may well follow that the court's conclusion of contributory negligence is based on the finding that plaintiff ran his tricycle "into the street and under and against defendant's truck," a finding radically at variance with the other findings that the defendant backed and propelled said truck against said tricycle, and collided violently with plaintiff and his tricycle which had already been brought to a stop near the middle of the street.

[4] We think the ultimate fact of contributory negligence as declared by the court cannot be upheld upon these contradictory findings as to the probative facts. If the case rested upon the ultimate finding of contributory negligence in express terms, it might well be argued that in the absence of a transcript of the testimony it must be presumed that there was sufficient evidence to sustain the finding, but here the trial court has explicitly set forth the probative facts upon which it relies to establish contributory negligence. The language used is:

"That the said injuries received by plaintiff were caused by his own fault, carelessness, and negligence, in this"

—and then follows a statement of the specific facts alleged to constitute the negligence, facts which are in plain conflict with other facts in evidence elsewhere found by the court. Under such circumstances the ultimate declaration of contributory negligence is no more than a conclusion of law deduced from the facts found, and cannot stand unless logically and legally deducible from such specific findings.

In view of these conditions it is unnecessary to determine whether contributory negligence can be attributed to an infant of 4½ years of age under the circumstances here shown. Even in the absence of the findings in conflict with those relied on to prove such contributory negligence, it might well be questioned if the plaintiff, a mere baby, should not be held non sui juris as a matter of law. Presumptively, at least, a child of such tender years could not be held accountable under these conditions. It would require an unusual degree of observation and comprehension to impress upon the consciousness of a child of such tender years that this autotruck was reversing its usual mode of progress and was starting to move backward. The circumstances at least are such as to emphasize the importance of the conflict in the findings in reviewing the conclusions of the trial court.

It was found definitely in this case that the parent and custodian of the child were free from negligence, so that the question of imputed negligence is not involved in this appeal.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LAWLOR, J.; LENNON, J.

183 Cal. 801

ZECHIEL v. LOS ANGELES GAS & ELECTRIC CORPORATION. (L. A. 5272.)

(Supreme Court of California. Oct. 1, 1920.)

In Bank.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Charles H. Zechiel against the Los Angeles Gas & Electric Corporation. From judgment for defendant, plaintiff appeals. Reversed.

F. McD. Spencer, of Los Angeles, for appellant.

Paul Overton, William A. Cheney, J. H. Powell, S. W. Guthrie, and Herbert J. Goudge, all of Los Angeles, for respondent.

SLOANE, J. This appeal by plaintiff from a judgment in the superior court of Los Angeles county involves the same issues of law upon which the appeal was taken and decided in the case of Louis Zechiel, 192 Pac. 720, a minor, by his guardian ad litem against the same defendant (L. A. No. 5271) the decision in which is this day filed.

Both actions are for the recovery of damages for injuries resulting from negligence of the defendant in running an autotruck over the minor, Louis Zechiel. The action by the minor was for his personal injuries. The action by the plaintiff, Chas. H. Zechiel, who is the father of the minor, is for loss of services to the plaintiff and cost of medical attendance on the minor resulting from the same injuries.

Upon the authority of the decision in said case No. 5271, the judgment is reversed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

49 Cal. App. 63

PEOPLE v. LATHROP. (Cr. 510.)

(District Court of Appeal, Third District, California. Aug. 17, 1920.)

1. Assault and battery ⇐90—Evidence that assaulted person unable to work, etc., admissible.

In a prosecution for assault in defendant's attempt to arrest the prosecuting witness trespassing on his land, testimony that the prosecuting witness was not able to work for a month and a half after being shot in the legs, etc., *held* admissible to show a violent injury was done to his person.

2. Criminal law ⇐1144(15)—Appellate court must assume jury followed instructions.

The appellate court must assume that the jury were sensible men and followed the instructions of the trial court that no question of mercy, sentiment, or anything else resided with them except the question whether or not they believed from the evidence that defendant was guilty.

3. Arrest ⇐68—Neither officer nor private citizen can seriously injure or kill one arrested for misdemeanor.

Neither an officer nor a private citizen who has arrested a third person for a misdemeanor has the right intentionally to injure or to kill the one arrested merely to prevent his escape.

4. Arrest ⇐68—Officer or citizen can pursue escaping prisoner with reasonable force.

Under Pen. Code, § 835, an arresting officer or private citizen has the right to pursue an escaping prisoner and use whatever force may be necessary for his arrest, using whatever reasonable means are available, and summoning, under section 843, as many persons as he deems necessary to assist him, though he must stop short of killing or seriously injuring the fleeing person except in self-defense.

5. Assault and battery ⇐64—Guilt of private citizen who shot person arrested, unless shooting was willful, depended on negligence.

If defendant, a private citizen, willfully shot the person he had arrested when found trespassing upon his land, he was guilty of an

offense, but if he had no intention of shooting him, but fired merely to frighten him into submission, the question of his guilt of an assault depended on the question whether he acted with criminal negligence, or according to the standard prescribed for reasonable men under such circumstances.

5. Criminal law ⟸822(7)—Instruction on right of defendant to shoot party arrested by him not misleading.

In a prosecution of defendant, a private citizen, for assault committed by shooting prosecuting witness, whom he had arrested while trespassing upon his land, instruction that, under Pen. Code, § 837, permitting a private citizen to arrest for a public offense committed in his presence, it is not intended the private party has the right to shed blood, etc., *held* to imply the element of purpose or intention in defendant's act, and, considered with the other instructions, not to be misleading.

7. Criminal law ⟸761(18)—Instruction as to effect of good character properly refused as assuming existence of fact.

In a prosecution of defendant, a private party, for assault committed by shooting one whom he had arrested for trespassing, defendant's requested instruction that his good character must be considered with all other evidence, and was a sufficient fact from which a reasonable doubt of guilt might arise, was properly refused as assuming defendant's good character was established beyond question, when it was a matter for the jury.

8. Criminal law ⟸1173(2) — Refusal of instructions as to assaulted party's guilt of offense harmless.

In a prosecution for assault by defendant, a private citizen, in shooting one whom he had arrested for trespassing, refusal to give instructions requested by defendant that the assaulted party was guilty of a misdemeanor if at the time he had in his possession a dying swan shot by him *held* harmless to defendant; the assaulted party's guilt of a misdemeanor being practically admitted and certainly understood by the jury.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Reuble C. Lathrop was convicted of assault, and he appeals. Affirmed.

F. W. Henderson and Andrew R. Schottky, both of Merced, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendant was accused of the crime of assault with intent to commit murder and the jury found him guilty of assault. The court sentenced him to pay a fine of $300 and to serve a term of three months in the county jail. The appeal is from the judgment and an order denying his motion for a new trial. As stated by appellant, he relies for reversal upon three grounds:

"(1) That the court erred in the admission of certain testimony offered by plaintiff and objected to by defendant; (2) that the court misdirected the jury in certain instructions given to the jury at the trial; (3) that the court erred in refusing to give to the jury certain instructions requested by the defendant."

It is not disputed that the evidence is sufficient to support the verdict. It appears without conflict that Soares, the complaining witness, was hunting upon the land of the defendant and was trespassing thereon, that he was discovered by the defendant, who was not an officer, and that the defendant placed Soares under arrest and took from him a shotgun belonging to said Soares. As to the details of what followed the prosecuting witness and the defendant are not entirely in accord. Soares testified:

That the defendant "said, 'We will go and see the judge,' and I asked him if he was the sheriff. He said, 'Never mind about that, but come on, and we will go and see the sheriff.' I said, 'If you was not the sheriff you don't have to take me.' I started to walk a little ways, and he went back to the machine and took the gun out and took a step and shot me in the legs."

He further testified that Mr. Lathrop was about 25 yards away from him at the time, and that the shot was fired from the said gun belonging to Soares. Lathrop testified that Soares started to run away; that the former called to the latter to stop, and upon his failing to do so appellant fired into the ground some eight feet behind Soares to scare him, the theory of appellant being that the shot must have glanced on the hard surface of the ground, thus causing the wound.

[1, 2] It is quite apparent that no prejudicial error was committed in the matter to which the first objection is addressed. The effect of that testimony is that Soares was not able to work for "about a month and a half" after he was shot, and that the wounds "bother me sometimes, once in a while they hurt me a little bit." It is the claim of appellant that this testimony "could throw no light upon whether or not the defendant was guilty of the offense charged," and that it had a tendency to excite the sympathy of the jury for the prosecuting witness, and thereby influence the verdict. But we think it was proper to introduce such evidence to show that a "violent injury" was done to the person of Soares. It is true that the charge involved only an attempt to commit a violent injury, and that the defendant might have been convicted without having consummated such attempt; yet in such cases it is proper to show the character of the injury that was actually inflicted as evidence that the defendant intended such consequences. Besides, the testimony added nothing of substantial import to the testimony of the physician who describ-

ed the wounds. From that description it would necessarily follow that the prosecuting witness would suffer considerable pain and would be incapacitated for work for some time. Moreover, the jurors were specifically instructed that "no question of mercy, sentiment or anything else resides with you except the question of whether or not you believe from the evidence, and beyond a reasonable doubt that the defendant is guilty." We must assume that they were sensible men and followed the instructions of the court.

The instruction of which appellant complains was as follows:

"You are further instructed that under section 837 of the Penal Code of the state of California, which permits a private person to arrest another for a public offense committed or attempted in his presence, it is not intended that the private party making the arrest has the right to proceed to the extremity of shedding blood or shooting the offender, in arresting or in preventing the escape of one whom he has arrested for an offense less than a felony, except in self-defense, even though the misdemeanor be committed in the presence of such private person."

The claim of appellant is that this was equivalent to an instruction to the jury that because defendant may have shed the blood of Soares or shot him he was guilty of the offense, whether the defendant intended to shoot him or not. It is asserted that—

"It was for the jury to determine whether under all of the circumstances the acts of the defendant were unwarranted or unreasonable," and "the defendant was entitled to have the jury consider whether he intended to shoot Soares, or whether he merely fired to frighten Soares and cause him to cease his flight."

The theory of defendant as to the test to be applied to his conduct is more explicitly declared in this instruction given by the court at his request:

"That if you believe from the evidence that the defendant arrested the said Soares for the commission of a public offense in the presence of the defendant, and the said Soares escaped from the defendant, then the defendant could lawfully and immediately pursue and retake the said Soares at any time and in any place within the state of California.

"That, in so pursuing and recapturing the said Soares, the defendant could lawfully perform such acts as are usually and not uncommonly used under similar circumstances in the stopping of arrested persons when fleeing from lawful arrest. It is for you to determine whether the acts of the defendant were unusual and uncommon among men in the same or similar circumstances. If you believe that such acts as committed by the defendant were not unusual or uncommon under the circumstances, then the defendant was not criminally negligent."

[3] The criticized instruction was framed by the district attorney to meet the view of the law generally recognized by the authorities that neither an officer nor a private citizen who has arrested a third party for a misdemeanor has the legal right intentionally to seriously injure or to kill the one arrested merely to prevent his escape. The subject is fully considered in a note to State v. Phillips (Iowa) 67 L. R. A. 292. Therein the doctrine is announced and authorities cited to support it that—

"An officer has no right to shoot a person who is merely running away from him without committing any violence, when under arrest, or to avoid arrest for a misdemeanor."

[4] The rule is declared to be otherwise in case of a felony. It would indeed be abhorrent to the moral sense of every right-thinking citizen to uphold such brutality where the offense involved is so petty as a mere misdemeanor and the arrest is attempted without a warrant. And yet the arresting officer or individual has the right to pursue the escaping prisoner and use whatever force may be necessary for his arrest and detention. Section 835, Pen. Code. No doubt, to accomplish this purpose he may use whatever reasonable means are available and may summon as many persons as he deems necessary to assist him (section 893, Pen. Code), but he must stop short of killing or seriously injuring the fleeing criminal, unless, as before stated, in self-defense.

Our statute does not expressly make this distinction between a misdemeanor and a felony, but it seems to enlarge the authority of an arresting officer where he is in possession of a warrant of arrest. While it recognizes the right in certain cases to make an arrest without a warrant (sections 836 and 837, Pen. Code), yet in section 843 of said Code it provides:

"When the arrest is being made by an officer under the authority of a warrant, after information of the intention to make the arrest, if the person to be arrested either flees or forcibly resists, the officer may use all necessary means to effect the arrest."

[5] This would undoubtedly permit an officer with a warrant even to shoot an escaping prisoner if necessary to effect the arrest, but here, of course, we have no such case. If the defendant willfully shot or shed the blood of Soares under the other circumstances disclosed by the evidence, he was guilty of an offense, but if he had no intention of shooting him, but fired the gun, as he claimed, merely for the purpose of frightening him into submission, then it is conceded by both parties that his guilt would depend upon the question whether he acted with criminal negligence or according to the standard prescribed in said instruction requested by the defendant.

[6] The criticized instruction might have been more explicit in the respect indicated, but we think the element of purpose or in-

tention is implied in the language used, and that, considered with the other instructions of the court, it was not misinterpreted by the jury to the prejudice of the defendant. A declaration that one shot or shed the blood of another implies that the act was done with such intent.

[7] There was no error in refusing the following requested instruction:

"Good character of the defendant must be considered with all other evidence in the case, and is of itself sufficient fact from which a reasonable doubt of guilt may arise, and if the jury have reasonable doubt of the guilt of the defendant, he is entitled to their verdict of acquittal."

It is stated by appellant that—

"A number of witnesses testified as to the character of the defendant, some being favorable and some unfavorable."

This statement justifies the action of the court in refusing said instruction, since it assumed that appellant's good character was established beyond question. The truth is that it was a matter for the jury to determine, and, it may be added, the court, on the request of the defendant, did give a proper instruction on the subject.

[8] A more serious question in the case arises from the refusal of the court to give any of the following instructions requested by the defendant:

"If you believe from the evidence that the said John Soares, at the time and place when and where the defendant is alleged to have fired the shot, had in his (Soares') possession a dying swan which had been shot by the said Soares, then I instruct you that said Soares was then and there guilty of a misdemeanor under the law."

"If you believe from the evidence that at the time and place when and where the defendant is alleged to have fired the shot that the said Soars was hunting upon the land or property of the defendant without right or permission of the defendant to hunt thereon, then I charge you that the said Soares was guilty of a misdemeanor under the law."

"If you believe from the evidence that at the time and place when and where the defendant is alleged to have fired the shot that the said Soares was hunting animals or game, other than predatory animals or game, without a legal license so to do from the government of the state of California, I charge you the said Soares was guilty of a misdemeanor under the law."

The importance of these instructions can be understood when we recall that the evidence shows that Soares was guilty of each of said offenses, and that this fact constituted the foundation of appellant's defense. The whole case of defendant, in other words, rested upon these facts, that Soares committed a misdemeanor in his presence, that he had, therefore, a right to arrest and recapture him, and that appellant fired the gun for the purpose of scaring, but without any intention of hitting, him. The commission by Soares of a misdemeanor is thus shown to be an important link in the chain, and said instructions covered that particular feature. However, we do not believe that the case should be reversed for said omission.

In the first place, it is altogether probable that the jurors were sufficiently familiar with the law to know that said acts constituted a misdemeanor. It is fair to assume that in such a farming community a general knowledge exists of the game laws. Again, it was shown without objection that Soares pleaded guilty to said offense, and it was admitted by him that he knew he had committed a crime. There was no controversy whatever about it during the trial, and it was virtually conceded by all parties that said acts of Soares amounted to a violation of the law. We may add that several instructions, including the one first quoted herein, assumed that Soares had committed a misdemeanor. Indeed, the effect could hardly have been more pronounced if the people had expressly admitted that Soares was guilty of a misdemeanor. In such case, of course, an instruction on that subject would have been useless. Any average man would understand from the proceedings that a misdemeanor had been committed by Soares, and, while it might be more satisfactory, if said instructions had been given, there was no prejudicial error in such refusal. Moreover, there is no evidence in the record of justification of the act of defendant. According to his own statement, he manifested such reckless indifference to the welfare of Soares that his conviction of simple assault justly followed. He testified:

"I took the gun out of the rear seat of the machine, and I saw it was a pump gun; I had not noticed before what it was, and I said, 'Stop or I will shoot.' He did not stop. He kept looking back all the time over his right shoulder. He was running from there. I took a look at the gun, and I just pumped her down and threw out a shell and threw in one, and I threw the gun to my shoulder, and I shot about six or eight feet behind the fugitive, on the ground."

To fire a shotgun in a direct line with the fugitive and aiming only a few feet behind him was so likely to produce great bodily injury as to rob this alleged defense of all merit. There was no pretense of any resistance on the part of Soares or that defendant was in any danger of violence, and the mere fact that Soares had committed a misdemeanor and was attempting to escape did not warrant the defendant in thus recklessly exposing Soares to such injury. The humanity of the law requires rather that the fugitive should have been permitted to escape for the time being. There was nothing so urgent about the case as to demand the drastic course pursued by the defendant. Other ef-

fective and less dangerous means were open to him.

We conclude, therefore, that if said instruction had been given and full force and effect were accorded to defendant's theory that he fired simply to frighten Soares, the jury should and would have found him guilty of simple assault.

We may add that, from the evidence for the people, the jury would be justified in concluding that the defendant fired deliberately at the legs of Soares, but upon this or the defendant's own theory, that he did not intend to wound him, he has no just cause for complaint at the verdict.

The judgment and order are affirmed.

We concur: NICOL, Presiding Judge pro tem.; HART, J.

49 Cal. App. 58

RICKARD v. COUNCIL OF CITY OF SANTA BARBARA et al. (Civ. 3407.)

(District Court of Appeal, Second District, Division 2, California. Aug. 14, 1920.)

1. Municipal corporations ⟸974(2)—Board of equalization cannot act without complaint, but it need not be in writing.

While the city council, sitting under Santa Barbara Charter, § 85, as a board of equalization, cannot act without a complaint, the complaint need not be in writing.

2. Municipal corporations ⟸974(3)—Recital that board of equalization heard complaints does not establish particular complaint.

A recital in the record on certiorari to the city council, acting as a board of equalization under Santa Barbara Charter, § 85, that the board heard complaints regarding taxes, does not establish that in the particular case there was a complaint which would warrant action by the board.

3. Taxation ⟸319(2)—There is a presumption that property was fairly assessed.

The law presumes that a tax assessor performed his duty and assessed property upon an equal basis.

4. Courts ⟸36—No presumption in favor of jurisdiction of city council acting judicially.

While the city council of a city acting as a board of equalization acts in a judicial capacity, nevertheless there is no presumption in favor of its jurisdiction any more than any other inferior tribunal.

5. Municipal corporations ⟸974(3)—One aggrieved by action of board of equalization not entitled to certiorari, having adequate remedy at law.

A property owner aggrieved by the action of the city council, sitting as a board of equalization under Santa Barbara Charter, § 85, who asserted that there was no complaint so as to give the board jurisdiction, is not entitled to certiorari, having a plain, speedy, and adequate remedy by action at law, provided for by Pol. Code, § 3819, being entitled thereunder to pay the tax under protest and bring an action to recover back the illegal part of the tax, in which action all questions of jurisdiction may be determined.

Application by Acacia Orena Rickard for a writ of certiorari to annul an order of the Council of the City of Santa Barbara, sitting as a board of equalization of the City of Santa Barbara. Proceeding dismissed.

Richards, Heaney & Price, James B. Rickard, B. F. Thomas, R. B. Canfield, and Fred H. Schauer, all of Santa Barbara (Thompson & Robertson, of Santa Barbara, of counsel), for petitioner.

W. P. Butcher, of Santa Barbara, and Robert M. Clarke, of Los Angeles, for respondents.

FINLAYSON, P. J. This is an original proceeding in certiorari to annul an order of the council of the city of Santa Barbara, sitting as a board of equalization, whereby the assessed valuation of petitioner's property was increased. Petitioner seeks to have the order declared void upon the ground that the board had no jurisdiction, for the reason that, according to her claim, no "complaint" was made to the board, as contemplated by section 85 of the city charter, which reads:

"On the first Monday in July in each year, and daily thereafter until and including the following Saturday, or for such further time as they may find necessary, the council shall meet as a board of equalization, for the hearing and adjudication of all complaints regarding the description, valuation and ownership of assessed property, or the omission of property which should be assessed, and notice of the time and place of such meetings shall be included with notice of publication of the tax roll, and upon such roll when published. At such meetings the council shall publicly order, and the assessor shall enter upon the tax roll, all such corrections as may be adjudged equitable, and in case of any additional assessment, the assessor shall immediately send written notice of the same to the person assessed."

It will be noticed that by this charter provision the board of equalization is authorized to meet for the hearing and adjudication of "complaints."

[1] In reviewing the assessments of individuals, the powers of the board of equalization, under this charter provision, are not original, but are appellate and specific, and dependent upon the condition that there shall first be made a "complaint" upon which the board may act and hear evidence to determine whether the objection to the assessment is well founded. People v. Reynolds, 28 Cal. 108; People v. Flint, 39 Cal. 670; People v. Goldtree, 44 Cal. 323. But it is not necessary that the complaint should be in

writing. The charter requirement is fulfilled when a complaint has been made to the board, stating the objections to the assessment, either orally or in writing. That an oral complaint is sufficient has been held in well considered opinions by the highest courts of sister states construing similar statutory requirements. See State v. Northern Belle M. Co., 12 Nev. 92; State v. Washoe Co., 14 Nev. 140; Central Pac. R. Co. v. Standing, 13 Utah, 488, 45 Pac. 344. And we know of no decision in this state to the contrary, unless it can be said that a written complaint was held to be essential in People v. Goldtree, supra. But there the point was not really involved, as that case was decided upon the ground that no complaint of any sort whatever had been made to the board. All that these early California cases hold is that, under section 23 of the Revenue Act of 1861 (Stats. 1861, p. 427), the board cannot act without a complaint. This, as said by the Nevada and Utah courts in the cases cited supra, does not necessarily mean a complaint in writing. And we are satisfied that an oral complaint stating the objections to the assessment will answer all the requirements of this charter provision.

[2-5] Upon the presentation of the petition for the writ of certiorari, we ordered the writ to issue, and thereafter the respondents made their return, setting forth therein what purports to be a full, true, and correct copy of the record of the proceedings of the board of equalization. Nowhere in the return to the writ is there to be found any written complaint of any assessment. As the return purports to set forth in full all matters before the board of equalization and the proceedings of the board thereon, we can only conclude that no written complaint of the assessment of petitioner's property was made or heard and determined. It is possible, however, that oral complaints, sufficient to meet the charter requirement, may have been made, and, as there is no law of which we are aware requiring a written record to be made of such complaints, they may have been made notwithstanding the record's silence. The resolution of the board of equalization approving the tax roll recites that the board "has heard and adjudicated all complaints regarding the description, valuation, and ownership of the property assessed, and publicly ordered and caused the assessor to enter upon such tax roll all corrections made by it as required by law and the charter of said city." We do not think, however, that this mere recital that the board heard and adjudicated "complaints" is of itself sufficient as legal evidence that "complaints," either written or oral, were made to the board as contemplated by section 85 of the charter. The law presumes that the assessor, when he assessed the property, performed his duty, and that therefore he assessed all properties fairly and upon an equal basis. The board of equalization exercises judicial functions, and, before it could acquire jurisdiction to review the assessor's work, every jurisdictional prerequisite must have been fulfilled. It is well settled that no intendments can be indulged in favor of the jurisdiction of inferior tribunals, but that their jurisdiction must affirmatively appear. There seems, however, to be authority for the proposition that upon certiorari, if the jurisdictional facts do not appear of record because the law has not required a record of them to be made, the respondent may be required not only to certify what is technically denominated the record, but also to present such evidence of the jurisdictional prerequisites as may be necessary to determine the question of jurisdiction. Blair v. Hamilton, 32 Cal. 53; Whitney v. Board, 14 Cal. 479; Lowe v. Alexander, 15 Cal. 300; In re Madera Irrigation District, 92 Cal. 335, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; Stumpf v. Board, 131 Cal. 367, 63 Pac. 663, 82 Am. St. Rep. 350. See, however, Farmers', etc., Bank v. Board, 97 Cal. 325, 326, 32 Pac. 312. In Blair v. Hamilton, supra, it is said:

"In many cases jurisdictional facts may not appear of record, either by failure of the inferior court or officer to follow the requirements of the law and make them of record, or because the law itself does not require it to be done. In such cases this court, and all other courts having jurisdiction to review and correct the proceedings of inferior courts, would be powerless, unless it can compel the inferior tribunal to certify to this court, not only what is technically denominated the record, but such facts, or the evidence of them, as may be necessary to determine whatever questions as to the jurisdiction of the inferior tribunal may be involved, and the grossest abuses of power, to the great reproach of the law might be perpetrated with impunity and without the possibility of a remedy."

Whether evidence dehors the record may be given in this proceeding for the purpose of showing whether the board acted upon a sufficient oral complaint is a nice question that need not be decided. For we are satisfied that this is not a case for certiorari, since petitioner has another form of redress that gives her a plain, speedy, and adequate remedy.

Petitioner is, we think, afforded a plain, speedy, and adequate remedy by the action at law which an aggrieved taxpayer is permitted to bring under section 3819 of the Political Code. We think, therefore, that we ought not to have issued the writ. In State v. Washoe Co., supra, the Supreme Court of Nevada held that, if the board of equalization acts without jurisdiction in raising an assessment, that fact is a good defense pro tanto in any suit for the tax, and, being a good defense, the taxpayer is thereby afforded a plain, speedy, and adequate remedy,

so that the writ of certiorari ought not to issue to review the action of the board. Petitioner here, under section 3819 of the Political Code, may pay her tax under protest, and thereafter, within the time provided by this Code section, may bring an action to recover back the illegal part of the tax. Mackay v. San Francisco, 113 Cal. 401, 45 Pac. 696; Columbia Savings Bank v. Los Angeles, 137 Cal. 467, 70 Pac. 308. If the method pursued in making an assessment is not that prescribed by law, the matter can always be gone into by the courts and the taxpayer relieved of the assessment. Miller & Lux v. Richardson (Sup.) 187 Pac. 411. A weighty reason impelling us to the conclusion that petitioner should be remitted to the mode of redress provided by section 3819 is that in an action brought by her under the permissive provisions of that Code section there can be no question as to the right of the respective parties to go fully into all the facts relative to the question as to what complaints, if any, were made before, and heard and determined by, the board of equalization.

The writ, having been improvidently issued, is hereby set aside, and the proceedings dismissed.

We concur: THOMAS, J.; WELLER, J.

183 Cal. 714

ENGELS COPPER MINING CO. v. INDUSTRIAL ACC. COMMISSION et al. (No. 3018.)

(Supreme Court of California. Sept. 17, 1920. Rehearing Denied Oct. 14, 1920.)

1. Master and servant ⟸372 — Compensation allowable for injury by disease.

Incapacitating injury to the heart, through influenza contracted by the employé of a copper mining company, was an injury for which compensation could be awarded, under Const. art. 20, § 21, as it was before amendment.

2. Master and servant ⟸375(1) — Injury in voluntary act outside employment not in course of employment within Compensation Law.

An injury suffered by an employé in voluntarily doing something outside of his employment, though for the benefit of his employer, is not an injury, suffered by him in the course of employment, entitling him to compensation.

3. Master and servant ⟸375(1)—Compensation allowable for injuries in caring for influenza patients pursuant to direction.

Where a copper mining company's superintendent directed its safety engineer to assist in caring for the company's influenza patients, the engineer's services in so doing were not voluntary, though exceptional, and, though they were without the usual scope of his employment, they were within its actual scope, and injuries suffered therein entitled the engineer to compensation.

4. Master and servant ⟸403 — Compensation claimant must show cause of incapacitating illness.

The burden rested upon an injured employé seeking compensation to show that the illness which resulted in his incapacity resulted from the exceptional exposure to which he was subjected in caring for the influenza patients of his employer.

5. Master and servant ⟸417(7)—Compensation award conclusive unless unreasonable.

The Supreme Court cannot disturb the award of the Industrial Accident Commission, unless it can say that a reasonable man, on the evidence as to whether the illness contracted by the employé caused his incapacity, could not have reached the conclusion which the commission did.

6. Master and servant ⟸405(4)—Compensation award for illness warranted by evidence.

Evidence that a mining company's employé, incapacitated for work through heart weakness caused by influenza, contracted the disease while caring for the company's patients during an epidemic at the direction of its superintendent, *held* sufficient to sustain award of compensation to him.

In Bank.

Proceedings for compensation under the Workmen's Compensation Act (St. 1917, p. 831) by Duane Rebstock, the employé, opposed by the Engels Copper Mining Company, the employer. Compensation was awarded by the Industrial Accident Commission, and the employer petitions for certiorari. Award affirmed.

R. P. Wisecarver and Redman & Alexander, all of San Francisco, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

OLNEY, J. This proceeding is one seeking the annulment of an award of the Industrial Accident Commission. One Rebstock was taken ill with influenza while in the employ of the petitioner, a mining company, resulting in an affection of the heart which incapacitated him for anything but light work. For this he claimed and was awarded compensation. Two grounds are advanced for the annulment of the award: First, that injury by disease is not an injury for which compensation could be awarded under section 21 of article 20 of the Constitution as it read before its recent amendment and at the time Rebstock contracted influenza; and, second, that the disease was not incurred by him as the result of his employment.

[1] The case markedly resembles what is known as the Slattery Case, San Francisco v. Industrial Accident Commission, 191 Pac. 26, decided by us since the submission of the present case, and the question presented by the first ground urged for annulment, which is purely a question of law, was there discussed and determined adversely to the contention of the petitioner here. No discussion, therefore, of that question is necessary other than a reference to that decision and the statement that we adhere to the views there expressed.

The question presented by the second ground urged, that Rebstock did not contract the disease as the result of his employment, is of course a question of fact and cannot be so summarily disposed of, although the substantial facts of the case are in most respects the same as those of the Slattery Case. Rebstock was employed at the company's mine in Plumas county as a "safety engineer." His duties in that capacity did not require him to give attention to or to come in contact with sick employés of the company, at least above ground. The epidemic which prevailed throughout the country in the fall of 1918 did not omit the little settlement at the company's mine, and a very considerable number of its employés were attacked. The company attempted to care for these cases in its hospital and in temporary accommodations for that purpose. Among the places so used was Rebstock's office. The number of regular medical attendants and nurses of the company was insufficient to meet the emergency, and in this situation Rebstock practically gave up his regular duties, and for some five or six days devoted himself to

caring for the influenza patients, bathing them, giving them food and medicine, attending to their wants generally, and having the closest personal contact with them. At the end of that time he himself was taken with the disease, resulting finally in his permanent industrial impairment, as already stated. The period of incubation of the disease is from two to five days, so that Rebstock in all probability contracted the disease during the period when he was exposed to the contagion in an exceptional manner because of his attendance upon influenza patients.

The company's first claim is that the exceptional exposure to which Rebstock was subjected, and by reason of which alone it can be claimed that he contracted his illness in the course of his employment, was incurred by him, not in the performance of the duties for which he was employed, but in the performance of services outside his duties, voluntary in nature, and not so much for the benefit of his employer as for that of the little community of which he was a part. The second claim of the company is that in any case there is nothing to show that Rebstock contracted his disease by reason of the exceptional exposure to which he was subjected; that it is not at all improbable that he acquired it by reason of the general exposure to which every member of the community was subjected at the time; that it is not possible to determine with any reasonable certainty whatever which exposure was the cause of his illness, and to endeavor to do so is but guessing; and that the award of the commission cannot be justified by a mere guess, but in order to be valid requires for its support an affirmative showing which takes the determination out of the realm of mere conjecture.

[2, 3] As to the first claim, it is true that an injury suffered by an employé in voluntarily doing something entirely outside of his employment, even though of benefit to his employer, is not an injury suffered by him in the course of his employment, and if the facts of this case were only those we have stated it might be that the award would have to be annulled on that ground. But there was evidence in the case which would justify the commission in believing that the further fact was present that the company's superintendent had directed Rebstock to assist in caring for the company's influenza patients. This fact, for we must take it to be the fact, at once took Rebstock's services in that respect out of the class of purely voluntary services. Although the services were exceptional, and without the usual scope of Rebstock's employment, they were within its actual scope at the immediate time, because rendered in response to the company's direction. Miner v. Franklin County Telephone Co., 83 Vt. 311, 75 Atl. 653, 26 L. R. A. (N. S.) 1195; Sunnyside Coal Co. v. Industrial Accident Commission, 291 Ill. 523, 126 N. E. 196, and authorities there cited. This is sufficient to justify the award so far as this particular point is concerned.

[4, 5] As to the second contention of the company, it is of course true that the burden rested upon Rebstock to show that his illness resulted from the exceptional exposure to which he was subjected in caring for the patients of the company. It is likewise true that in order to meet this burden he had to show facts sufficiently cogent to take the determination of the question out of the realm of pure conjecture. It is also true that it cannot be said from the facts of the case that it is certain that Rebstock contracted the disease because of his exceptional exposure to it. But as was said in the Slattery Case, 191 Pac. 29:

"Certainty is not required. It is not even required that the award be, in our judgment in accord with the preponderance of the evidence, in order that we be not at liberty to annul it. We cannot disturb the award unless we can say that a reasonable man could not reach the conclusion which the commission did."

The test so stated in the last sentence just quoted is that which must be applied here.

Upon the point as to how the disease was contracted by the employé, whether because of the exceptional exposure to which he was subjected or because of the exposure to which he was subjected in common with the rest of the community, the material facts are the same as those of the Slattery Case. The medical evidence in the Slattery Case is by stipulation made a part of the record here, and the discussion upon this point in the Slattery Case will suffice for the discussion in this. That discussion was:

"If there had been no epidemic in San Francisco at the time, and it appeared that Slattery as hospital steward had been exposed directly to a considerable number of influenza patients, and was not known to have been exposed otherwise, and had come down with the disease within the period of incubation after his exposure, the conclusion that the disease was due to his exposure in the course of his work could hardly be questioned. But these are the actual facts, with the single exception that an epidemic was raging. To the extent of the severity of this epidemic the strength of the conclusion is weakened. It may well be that if the epidemic were so severe that the proportion of the general public who were attacked was anything like as great as the proportion of those exposed as was Slattery, the question of whether he was attacked because of the exposure incident to his employment or because of the exposure general to the public would be so much a matter of conjecture and speculation as not to warrant a definite conclusion as the basis of an award. But the actual fact is that of persons exposed as was Slattery the proportion of those attacked was from five to eight times as great as the proportion of those not so exposed. This ratio is so great that it cannot be said that the com-

mission was not justified in concluding from it, in connection with the other facts, that Slattery's illness was due to the peculiar exposure of his employment. Its conclusion is the more justified by the fact that it coincides with the conclusions of most of the physicians who testified. Their opinions upon a point of this character are entitled to consideration, since it is a part of their vocation to observe diseases and how they spread, and to draw conclusions from their observations."

[6] There was one particular in which perhaps it might be said that the facts here differ from those of the Slattery Case. The evidence there might be taken to show that Slattery's exposure to the disease, outside of that incident to his employment, was less than the similar exposure of Rebstock. The testimony of Slattery's wife was that during the probable period of incubation he had been confined pretty strictly to his home and to the hospital where he was employed. This factor is absent in the present case. But, as the foregoing quotation shows, the reasoning by which we reached the conclusion that the finding of the commission that Slattery's illness had been contracted because of exceptional exposure should be sustained did not proceed upon the assumption that he was not also exposed as a member of the community, or that his exposure in that respect was less than that to which the community in general was subjected. On the contrary, it proceeds on the assumption that he was exposed in that respect like any one else, and the conclusion reached is justified by reason of the very great difference between the respective proportions of those attacked in the community at large and those attacked in the class exposed in the exceptional manner in which were both Slattery and Rebstock. The proportion of the latter was from five to eight times as great, and this was deemed, and we deem it now, sufficient to remove from the realm of pure conjecture the conclusion that a person so exceptionally exposed and contracting the disease contracted it in the course of such exposure.

There was urged upon us in the Slattery Case, and there is urged upon us now, the authority of Martin v. Manchester Corporation, 5 B. C. C. C. 259, and it is well, perhaps, for us to express our views concerning it. It was there held that the conclusion was not justified that an employé of a scarlet fever hospital, particularly exposed to the disease in the course of his employment and who was attacked by it, acquired the disease through such exposure. It is said that he might have acquired it in some other manner. It is, of course, true that he might have acquired the disease in some other manner, but that he actually did so would seem to be quite improbable. The decision practically requires absolute certainty as to the fact that the disease was contracted because of the employment and in no other manner. This is not possible or necessary. All that is required is that degree of certainty upon which men may reasonably act, and by which their affairs may reasonably be determined. It would seem well-nigh beyond argument that for the practical conduct and governance of human affairs the conclusion that a man attacked with scarlet fever had incurred the infection by his exposure to it in a scarlet fever hospital would appear with sufficient certainty when it appeared that he had been employed in the hospital during the period when he must have been infected, and there daily brought into close contact with patients suffering from the disease, and it did not appear that he had been particularly exposed in any other manner. We cannot follow the decision mentioned holding to the contrary.

Award affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; LAWLOR, J.; SHAW, J.; WILBUR, J.; SLOANE, J.

184 Cal. 21

PACIFIC WHARF & STORAGE CO. v. STANDARD AMERICAN DREDGING CO. et al. (L. A. 4969.)

(Supreme Court of California. Oct. 5, 1920. Rehearing Denied Nov. 4, 1920.)

1. Contracts ⟸138(6)—Illegality, though not presented by issues, prevents enforcement.

Where it appears that the contract sued on is illegal, the court sua sponte will withhold all relief, though the illegality is not presented by the issues.

2. Contracts ⟸171(1)—Whether entire or separable question of construction.

Whether a contract is entire or separable, in which latter case, under Civ. Code, § 1599, a valid part may stand notwithstanding an invalid part, depends on its language and subject-matter, and is a question of construction to be determined by the court according to the intention of the parties.

3. Contracts ⟸171(1)—Equities not controlling on question of construction of contract as entire or severable.

That it would be inequitable not to enforce part of a contract is not controlling on whether the contract shall be construed as severable, and such part enforced notwithstanding another part in restraint of trade, and so against public policy.

4. Contracts ⟸153—If possible, to be construed as valid.

A contract being capable of two constructions, one making it valid, the other void, the first should be accepted.

5. Sales ⟸62 — Contract severable allowing recovery of price, notwithstanding covenant in restraint of trade.

The rule that, where several things are to be done under a contract, if the money consideration to be paid is apportioned to each of the items to be performed, the covenants are to be regarded as severable and independent, applies to a contract of sale of a dredge, providing for payment of a certain amount as the price thereof, so as to allow recovery of such price, notwithstanding a covenant for employment of the seller by the buyer to do certain work at a certain amount per yard, and a covenant of the seller not to engage in the dredging business; there being nothing to indicate that such covenants form any part of the consideration to be paid for the dredge.

In Bank.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by the Pacific Wharf & Storage Company against the Standard American Dredging Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Overton, Lyman & Plumb, of Los Angeles, for appellants.

Goodwin & Morgrage, of Los Angeles, for respondent.

PER CURIAM. The following opinion was prepared by Mr. Justice KERRIGAN of the District Court of Appeal for the First Appellate District while acting as justice pro tempore in this court in the place of Mr. Justice MELVIN. It is adopted as the opinion of this court:

This is an action to recover on seven promissory notes for $2,000 each, executed by defendant corporation and indorsed by the defendant R. A. Perry. The notes were made in favor of and delivered to plaintiff corporation in conformity with the terms of a certain written contract entered into by and between the parties hereto on the 18th day of June, 1912. The contract provided for the sale by plaintiff to defendant of a certain dredge for the sum of $36,000 payable as follows: The sum of $2,000 to be credited to defendant upon the execution of the agreement, which amount was due defendant from plaintiff upon the settlement of certain accounts had between them; the further sum of $6,000 for the performance by defendant of certain work; and the balance of the purchase price amounting to the sum of $28,000, by the execution and delivery by defendant to plaintiff of two promissory notes in the principal sum of $14,000 each, to mature in 6 and 12 months respectively from the dates thereof. In lieu of the two notes thus provided for, one note for $14,000 was given, and seven notes for $2,000 each. The $14,000 note was paid. The seven notes for $2,000 each were indorsed by defendant Perry. These seven notes were not paid, and plaintiff's cause of action is founded thereon.

The complaint, which was filed December 13, 1913, contains seven separate causes of action. By answer and counterclaim defendants admitted the execution and delivery to plaintiff of the several notes sued upon and the ownership thereof in plaintiff, but denied that there was due and unpaid thereon more than $1,527.29 of principal of each of said notes.

A trial was had upon the merits, and at the conclusion thereof judgment was rendered in favor of plaintiff for the full amount of the notes, together with interest thereon and attorney's fees.

Thereafter defendant moved for a new trial, and in support of the motion presented only one ground, viz. that the decision was against law in that the evidence showed that an inseparable part of the consideration of the notes in suit was illegal, void, in restraint of trade, and made for the purpose of creating a monopoly of the dredging business in the harbors of San Diego and Los Angeles.

The trial court denied the motion, and the only point raised by appellant on this appeal is the claim that the evidence shows that the consideration for the notes was illegal, and that therefore no recovery should be had thereon. Respondent, in support of the judgment, presents several answers to the objection made by appellants. In substance, the contract is as follows: After the introductory paragraph the first covenant provides for the sale of the dredge for the specified amount named, and the payments to be made in the manner heretofore indicated. The next covenant provides for the employment of defendant by plaintiff to do certain dredging in Los Angeles harbor at a certain price per cubic yard, and then follows the obnoxious paragraph, which reads:

"The parties of the first part hereby agree not to build any dredge or dredging plants in Los Angeles or San Diego harbors, or to engage in the dredging business at either of said places."

It is the latter paragraph that appellants claim to be in restraint of trade and therefore void, and we are cited to sections 1673 and 1674 of our Civil Code as supporting this contention.

In substance, these sections provide that every contract by which any one is restrained from exercising a lawful business is to that extent void, except where he has sold the good will of a business, in which case he may agree not to engage in a similar business within specified limits. The language of these Code sections is clear and unambiguous, but respondent claims they do not control this case for several reasons.

[1] It is first urged by it in support of the

judgment that, the illegality not having been presented by the issues of the case, it cannot be heard or considered. This question is not one of first impression in this state. The rule here is well settled that the failure of the party against whom relief is sought upon an illegal contract to make objection upon the ground of illegality will not justify a court in enforcing the same. The illegality appearing, the court sua sponte, will withhold all relief. It has been further held that such a contract cannot be enforced, even where there has been a waiver of the illegality and express consent given for the enforcement thereof. Union Collection Co. v. Buckman, 150 Cal. 159, 88 Pac. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609; Kreamer v. Earl, 91 Cal. 112, 27 Pac. 735; Ball v. Putnam, 123 Cal. 134, 55 Pac. 773. Here the contract was in evidence, and when the attention of the court was directed to the infirmity, upon defendants' motion for a new trial, it should have withheld all relief to the parties, unless the sections referred to were not controlling.

[2] The action of the trial court in denying defendants' motion, no doubt, was based upon its conclusion that the provisions of the contract were severable, and this is one of the grounds relied upon by respondent in support of the judgment. In this behalf it is urged that the provisions of the contract in relation to the sale of the dredge are fixed and definite and in no manner interrelated or connected with the covenants providing for the performance of work, to which provisions, it is claimed, the restraint applies. Whether a contract is entire or separable depends upon its language and subject-matter, and this question is one of construction to be determined by the court according to the intention of the parties. If the contract is divisible, the first part may stand, although the latter is illegal. Civ. Code, § 1599.

[3] In invoking the aid of this rule respondent urges the argument that defendant corporation has enjoyed the use of the property it bought since June, 1912, and it would be inequitable to allow it to retain and enjoy the dredge and successfully resist payment therefor. The rule making void contracts in restraint of trade is not based upon any consideration for the party against whom the relief is sought, but upon considerations of sound public policy. Union Collection Co. v. Buckman, supra. As was said in Hill v. Kidd, 43 Cal. 615:

"When parties make such contracts, they must rely upon the good faith of those with whom they deal for their performance, and, that failing, they are denied all redress."

[4] This consideration, therefore, is not controlling. The question as to whether a contract is entire or severable is a question that is sometimes difficult to determine. Sterling v. Gregory, 149 Cal. 117–120, 85 Pac. 305. Where, however, a contract is capable of two constructions, the one making it valid, and the other void, the first ought to be accepted. Herzog v. Purdy, 119 Cal. 99, 51 Pac. 27; McVicker v. McKenzie, 136 Cal. 656, 660, 69 Pac. 495. Here the notes were given and accepted as the balance of the purchase price of the dredge, and the amount was in no manner connected with or related to the covenant concerning work. There is no provision in the contract that in any manner shows that the different covenants are dependent upon each other, or that the illegal portion of the contract forms any part of the consideration for the notes sued upon. The price agreed to be paid for the dredge was definite and in no manner interdependent or connected with the provisions relating to the doing of work.

[5] The rule is well settled that, where several things are to be done under a contract, if the money consideration to be paid is apportioned to each of the items to be performed, the covenants are ordinarily regarded as severable and independent. Sterling v. Gregory, supra. The items here are so apportioned. The different provisions, being in no manner interrelated or connected, are severable, and the good may be enforced. To our minds this seems to be the most obvious and just construction to be given the contract.

Considering the conclusion we have reached, other points raised by respondent become unimportant.

Judgment affirmed.

184 Cal. 50

SCHUMANN v. KARRER. (L. A. 5517.)

(Supreme Court of California. Oct. 7, 1920.)

1. Appeal and error ⊜1066 — Trial ⊜250 — Instruction in tenant's action inapplicable to case harmless to defendant landlord.

In an action by lessee against lessor for interference with use of premises, instruction that, in the absence of designation by the lessee of any part of the leased premises which the lessor might use or occupy, he would have no right to do so, *held* without application either to the issues or the evidence, but harmless to defendant lessor, who was not shown to have sought to use the premises not needed by plaintiff lessee.

2. Landlord and tenant ⊜123 — Lease of slaughterhouse held to include use of lessor's barn.

Lease of butcher shop and adjoining slaughterhouse on defendant lessor's farm to plaintiff, providing it was understood and agreed that plaintiff lessee should have the right to occupy and enjoy all the property connected with the slaughterhouse that he might deem essential and necessary to carry on his business, *held* to include use of defendant lessor's barn.

3. Landlord and tenant ⊂132(3)—Evidence as to profit of lessor admissible on issue of damages to lessee.

In an action by the lessee of a slaughterhouse against his lessor for interference with use of the premises, testimony of a butcher, formerly in defendant lessor's employ, and a witness for plaintiff lessee, that defendant lessor made $4 or $5 on each of the hogs which he sold at wholesale, *held* relevant and competent on the issue of damages to plaintiff lessee's business by reason of defendant lessor's rival business in the same line.

4. Landlord and tenant ⊂132(3)—Evidence of prospective profits of lessee suing lessor for interference admissible.

In an action by plaintiff lessee of a slaughterhouse for defendant lessor's interference with the use of the premises, testimony of plaintiff lessee as to the amount of the loss which he had sustained by not being able to purchase and fatten hogs and dispose of them on account of defendant lessor's interference with his business *held* competent, relevant, and material as to prospective profits which would have been a direct result of plaintiff lessee's conduct of the butcher business if not interfered with.

5. Landlord and tenant ⊂132(2)—What butcher business which lessor covenanted not to carry on embraced admissible.

In an action by the lessee of slaughterhouse premises, the lease containing covenant defendant lessor would not carry on the butcher business during the term of the lease, and plaintiff lessee claiming he had done so, it was material to show what such business embraced.

6. Appeal and error ⊂1056(1)—Exclusion of evidence harmless to lessor in lessee's action.

In an action by the lessee of a slaughterhouse for defendant lessor's interference with his business, exclusion of lessor's offer of evidence as to what the business which the lessor had covenanted not to carry on embraced *held* harmless to defendant lessor; the parties having clearly intended that the business which plaintiff lessee was to carry on should include the buying and fattening of hogs.

7. Evidence ⊂484—Opinion as to capacity of slaughterhouse plant admissible.

In an action by the lessee of a slaughterhouse for defendant lessor's interference with his use of the premises, the opinion of a witness as to the capacity of the slaughterhouse plant with appurtenances was admissible; the matter not being a subject of common knowledge.

8. Appeal and error ⊂1057(1)—Exclusion of opinion on point shown by other evidence harmless.

In an action by the lessee of a slaughterhouse for defendant lessor's interference with use of the premises, exclusion of the admissible opinion of a witness as to the capacity of the slaughterhouse plant *held* harmless to defendant lessor; there having been positive evidence before the jury on the point.

9. Appeal and error ⊂1047(3) — Refusal to strike testimony harmless to party who did not object to similar testimony.

In an action by the lessee of a slaughterhouse for the lessor's interference with use of the premises, refusal to strike a witness' answer as a conclusion was harmless to defendant, where another witness gave testimony to the same effect without objection.

10. Appeal and error ⊂1048(6), 1050(1) — Sustaining objection to question objected to as not proper cross-examination and as calling for a conclusion held harmless.

In an action by the lessee of a slaughterhouse for defendant lessor's interference with his use of the premises, sustaining plaintiff lessee's objection to a question to a witness on the ground that it was not cross-examination and called for a conclusion of the witness *held* harmless to defendant lessor.

11. Appeal and error ⊂1048(6)—Rulings as to questions on cross-examination held harmless.

In an action by the lessee of a slaughterhouse for defendant lessor's interference with his use of the premises, rulings sustaining plaintiff lessee's objections to questions put to him on cross-examination as to whether he could not have made a screen room he was compelled to use after being excluded from a cooling room as dark as the cooling room, etc., if erroneous, *held* harmless to defendant lessor.

12. Landlord and tenant ⊂132(3)—Evidence held to sustain verdict for $50 for conversion of bones by lessor of slaughterhouse.

Evidence for plaintiff lessee of a slaughterhouse *held* sufficient to sustain verdict for him for $50 against defendant lessor on account of plaintiff's loss of bones converted by defendant.

13. Landlord and tenant ⊂132(3)—Evidence held to show lessee of slaughterhouse damaged $90 through destruction of hay by lessor's hogs.

Evidence *held* to justify finding for plaintiff lessee of a slaughterhouse that he had been damaged by defendant lessor in the sum of $90 by reason of hay destroyed by defendant's hogs.

14. Landlord and tenant ⊂132(3)—Evidence held to show plaintiff lessee of slaughterhouse damaged $800 through deterioration of meat caused by exclusion from cooling room.

Evidence *held* to show that plaintiff lessee of a slaughterhouse had been damaged in the sum of $800 by defendant lessor, whose exclusion of plaintiff from use of a cooling room had caused plaintiff's meat to become flyblown.

15. Landlord and tenant ⊂132(3)—Evidence held to sustain finding lessee of slaughterhouse damaged $1,000 by lessor's interference with workmen.

In an action by the lessee of a slaughterhouse for defendant lessor's interference with his use of the premises, evidence *held* to support the special finding of the jury that plaintiff lessee had suffered damages in the sum of $1,000 by reason of the lessor's interference with his workmen.

16. Trial ⊂=295(5)—Charge as whole gave accurate statement of law despite omissions in parts.

In an action by the lessee of slaughterhouse premises against the lessor for interference with their use, charge *held* to have given the jury a fair and accurate statement of the law of the case, though certain instructions, considered separately, did not contain complete statements of the law.

In Bank.

Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Action by R. C. Ferdinand Schumann against Joseph Karrer. From judgment for plaintiff, defendant appeals. Affirmed.

Crouch & Chambers, of San Diego, and Philip Storer Thacher, of El Cajon, for appellant.

Sweet, Stearns & Forward, of San Diego, Gustave Duschnes, Richard Kew, and R. Sherman Lacey, all of San Diego, for respondent.

LAWLOR, J. This is an appeal by the defendant, Joseph Karrer, from a judgment in favor of the plaintiff, R. C. Ferdinand Schumann, in an action to reform a lease and to recover damages for the breach of certain covenants therein contained.

On February 18, 1915, the defendant executed and delivered to the plaintiff a lease of his butchershop and adjoining slaughterhouse on his 15-acre farm in the town of El Cajon, San Diego county. The term of the lease was two years, commencing March 1, 1915. After bounding the premises leased, the instrument proceeded further to describe the property:

"Together with all improvements thereon, including the butcher shop; * * * also machinery, fixtures, tools, appliances, and appurtenances now in or used in connection with said butcher shop or the butcher business carried on and conducted upon and about said premises; also the slaughterhouse now owned and used by said lessor in connection with the butcher business, together with sufficient corrals for all hogs, cattle, and other stock; scales, runways, water, water appliances, fixtures, and all personal property used in connection with said slaughterhouse or said butcher business, and by the use of the word 'sufficient' it is understood and agreed that said *lessor* shall have the right to occupy and enjoy, during the term of this lease, all said property connected with said slaughterhouse that he may deem essential or necessary to properly and efficiently carry on his business; but any property not used by said *lessor* at said slaughterhouse shall remain subject to the use of said lessor." (Italics ours.)

In addition to the usual covenant of quiet enjoyment the lease contained this provision:

"It is further agreed that during the existence of this lease said lessor will not personally, or by or through any agent or representative, carry on the butcher business in or about the El Cajon Valley, and that he will not do, take, or perform any act or thing that would tend to lessen the business of said lessee in connection with the property hereby leased."

The complaint alleged that through the mutual mistake of the parties the word "lessor" was used, as indicated by our italics, in that portion of the lease first above quoted instead of the word "lessee," as they intended; that the defendant had breached the covenant of quiet enjoyment by refusing to allow plaintiff to use a barn situated on the premises and connected with the slaughterhouse, or the cooling room in the said slaughterhouse, or to bury offal on the premises, by interfering with the plaintiff's workmen, and by removing a quantity of bones which the plaintiff had stored on the premises; and that defendant, in violation of the second portion of the lease above quoted, had ever since the date of the execution of said lease carried on the butcher business in El Cajon Valley. Damages were sought in the sum of $5,000. On the trial the plaintiff moved to dismiss a jury which had been impaneled, and have the court try the issues of fact relating to the reformation of the lease. The motion was granted over the defendant's objection. The court made findings of fact substantially in accordance with the allegations of the complaint and conclusions of law, and reformed the lease. The issue of damages was tried before the jury which returned a general verdict in favor of the plaintiff in the sum of $2,940, and a special verdict that the items of plaintiff's damages were: (1) $50 "by reason of loss of bones"; (2) $90 "by reason of loss of hay"; (3) $800 "by reason of loss of meat from flyblow"; (4) $1,000 "by reason of defendant's interference with plaintiff's workmen upon the leased premises"; and (5) $1,000 "by reason of the defendant being engaged in the butcher business" since the date of the execution of the lease. The court thereupon rendered judgment reforming the lease, enjoining the defendant from interfering with plaintiff's quiet enjoyment of the premises during the term of the lease, and from carrying on the butcher business in El Cajon Valley "so long as the plaintiff is carrying on a like business therein," and awarding damages to the plaintiff in the sum of $2,940. A motion for a new trial was interposed on behalf of the defendant and denied.

1. To quote from appellant's brief, "it is conceded that the defendant at times acted in excess of his legal rights," but the contention is made "that the plaintiff was permitted by the trial court to prove his case to the jury in utter disregard of the rules of evidence, and that the court, in its rulings and instructions, so misinterpreted the issues and the

law relating thereto that the defendant was prevented from having even a semblance of a fair trial." Appellant's first assignment of error is to the giving of this instruction:

"(13) In the absence of a designation by the plaintiff of any part of the leased premises which the defendant might use or occupy, he would have no right to use or occupy any of the same."

It is claimed that "the court extended this lease beyond its plain terms when it held it to cover the entire farm." As has been shown, the lease, as reformed by the court, provided that "any property not used by said lessee * * * shall remain subject to the use of said lessor." The complaint alleges that appellant refused to permit respondent to use the slaughterhouse, barn, and cooling room or to bury offal on the premises, and interfered with respondent's workmen "in and about the said slaughterhouse." It is not questioned that under the terms of the lease respondent was entitled to use that portion of the demised premises which he might reasonably deem necessary for the conduct of his business as a butcher. No provision was made that before appellant might use the portion not deemed necessary respondent should designate such portion. Nor, as we understand the position of appellant, is it claimed that he had the right to use any portion which the respondent might reasonably deem necessary for his own use. Aside from the reformation of the lease, the only issues in the case, therefore, were whether the barn, cooling room, and slaughterhouse were necessary; whether respondent used them; and whether appellant had interfered with respondent in such use. On each of these issues the jury found for respondent, and, as we shall see, the verdict finds ample support in the evidence.

[1] Respondent does not claim that appellant was not entitled to use any portion of the premises which he (respondent) should not require, whether or not the latter has designated such unused portion. Instruction 13, therefore, has no application either to the issues or to the evidence and should not have been given. But we do not perceive how the giving of the instruction could have injuriously affected appellant's case before the jury. It does not appear that appellant sought to use the premises not needed by respondent, or that there was any occasion for respondent to designate such portion. The point in dispute was whether appellant interfered with respondent with respect to the portion actually used. This being the only question before the jury, the vice of the instruction was limited to the injection of a false quantity, which we cannot conceive entered into the solution of the evidence by the jury. In any event the error was not prejudicial.

[2] 2. We shall next consider appellant's contention that the court erred in holding that the use of appellant's barn was included in the lease. This position is not tenable. Those portions of the lease which we have already quoted state that "it is understood and agreed that said lessee shall have the right to occupy and enjoy * * * *all said property connected with said slaughterhouse* that he may deem essential or necessary to properly and efficiently carry on his business." (Italics ours.) The term "all said property" referred, we think, not only to the chattels listed in the instrument, but to the entire realty "together with all improvements thereon, * * * commencing at the east side of the said butcher shop, and running thence westerly to the west edge of the property owned by said lessor," as the premises are described in the lease. Moreover, it appears that appellant had used the barn in conducting the butcher business. It was therefore a part of the property which was "connected with said slaughterhouse." It may be assumed there was no question but that respondent deemed it necessary to use the barn. Appellant's contention is therefore without merit.

[3] 3. W. B. Jones, a butcher who had formerly been in appellant's employ, and a witness for the respondent, testified that appellant made a profit of $4 or $5 on each of the hogs which he sold at wholesale. Appellant objected that the question was incompetent, irrelevant, and immaterial, the objection was overruled, and the ruling is assigned as error. Upon the issue as to the damages caused to respondent's business by the alleged interference by appellant with respondent's use of the leased premises in that business, and upon the issue as to the damages to respondent's business by reason of appellant's rival business in the same line, this evidence was both relevant and competent. It tended in some degree to show the value of the business and the loss to respondent that would probably ensue from appellant's interference and rivalry. The testimony of the witness showed that he was sufficiently familiar with the business to be competent to testify to the profit to be made on each hog.

4. Respondent testified that the amount of loss which he had sustained "by reason of not being able to purchase and fatten hogs and dispose of them," because of appellant's interference with said business, was "a little over $1,500." The inquiry was objected to on the grounds of incompetency, irrelevancy, and immateriality. It was also objected "that the profits are speculative, and for the further reason that the fattening of hogs for market, or the profit derived from the fattening of hogs, is no part of the conduct of the butcher business." It was not specified in the trial court, nor is it claimed in the brief on appeal, that the inquiry called for a conclusion or opinion of the witness, but, after

the respondent had answered, a motion was submitted to strike out the answer "as not responsive and as stating an opinion, and not a fact and incompetent, irrelevant to any issue in this case." Elliott on Evidence, vol. 3, § 1994, states the rule to be that—

"Where the evidence shows than an established business of a permanent character is broken up or suspended by the wrongful act of another, in an action for damages for such wrong proof may be made of the profits, * * * present and past, for the purpose of furnishing the jury a basis for the measure of compensation to which the complainant is justly and properly entitled."

See, also, Lambert v. Haskell, 80 Cal. 611, 29 Pac. 327; Hawthorne v. Siegel, 88 Cal. 159, 25 Pac. 1114, 22 Am. St. Rep. 291; Bryson v. McCone, 121 Cal. 153, 53 Pac. 637; Alden v. Mayfield, 164 Cal. 6, 13, 127 Pac. 45; Hamer v. Ellis (App.) 180 Pac. 30; Nelson Theater Co. v. Nelson, 216 Mass. 30, 102 N. E. 926.

And in Shoemaker v. Acker, 116 Cal. 239, 244, 48 Pac. 62, 64, the court said:

" 'Prospective profits,' as damages, present one of the most difficult subjects with which courts have to deal. It is not the law, however, that they can never be recovered. Our own Code states the rule to be that the measure of damages for the breach of a contract is 'the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom.' Civ. Code, § 3300. An examination of the authorities will show that the cases in which future profits were rejected as 'speculative' or 'too remote' were cases where the asserted future profits were entirely collateral to the subject-matter of the contract, and not consequences flowing in a direct line from the breach of such contract. Familiar instances of profits which are thus speculative and remote are those which might have been realized on a new contract with a third person which could have been consummated with the proceeds of the contract sued on if the latter had not been broken; for in such case the profits on the new contract are wholly collateral to the one broken, do not directly flow from it, and are not stipulated for or contemplated by the parties to the contract sued on. But where the prospective profits are the natural and direct consequences of the breach of the contract they may be recovered; and he who breaks the contract cannot wholly escape on account of the difficulty which his own wrong has produced of devising a perfect measure of damages. Sutherland on Damages (2d Ed.) §§ 64, 72, 107, 120; Masterton v. Mayor, 7 Hill, 61, 42 Am. Dec. 38; U. S. v. Behan, 110 U. S. 344; Rice v. Whitmore, 74 Cal. 619; Hale v. Trout, 35 Cal. 229; Stoddard v. Treadwell, 26 Cal. 308; Cederberg v. Robison, 100 Cal. 98, 99; Tahoe Ice Co. v. Union Ice Co., 109 Cal. 242. In Sutherland on Damages, § 64, the author, after speaking of profits which are too remote, says, quoting from a decided case: 'But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties stand upon a different footing. These are part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed, perhaps, the only inducement to the arrangement.' "

See, also, Pacific, etc., Co. v. Packers' Ass'n, 138 Cal. 632, 638, 72 Pac. 161; McConnell v. Corona City Water Co., 149 Cal. 60, 65, 85 Pac. 929, 8 L. R. A. (N. S.) 1171; Fraser v. Bentel, 161 Cal. 390, 396, 119 Pac. 509, Ann. Cas. 1913B, 1062; Western Union Tel. Co. v. Commercial, etc., Co., 177 Cal. 577, 585, 171 Pac. 317.

The prospective profits from the sale of hogs, calves, and manure would have been one of the direct results of respondent's conduct of the butcher business if he had not been interfered with by appellant. Clearly the inquiry was competent, relevant, and material as to prospective profits.

[4-6] 5. We shall next consider appellant's contention that the court erred in refusing to allow C. M. Kuhlker, a witness for respondent, and William Funk, called by appellant, both butchers, to testify "whether the buying and fattening of hogs was any part of the butcher business." As we have pointed out, the lease contained the covenant that appellant would not carry on the butcher business during the term of the lease. Respondent claims that appellant had carried on such business. It was therefore material to show what that business embraced. But, conceding there was error in excluding this evidence, it seems plain that appellant was not prejudiced thereby. The property covered by the lease included the slaughterhouse, "together with sufficient corrals for all *hogs*, cattle, and other stock." (Italics ours.) James E. Wadham, the attorney who prepared and supervised the execution of the lease, testified that respondent was to have the use of any or all of the corrals for his livestock, and that prior to the lease appellant had conducted the butcher business on these premises and had raised and fattened hogs for market. Respondent testified that at the time of the execution of the lease appellant had indicated to him a field where he (respondent) could keep his hogs; that appellant had formerly engaged in the raising and fattening of hogs while he carried on the butcher business; and that when the lease was entered into appellant had asked him whether he could have the use of part of the hog corrals for raising his hogs. Fay and Jones testified that prior to the lease the appellant, in the conduct of his butcher business, had raised and fattened his hogs for market, and appellant himself admitted that "since Mr. Schumann

leased the place I have been using these fields for my hog business *just as I did before.*" (Italics ours.) It is not controverted that for some time before the execution of the lease appellant had conducted the butcher business on the premises, including the raising of hogs. In view of this testimony and the implied finding of the jury, it must be held that the parties clearly intended that the business which respondent was to carry on should include the fattening of hogs for market.

[7, 8] Touching the question put to the witness Kuhlker asking his opinion as to the capacity of the plant, meaning the slaughterhouse and appurtenances in controversy, we think it should have been allowed, for clearly it is not a subject of common knowledge. But Funk testified that "the capacity of the slaughterhouse is 12 or 15 beef and about the same amount of hogs." Thus, while Kuhlker should have been allowed to testify as to the capacity of the plant, there was positive evidence before the jury on this point. The error was not harmful.

[9] 6. Miles Fay testified that at the time of the lease and thereafter he was using the premises to raise hogs under an "arrangement" with appellant. He further stated that respondent did not engage in the raising of sows and pigs, and was then asked, "Do you know why?" To this appellant objected that it was immaterial, but the objection was overruled, and the witness answered, "Why, simply because he didn't have room enough." The appellant moved "that the answer be stricken out as a conclusion and not testimony as to a fact," whereupon the motion was denied, and the ruling is now assigned as error. In strictness it may be said the question only called for a categorical reply, and appellant was not precluded from moving to strike out a complete answer to the question. But Jones, without objection by appellant, gave testimony of similar import, and upon no theory was the ruling prejudicial.

7. Respondent testified that appellant had locked and refused to allow him to use the cooling room on the premises, by reason of which he had suffered damages because of his meat becoming "flyblown." On cross-examination he was asked:

"After your mother came back, did she not have a conversation with Mr. Karrer regarding this difficulty, and as a result of that did not Mr. Karrer open that cooling house door * * * and told you and your mother that you were at liberty to use it?"

Respondent objected to the question on the ground that it was not "cross-examination and calling for a conclusion of the witness," and the objection was sustained. Appellant contends that this ruling was erroneous. Appellant himself later testified that—

"At Christmas time Mr. Schumann's mother came down to the slaughterhouse and the tankhouse door was mentioned. She asked me to open the door, and I told Mr. Schumann that the door was open. I had opened the door previous to that."

[10] Assuming that the question was properly framed, we cannot say, in view of the entire evidence, that the error could have affected the verdict.

8. The loss on account of meat becoming "flyblown" was due, according to respondent's testimony, to the fact that the "screen room," in which he kept the meat after having been excluded from the cooling room, was not as dark as the cooling room and admitted flies. The court sustained respondent's objections to these questions, put to respondent on cross-examination, whether he could not have made the "screen room" as dark as the cooling room by putting up "some cheap black cloth," and whether he could not have accomplished the same result and minimized his loss from "flyblown" meat "at a very slight expense." Appellant now claims that the objections should have been overruled, for the reason that the answers thereto would have tended to show that respondent did not "use all reasonable means to arrest his loss," citing 13 Cyc. 71. Even if it be assumed that this evidence should have been admitted, nevertheless when respondent was subsequently asked what measures he took "to provide a fly-proof, dark place," no objection was made, and the witness answered the question. He further testified:

"I don't believe that I could at slight expense have made that screen room as good a place to keep meat, * * * because of the flies and the ventilation."

[11] It cannot be said that appellant was prejudiced by the error, if any there was, in the rulings complained of.

9. For the purpose of minimizing any damage to which respondent might be entitled by reason of being unable to raise hogs for the market, appellant testified as to the cost of killing, dressing, and delivering them. Appellant claims that the court erred in refusing to allow him to state how much time it took to deliver the hogs which he sold. He had previously testified, however, that it cost 12 cents per hundred to haul them to market. This estimate of cost undoubtedly took into account the time consumed in delivery.

10. Funk testified that for ten years he had used an old slaughterhouse (not the one leased by appellant to respondent for that purpose) on the premises. To quote appellant's brief:

"It was sought to show by him that the old slaughterhouse had no cooling room and no facilities for keeping flies off the meat, and that

no loss from flyblow had occurred. The court refused to permit him so to testify. We think such evidence would have cast suspicion on the bona fides of plaintiff's claim on this item of loss, and that the court erred in excluding the evidence."

With this we cannot agree. There was no showing that respondent operated under the same conditions as Funk. The fact that there was no loss from "flyblown" meat in a certain slaughterhouse at one time would not tend to prove that no such loss would occur at another time and in a different slaughterhouse.

[12] 11. We now turn to a discussion of appellant's contention that the first four items of the special verdict are "unsupported by the evidence." As to the item of $50 damages sustained "by reason of loss of bones," the complaint alleged that the appellant "has, without plaintiff's knowledge or consent, taken away and converted to his own use bones belonging to said plaintiff." Appellant admitted: I may have sold some of Schumann's bones." Jones testified that dry bones were worth about $20 per ton. We think the evidence was clearly sufficient to sustain this portion of the verdict.

[13] As to the item of $90 "by reason of loss of hay," Jones further testified that appellant's hogs had destroyed "between five and six tons" of hay, which was at that time worth about $15 per ton. From this the jury was justified in finding that respondent had been damaged in the sum of $90.

[14] Respondent testified that he had weighed the meat which he had lost through its being "flyblown"; that "it averaged about ten pounds a day" for 360 days; and that he had kept a memorandum which showed a loss from that source of $946. The jury found that the respondent had been damaged "by reason of loss of meat from 'flyblow'" in the sum of $800, and in our opinion this finding was supported by the evidence.

[15] The fourth special finding of the jury was that respondent had suffered damages "by reason of defendant's interference with plaintiff's workmen" in the sum of $1,000. Jones testified that appellant had hindered him in the use of the slaughterhouse and had nailed up the cooling room, and that appellant had refused to allow him to use the hog corrals, because of which the witness was forced to move the hogs out of one of them. Respondent testified that appellant frequently insisted on using the slaughterhouse to the exclusion of the witness; that because of the exclusion of the respondent and his workmen from the cooling room he was obliged to expend $30 or $35 on building another room; that, due to appellant's refusal to allow him to use the barn, he "had to employ a couple of men to lug the hay from the barn over to this place [indicating on a diagram]"; that he found it necessary to hire a Mexican to dig a hole in which to bury offal which appellant had refused to allow to be disposed of in any other way; and that appellant had built certain fences so that the distance which respondent's workmen had to traverse in going from the slaughterhouse to the "hidehouse" was greatly increased. Fay stated that on many occasions the appellant had excluded respondent and his workmen from the slaughterhouse. We cannot say that, upon all the evidence on this issue, the finding is without support.

12. Appellant next assigns error to the refusal of the trial court to give fourteen instructions which he had requested. Assuming that the claim is properly presented in the brief, it is based upon his assignments of error in the rulings on evidence, and, since we have already disposed of those contentions, it will be unnecessary to discuss this point.

[16] 13. Finally, it is contended that the court erred in giving 12 instructions. While it may be true that certain instructions, considered separately, do not contain complete statements of the law, we nevertheless find from an examination of the entire charge that any such omissions appear to have been supplied. For instance, appellant makes specific objection to instruction 7, wherein the jury were told that appellant was liable "for *all* damage on account of such breach or interference by the defendant with the * * * quiet enjoyment of the plaintiff." (Italics ours.) It is claimed that herein the court "ignored the qualification that only such damages are recoverable as were proximate." But instruction 32 stated that the plaintiff must show that his loss "was the natural and proximate consequences of the wrongful acts complained of." We think the charge gave to the jury a fair and accurate statement of the law of the case.

It is plain from the foregoing that there is no foundation for the claim that "the defendant was prevented from having even the semblance of a fair trial." The evidence shows that the respondent was subjected by appellant to a series of aggravating interferences resulting in substantial pecuniary loss, and on the merits it would seem the verdict of the jury was amply justified.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SHAW, J.; LENNON, J.

183 Cal. 791

EDWARDS v. JORDAN, Secretary of State. (S. F. 9605.)

(Supreme Court of California. Oct. 4, 1920.)

1. Elections ⟸126(5) — **Primary law allows electors to write in name of any person.**

The purpose of Primary Law, § 5, subd. 7, as amended in 1917 (St. 1917, p. 1352), is to give every elector affiliated with any political party entitled to participate in primary elections the privilege not only of voting for avowed candidates, but of writing in the name of any person in the blank provided.

2. Elections ⟸126(5) — **Despite absence of complete ticket, electors might write in name of candidates.**

Under Primary Law, § 5, subd. 7, as amended in 1917 (St. 1917, p. 1352), providing that every political party qualified to participate in a primary election by the provisions of subdivision 9 of section 1 for nomination by which party there shall have been filed nomination papers for one or more candidates containing a sufficient number of signatures shall be entitled to a separate party ticket at the primary election, and all such party tickets must be alike in the designation of candidates for judicial officers, etc., and in view of section 17, declaring that the voter shall receive the official primary election ballot of the political party designated, and no other, persons affiliated with a political party qualified to have a separate ballot may write in the names of desired candidates, though nomination papers for such candidates were not filed in the office of the secretary of state, and there was no full ticket, etc.; for otherwise such persons would be practically disfranchised.

3. Elections ⟸126(4)—**Unsuccessful "candidate" of one party whose name was written in by electors of another disqualified.**

Under Primary Law, § 23, declaring that a candidate failing to obtain the nomination of his own political party is disqualified as a nominee for others, the disqualification extends to an unsuccessful candidate for the Republican nomination whose name was written in on the Prohibition ticket, this being so notwithstanding section 25, which distinguishes between the word "person" and "candidate"; the word "candidate," as used in the earlier section, extending to those whose names were so written in.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Candidate.]

In Bank.

Application by James S. Edwards for a writ of mandate to be directed to Frank C. Jordan, as Secretary of State, requiring him to file petitioner's certificate of nomination by the Prohibition party state central committee, etc. Writ granted.

J. E. Pemberton and Dozier & Dozier, all of San Francisco, for petitioner.

U. S. Webb and Robert Harrison, both of San Francisco, for respondent.

ANGELLOTTI, C. J. In view of the necessity for an immediate decision, judgment has already been given in this matter directing the issuance of a peremptory writ of mandate as prayed in the petition, without the filing of a written opinion; it being stated by us that such an opinion would be filed later.

The application was one for a writ of mandate requiring the secretary of state to file petitioner's certificate of nomination by the Prohibition party state central committee as that party's candidate for United States Senator at the general election to be held November 2, 1920, and to certify his candidacy to the county clerks and registrars of voters throughout the state, in order that his name shall appear as such candidate on the ballots to be provided by such officers at said general election.

There is no dispute as to the material facts. The Prohibition party was a political party qualified for participation in the primary election held August 31, 1920, by reason of the vote polled at the last general November election for one of its candidates, who was the candidate of such party only, for an office voted on throughout the state. Subdivision 9, § 1, Primary Law (St. 1913, p. 1379). Nomination papers containing a sufficient number of signatures were not filed for the present primary in the office of the secretary of state for any candidate for the Prohibition party nomination for any office voted on throughout the state. Nomination papers were, however, so filed for candidates for the Prohibition party nomination for certain congressional district and legislative offices, and in these portions of the state at least a Prohibition party ticket was furnished at such primary with a blank space for the "writing in" of the name of a candidate under the designation of the office of United States Senator. At the primary election the name of A. J. Wallace was "written in" on these ballots in such blank space, as the choice for the Prohibition party nomination for such office, by a sufficient number of voters to make him the nominee of that party for the office. Mr. Wallace, by registration, was affiliated with the Republican party, and at such election was a candidate for the Republican party nomination for that office; his name being printed on the Republican party ballot used at the primary election as such candidate. At the primary election he failed to receive the highest number of votes for the Republican party nomination, and by reason of this fact was rendered ineligible as the candidate of the Prohibition party. Section 23, Primary Law. Petitioner was selected by the state central committee of the Prohibition party to fill the alleged vacancy caused by the ineligibility of Mr. Wallace, the law having been amended since the decision in

Heney v. Jordan, 179 Cal. 24, 175 Pac. 402, so as to permit a vacancy caused by such an ineligibility of a "candidate" to be thus filled. Section 25, Primary Law.

[1] On behalf of respondent it is claimed by the Attorney General that, in view of the fact that nomination papers for a candidate for the Prohibition party nomination for any office to be voted on throughout the state were not filed in the office of the secretary of state, the Prohibition party could not legally participate in the primary election in so far as the nomination of a candidate for United States Senator was concerned, notwithstanding that it was "qualified to participate" in such election by reason of its vote at the last preceding election.

This claim is based principally on the language of the concluding portion of subdivision 7 of section 5 of the Primary Law, a portion added by amendment in the year 1917 (St. 1917, p. 1352). The subdivision originally was one relative to the method to be followed in ascertaining the total vote and the highest vote polled for Governor at the last preceding gubernatorial election in case of change of political subdivisions. The addition by the amendment of 1917 was as follows:

"Every political party qualified to participate in the primary election by the provisions of subdivision nine of section one of this act, for nomination by which party there shall have been filed nomination papers for one or more candidates containing a sufficient number of signatures, shall be entitled to a separate party ticket at the primary election; but all such party tickets must be alike in the designation of candidates for judicial, school, county, and township officers."

It is to be observed that, even if this provision be construed as a declaration by the Legislature that no party "qualified to participate" in the primary may do so unless nomination papers with sufficient signatures for one or more candidates have been filed, the provision, taken literally, was complied with as to the Prohibition party; for concededly nomination papers for certain congressional district and legislative district candidates were filed in the office of the secretary of state.

But we do not believe that the provision should be so construed. It certainly seems that, if the Legislature had intended to declare that a political party otherwise qualified to participate should be excluded from participation and its members deprived of the opportunity afforded the members of all parties participating to write in the names of such persons as they desired to see nominated, unless nomination paper were filed by a candidate or certain members of the party favoring a particular candidate, it would have so declared in plain and unambiguous terms. As a matter of fact, the provision contains no express prohibition whatever. It is rather an affirmative declaration as to the right of all parties participating to "a separate party ticket" at the primary election, with the proviso that all such tickets must be alike in the designation of candidates for judicial, school, county, and township offices. It does not in terms exclude any political party qualified to participate from participating, and in view of the plain purpose and spirit of the Direct Primary Law we are not warranted in so construing it.

The fundamental idea of the system is to give to every elector affiliated with any political party the power and opportunity to directly participate in the nomination of the candidates of such party by voting for whomsoever he desires for any nomination by the party, and this, as shown by the provisions of the act, entirely regardless of whether the name of his choice is printed on the ballot as the result of nominating petitions having been filed for him at the candidate's own instance or at the instance of a group of his advocates. This purpose is fully shown by the provisions for a blank for the writing in by the voter of a name not printed on the ballot.

[2] As we read the provisions of the Primary Law, it seems clear to us that it was the intention that a party ticket should be provided throughout the state for the affiliated members of every political party qualified to participate in the primary, entirely regardless of whether or not nomination papers are filed in the office of the secretary of state. It is to be noted that if it were otherwise we would have the absurd intention attributed to the Legislature that affiliated and duly registered members of a party as to which no nomination petitions have been filed could not legally vote at the primary election for the nomination of candidates for nonpartisan offices, including all judicial, school, and county offices, the final selection of the incumbents of which is, in perhaps a majority of cases, practically made at such primary. This is so because it is expressly provided in section 17 of the Primary Law that the voter shall "receive the official primary election ballot of the political party designated in his affidavit of registration (or the nonpartisan ballot, providing no such party was so designated), *and no other.*" (Italics are ours.) If he is registered as a member of a "political party" as that term is defined in the law, the law says plainly and explicitly that he can be given only the official ballot of that party, and that he cannot be given the nonpartisan ballot. While the language in subdivision 1 of section 12 on this matter is slightly different, it means the same thing. Taking the subdivision as a whole, the meaning is very clear. It first provides in mandatory terms that "a separate official ballot for each political party

shall be printed and provided for use at each voting precinct," all such tickets to be alike, however, in the designation of candidates for judicial, school, county, and township officers (nonpartisan officers). It then provides for a nonpartisan ballot containing only the matter relative to nonpartisan officers, and that one of the nonpartisan ballots "shall * * * be furnished to each registered qualified elector who is not registered as intending to affiliate with any one of the political parties participating in said primary election; but to any elector registered as intending to affiliate with any political party participating in the primary there shall be furnished, not a nonpartisan ballot, but a ballot of the political party with which said elector is registered as intending to affiliate." Particular stress is laid by respondent on the use of the words "participating in said primary election" as indicating a different meaning, but to our minds these words, which were placed in the law at the same time that section 17 was enacted, mean any party qualified to participate under subdivision 9 of section 1 and designated in the notice of the secretary of state as so qualified (subdivision 1, § 4), and for which a separate official ballot "shall be printed and provided for use at each voting precinct" (subdivision 1 of section 12).

This mandatory provision of subdivision 1 of section 12 which we have just referred to would seem to be sufficient in itself to justify our conclusion, for its language is clear and unambiguous. "A separate official ballot for each *political party* shall be printed and provided for use at each voting precinct." (Italics ours.) The term "political party" is defined by subdivision 4 of section 1, and means any party "which has qualified" as therein provided "for participation" in the primary. As we read the law, this ballot should have designated upon it in the form and manner provided by section 12 every office for which nominations are to be voted for at the primary election in the precinct in which it is to be used, and under the designation of each such office the names of the candidates therefor for whom nomination petitions have been filed, and a blank line for the insertion by the voter of the name of any other person for the nomination for such office, and, in the event that nomination petitions have not been filed for any person as a candidate for an office, that there should be simply a blank line under the designation of the office for the insertion by the voter of the name of the person for whom he desires to vote.

Our conclusion on this branch of the case is that those affiliated by registration with the Prohibition party were entitled to participate in the primary election as members of such party in the nomination of a candidate of the party for United States Senator, and to nominate such a candidate by writing in the blank space provided therefor the name of the person for whom they desired to vote.

[3] From what we have said it follows, in view of the admitted facts, that Mr. Wallace was legally nominated as the Prohibition party "candidate" for United States Senator at the next general election, and that his ineligibility to qualify as such candidate because of his defeat for the Republican party nomination (section 23, Primary Law) created a "vacancy" on the Prohibition party ticket, which, in view of the amendment of section 25 in 1919 (St. 1919, p. 53), could be filled by the state central committee of the Prohibition party, unless the provisions of that section in that regard are not applicable to persons nominated by the write-in method without first having nomination papers filed. It is the claim of respondent that they are not applicable in such a situation. This contention is based on the use of the word "candidate" as distinguished from the word "person" used in certain places in the same section (25) with relation to one receiving a nomination without first having nomination papers filed for him and having his name printed on the primary election ballot. The amendment of 1919 with relation to the filling of vacancies, which was designed to meet the situation presented in Heney v. Jordan, 179 Cal. 24, 175 Pac. 402, where we were obliged to hold that the law, as it then stood, prohibited the filling of a vacancy created by the failure of a candidate to secure the nomination of his own party (section 23), expressly provides that a vacancy on a ticket created by reason of the disqualification of a "candidate" under section 23 of the law may be filled in the manner provided in that section. It is urged that the term "candidate" as here used is confined to those for whom nomination papers were filed for the primary. We are of the opinion that this construction of the word is unwarrantably narrow and technical and altogether opposed to the real spirit of the provision. We find the same word used in the disqualification provision of section 23 itself; the language there being that "no *candidate* for a nomination" (Italics ours), who fails to receive his own party nomination shall be entitled to be the candidate of any other political party. Unless Mr. Wallace was a "candidate" for the Prohibition party nomination within the meaning of the term as used in this provision, it would seem that he was not disqualified by his defeat for the Republican nomination. No one claims this to be the situation, and it is admitted that a vacancy on the Prohibition ticket was created by his defeat for the Republican nomination. In any event we are satisfied that the term "candidate," as used in the vacancy pro-

visions of section 25, includes any person lawfully selected at the primary by the voters of a party as the nominee of such party.

We have discussed the only claims made by respondent on the argument. This opinion is filed in order that our reasons for our conclusion that petitioner was entitled to the relief sought, heretofore announced, may be of record.

We concur: OLNEY, J.; LAWLOR, J.; SHAW, J.; WILBUR, J.; SLOANE, J.; LENNON, J.

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HINES, Director General of Railroads, v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 9347.)

(Supreme Court of California. Oct. 4, 1920. Rehearing Denied Nov. 1, 1920.)

1. Master and servant ⊜417(6)—Compensation commission's finding held a conclusion of law presenting reviewable question of jurisdiction.

Finding of Industrial Accident Commission that during the time the engine on which deceased employé was working when killed was withdrawn from service for repairs it was not engaged in any service, interstate or otherwise, so that the employé was not engaged in interstate commerce at the time, *held* a conclusion of law, presenting the question of the jurisdiction of the commission to make the award, which may be considered on certiorari to review it.

2. Commerce ⊜8(6)—State Compensation Commission without jurisdiction of claim for injury in interstate commerce.

Where an employé is injured in work directly relating to interstate commerce, the Industrial Accident Commission has no jurisdiction to award compensation for the injury, the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), governing the case and furnishing exclusive remedy.

3. Commerce ⊜27(8)—Machinist helper, repairing switch engine withdrawn from service, not engaged in interstate commerce.

Railroad's machinist helper, who when killed was making repairs on a switch engine temporarily withdrawn from service in both inter- and intra-state commerce, *held* not engaged in interstate commerce at the time of the award of compensation to his dependents by the Industrial Accident Commission under the Workmen's Compensation Act, the instrumentality on which he was working not having been operated exclusively in interstate commerce, his work not having immediate effect to further such traffic, and not including both inter- and intra-state traffic, and the instrumentality not having been a car loaded with commodities consigned to or from other states.

4. Courts ⊜97(5)—Federal court's construction of Employers' Liability Act binding on state court.

Where the Supreme Court of the United States has construed the Federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), the Supreme Court of California must accept its declarations on the point involved as settled law, despite its own contrary holding in a prior case.

Wilbur, J., dissenting.

In Bank.

Application by Walker D. Hines, Director General of Railroads, United States Railroad Administration, for certiorari to review an order of the Industrial Accident Commission, awarding Fernanda Brizzolara, Maybelle Brizzolara, and others compensation for death of Angelo Brizzolara. Award affirmed.

Henley C. Booth, of San Francisco, for petitioner.

O'Gara & De Martini, of San Francisco, for respondents Fernanda Brizzolara, Maybelle Brizzolara, Bartolomeo Brizzolara, and Angelo Brizzolara.

A. E. Graupner, of San Francisco, for respondent Industrial Accident Commission.

LAWLOR, J. This is a writ of review issued upon the application of the petitioner, Walker D. Hines, as Director General of Railroads, United States Railroad Administration (Southern Pacific Railroad). On November 28, 1919, the respondent Industrial Accident Commission made an award against petitioner in the respective sums of $2,529.38 in favor of respondent Fernanda Brizzolara and $2,429.38 in favor of respondents Bartolomeo and Angelo Brizzolara, the last-mentioned amount to be paid to respondent Maybelle Brizzolara, as trustee for said Bartolomeo and Angelo Brizzolara. The award was made as compensation for the death of Angelo Brizzolara, an employé of William G. McAdoo, petitioner's predecessor in the office of Director General of Railroads.

As stated in petitioner's brief:

"The following findings of fact made by the commission * * * are fully sustained by the evidence:

"'(1) That Angelo Brizzolara, hereinafter called the employé, was injured on the 9th day of June, 1918, at San Francisco, * * * while in the employment of the United States Railroad Administration, William G. McAdoo, Director General, hereinafter called the employer, as a machinist's helper, and that said injury proximately caused the death of the employé on the same day.

"'(2) That at the time of said injury and death said employé was engaged in making repairs upon a switch engine, which had been temporarily withdrawn from service therefor. That when in service, said switch engine was used in both interstate and intrastate traffic.

That the evidence herein is insufficient to establish as a fact that the proportion of said interstate use exceeded or amounted to 30 per cent. of the whole. * * *

" '(3) That said injury arose out of and in the course of such employment, was proximately caused thereby, and occurred while the employé was performing service growing out of and incidental to the same, and happened in the following manner: While he was adjusting brakes upon a switch engine, which was used exclusively in the Mission Bay yards of the Southern Pacific Company, his head was crushed by a brake beam.' "

Petitioner applied to the commission for a rehearing, but the application was denied. Its principal contention here is:

"That said award * * * and denial of a rehearing were * * * in excess of the jurisdiction of said commission, * * * and in denial of a right, privilege, and immunity of this petitioner under * * * the federal Employers' Liability Act."

1. Before proceeding to a discussion of this contention, it will be proper to consider a preliminary question raised by petitioner. In addition to the findings already quoted, the commission found:

"That during the time said engine was withdrawn from service for repairs, said engine was not engaged in any service, interstate or otherwise. That said employé was therefore not engaged in interstate commerce at said time, and both employer and employé were subject to the jurisdiction of this commission."

Petitioner claims that "the last-quoted findings are in reality not findings of fact, but conclusions of law by the commission." This claim is not controverted by respondents. The commission made a similar finding in Southern Pacific Co. v. Pillsbury, 170 Cal. 782, 151 Pac. 277, L. R. A. 1916E, 916 (hereinafter referred to as the Ruth Case, because the injury for which compensation was awarded had occurred to an employé of that name), wherein the court said:

"That finding is not, in strictness, a finding of pure fact, but rather is it a conclusion of law drawn from a consideration of the admitted facts, to which consideration have been applied principles of law of more or less intricacy."

[1] This language is clearly applicable to the finding under consideration, which must therefore be regarded as a conclusion of law and as presenting the question of the jurisdiction of the commission to make the award —a question which may be considered on certiorari. Smith v. Ind. Acc. Comm., 26 Cal. App. 560, 147 Pac. 600.

2. This brings us to consider petitioner's principal contention, which, stated in different language, is that the deceased, at the time of the injury which resulted in his death, was employed in interstate commerce, and, therefore, that any compensation for such accident must be awarded under the federal Employers' Liability Act (U. S. Comp. Stats., §§ 8657–8665), and not under the Workmen's Compensation Act of this state. Stats. 1917, c. 586.

[2] At the outset it is to be observed that, where an employé is injured while engaged in work directly relating to interstate commerce, the commission has no jurisdiction to award compensation for such injury, since the federal act already referred to is the exclusive remedy. Southern Pacific Co. v. Pillsbury, supra; Smith v. Ind. Acc. Comm., supra; Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; Michigan Centl. R. R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176; Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 501, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; N. Y. Centl. R. R. Co. v. Winfield, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139. Indeed the correctness of this rule is conceded by respondents. The sole question then becomes, upon the facts found by the commission, was the deceased employé, at the time he received the fatal injury, engaged in work directly relating to interstate commerce?

At first glance the answer to this question would seem to be governed by the Ruth Case. There, as here, at the time the employé was injured, he was engaged in repairing a switch engine which had been temporarily withdrawn from service. While in service it was used "in handling both inter- and intrastate commerce." It was held, after a discussion of the decisions bearing upon the federal statute involved, that the employé was engaged in interstate commerce, and the award of the commission was annulled. But since the Ruth Case was decided (August 7, 1915), a number of decisions involving the construction, and the application to similar facts of the Employers' Liability Act have emanated from this, and from the Supreme Court of the United States, and respondents contend that, in the light of those decisions, this court must, on the facts herein, reach a conclusion opposite to that in the Ruth Case. Do those authorities sustain this contention?

In N. Y. Centl. R. R. Co. v. Carr, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298, the employé's injury was due to the negligence of a fellow servant (which barred a recovery under the New York law in the event that at the time of the injury the employé was engaged in intrastate commerce). We quote from the opinion:

"Carr was a brakeman on a 'pick-up' freight train running from Rochester to Lockport. * * * On November 18, 1910, some of the cars in this train contained interstate freight. Among those engaged in purely intrastate business were the two cars, at the head of the

train and next to the engine, which were to be left at North Tonawanda, N. Y. On arriving at that point they were uncoupled from the train, pulled by the engine down the track, and then backed into a siding. * * * The railroad company insists that when the two cars were cut out of the train and backed into a siding they lost their interstate character, so that Carr while working thereon was engaged in interstate commerce. * * * The scope of" the federal Employers' Liability Act "is so broad that it covers a vast field, about which there can be no discussion. But owing to the fact that, during the same day, railroad employés often and rapidly pass from one class of employment to another, the courts are constantly called upon to decide those close questions where it is difficult to define the line which divides the state from interstate business. * * * The matter is not to be decided by considering the physical position of the employé at the moment of injury. If he is hurt in the course of his employment while going to a car to perform an interstate duty, or if he is injured while preparing an engine for an interstate trip, he is entitled to the benefits of the federal act, although the accident occurred prior to the actual coupling of the engine to the interstate cars. * * * *Each case must be decided in the light of the particular facts with a view of determining whether, at the time of the injury, the employé is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part of a necessary incident thereof.* Under these principles the plaintiff is to be treated as having been employed in interstate commerce at the time of his injury, and the judgment in his favor must be affirmed." (Italics ours.)

It appeared in Del. L. & W. R. R. Co. v. Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397, that the defendant railroad company operated a colliery wherein coal was mined for use in its locomotives and other rolling stock used in interstate commerce. The plaintiff was injured while working in defendant's employ in the colliery. Applying the rule of the Carr Case, it was held that the accident did not occur in interstate commerce. See, also, Minneapolis & St. Louis R. R. Co. v. Nash, 242 U. S. 619, 37 Sup. Ct. 239, 61 L. Ed. 531; Raymond v. C. M. & St. P. Ry. Co., 243 U. S. 43, 37 Sup. Ct. 268, 61 L. Ed. 583.

In Shanks v. Del., L. & W. R. R. Co., 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797 (January 10, 1916), it was held that—

"Where a railroad company, which is engaged in both interstate and intrastate transportation, conducts a machine shop for repairing locomotives used in such transportation, an employé is not engaged in interstate commerce while taking down and putting up fixtures in such machine shop."

The court laid down this rule:

"Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion, * * * and that *the true test of employment in such commerce in the sense intended is, Was the employé at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?* * * * Coming to apply the test to the case in hand, it is plain that Shanks was not employed in interstate transportation, or in repairing or keeping in usable condition a roadbed, bridge, engine, car or other instrument *then in use* in such transportation. * * * The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines some of which were used in such transportation." (Italics ours.)

See, also, N. Y. Cent. R. R. Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629.

C., B. & Q. R. R. Co. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941 (May 1, 1916), was a case where the employé was killed while engaged at defendant's Kansas City terminal yards as a member of a switching crew in transporting coal from a storage track to a coal shed, whence it was to be supplied to locomotives of all classes, engaged in interstate traffic. The court held that the federal act did not apply, and declared, quoting with approval from the Shanks Case:

"It is not important whether he had previously been engaged in interstate commerce, or that it was contemplated that he would be so engaged after his immediate duty had been performed. * * * Manifestly, there was no * * * close or direct relation to interstate transportation in the taking of the coal to the coal chutes."

Upon the authority of this case it was held in Lehigh Valley R. R. Co. v. Barlow, 244 U. S. 183, 37 Sup. Ct. 515, 61 L. Ed. 1070 (May 21, 1917), that a switchman was not engaged in interstate commerce while moving from a siding to an unloading trestle three cars of coal which had, some three weeks before been brought from another state.

In Louisville & N. R. R. Co. v. Parker, 242 U. S. 13, 37 Sup. Ct. 4, 61 L. Ed. 119 (November 13, 1916), the court, referring to a fireman who had been killed while running a switch engine "for the purpose of reaching out and moving an interstate car" declared:

"The purpose would control and the business would be interstate. The difference is marked between a mere expectation that the act done would be followed by other work of a different character, * * * and doing the act for the purpose of furthering the later work."

The injury for which compensation was sought in the Rolfe Case (Southern Pacific Co. v. Ind. Acc. Comm., 174 Cal. 8, 161 Pac.

1139, L. R. A. 1917E, 262 [December 14, 1916]), was the death of a flagman at a railroad crossing, who had been struck by a passing local train. The tracks at that point were used by both interstate and intrastate traffic. It was said:

"The duties of deceased * * * had to do directly with the keeping of an instrumentality of interstate commerce in suitable condition for the use of such commerce. And exactly as in the case of one engaged in repairing such an instrumentality after injury thereto has occurred, who concededly is engaged in interstate commerce, it is immaterial whether or not any interstate traffic was *immediately* to be had over the same. * * * In the light of what has already been decided by that court [the Supreme Court of the United States], we are of the opinion that *any work having for its immediate object, in whole or in part, the keeping of the track in condition for use according to schedule for interstate traffic has such a close and direct relation to interstate transportation as to be practically a part of it*, and that such work as deceased was engaged in at the time of his death was work of this character." (Italics ours.)

In Erie R. R. Co. v. Welsh, 242 U. S. 303, 37 Sup. Ct. 116, 61 L. Ed. 319 (December 18, 1916), the employé was a yard conductor, and it appeared that just previous to the accident he had been engaged in maneuvering a freight car into position where it could be included in an interstate train; that he was injured while returning to the yardmaster's office for orders; and that the orders awaiting him there required him to proceed immediately to make up an interstate train. The court continued:

"Upon the strength of this it is argued that his act at the moment of his injury partook of the nature of the work that, but for the accidental interruption, he would have been called upon to perform. In our opinion, this view is untenable. By the terms of the Employers' Liability Act *the true test is the nature of the work being done at the time of the injury*, and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act." (Italics ours.)

Held, that the federal act did not apply.

The facts of the case and the decision reached by the court in Minneapolis & St. Louis R. R. Co. v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54 (January 8, 1917), appear in the following excerpt from the opinion which we have italicized:

"The plaintiff was making repairs upon an engine. This engine 'had been used in the hauling of freight trains over defendant's line, * * * which freight trains hauled both intrastate and interstate commerce, and * * * it was so used after the plaintiff's injury.' * * * That * * * is not sufficient to bring the case under the act. *This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine as such is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other.* Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events."

On January 29, 1917, in B. & O. R. R. Co. v. Branson, 242 U. S. 623, 37 Sup. Ct. 244, 61 L. Ed. 534, the Supreme Court reversed the judgment of a Maryland trial court which had been affirmed by the Supreme Court of that state in 128 Md. 678, 98 Atl. 225. In that case the plaintiff, Branson, had suffered injury by inhaling the spray from a "paint gun," which he used in defendant's employ in painting engines and cars used in interstate commerce. He sued to recover under the federal Employers' Liability Act. Both the trial court and the state Supreme Court held that he was engaged in interstate commerce, and that the statute was applicable. The United States Supreme Court filed a memorandum opinion, reversing the judgment upon the authority of the Yurkonis, Harrington, Shanks, and Winters Cases.

Subsequently, on April 30, 1917 (243 U. S. 656, 37 Sup. Ct. 481, 61 L. Ed. 949), the Supreme Court, without comment, denied the petition filed by respondent commission for a writ of certiorari in the Rolfe Case, and on May 21, 1917 (244 U. S. 653, 37 Sup. Ct. 652, 61 L. Ed. 1373), a similar petition was denied, also without comment, in the Ruth Case.

On the last-mentioned day, the decision was filed in Erie R. R. Co. v. Winfield, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662. In that case, "the employé was in charge of a switch engine in the carrier's extensive yard at Croxton, N. J., and was switching freight cars about in the yard, especially to and from a transfer station. * * * In some [cars] the freight was interstate, in others intrastate and in still others it was of both classes. * * * In concluding his work for that day the employé took his engine to the place where it was to remain for the night, and started to leave the yard. His route lay across some of the tracks, and while passing over one he was struck by an engine, and received injuries from which he soon died. * * * In leaving the carrier's yard at the close of his day's work the deceased was but discharging a duty of his employment. * * * Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work, and partook of the character of that work as a whole. * * * His day's work was in both interstate and

intrastate commerce, and so when he was leaving the yard at the time of the injury his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment also extended to intrastate commerce is for present purposes of no importance."

Southern Pacific Co. v. Ind. Acc. Comm., 178 Cal. 20, 171 Pac. 1071 (March 25, 1918), was a case where compensation was sought for the death of one Butler, caused by electrocution while Butler was working for petitioner as an electric lineman. The opinion states that petitioner "operates a system of electric railway lines, * * * its cars being used in both intrastate and interstate commerce," and continues:

"The opinion in the Shanks Case refers to a number of earlier cases in which, upon varying facts, the federal statute has been held to be applicable or inapplicable. Upon examination of these decisions it will be found that each case turned upon the peculiar facts of the employment in question. It may be said, however, that *the decisive consideration is always the closeness or remoteness of the particular work, as related to interstate transportation.*" (Italics ours.)

The award was affirmed on the authority of the Harrington Case.

In Southern Pacific Co. v. Ind. Acc. Comm., 179 Cal. 59, 175 Pac. 453 (September 30, 1918), the employé, Morton, was a member of a repair crew in petitioner's Bay Shore Freightyards, engaged in repairing cars, some of which carried intrastate and others interstate shipments. He was killed by an empty car while proceeding across the yard from one repair job to another. After quoting from Erie R. R. Co. v. Winfield, supra, the court said:

"By the same process of reasoning the decedent, whose general employment was to repair cars containing interstate and intrastate freight in the yards of the petitioner, was employed in interstate commerce while passing through the yard from one such car to another."

The facts in N. Y. Central R. R. Co. v. Porter, 249 U. S. 168, 39 Sup. Ct. 188, 63 L. Ed. 536 (March 3, 1919), show that compensation had been awarded under the New York Workmen's Compensation Act for the death of an employé who was killed by a passenger train while shoveling snow from certain tracks which "were used for the purpose of transporting * * * both interstate and intrastate commerce." It was held that he was engaged in interstate commerce, and therefore that the state statute was not applicable.

In Phila., B. & W. R. R. Co. v. Smith, 250 U. S. 101, 39 Sup. Ct. 396, 63 L. Ed. 869 (May 19, 1919), the employé was engaged as cook in a construction crew, whose duty it was to move from one point to another repairing bridges, and who lived in a "camp car." The car was standing upon a siding near an abutment on which the crew were working, when another train collided with it, causing the injuries from which plaintiff sought to recover under the federal act. The court affirmed the judgment rendered in his favor, saying:

"The relation of plaintiff's work to the interstate commerce of his employer would seem to be rather remote. But upon a closer examination of the facts the contrary will appear. * * * The significant thing, in our opinion, is that he was employed by defendant to assist, and actually was assisting, the work of the bridge carpenters by keeping their bed and board close to their place of work. * * * He was employed, as they were, in interstate commerce."

On the same day the opinion was filed in Kinzell v. C., M. & St. P. Ry. Co., 250 U. S. 130, 39 Sup. Ct. 412, 63 L. Ed. 893. In that case the employé was a member of a repair crew which was making a "fill" for a bridge used by interstate trains. At the time of the injury the earth had been heaped up over the track, and the employé was engaged in coupling a "scraper" to a train of cars in order to clear the earth from the track. The court declared:

"The doing of work which has for its immediate purpose the furthering of the conduct of interstate commerce constitutes an employment in such commerce within the meaning of the act." (Italics ours.)

The award in the Butler Case was annulled on January 5, 1920. 251 U. S. 259, 40 Sup. Ct. 130, 64 L. Ed. ——. We quote from the opinion:

"Generally, when applicability of the federal Employers' Liability Act is uncertain, *the character of the employment, in relation to commerce, may be adequately tested by inquiring whether, at the time of the injury, the employé was enagged in work so closely connected with interstate transportation as practically to be a part of it.* * * * Applying the suggested test, we think these circumstances suffice to show that his the [employé's] work was directly and immediately connected with interstate transportation and an essential part of it." (Italics ours.)

On May 17, 1920, the decision was filed in Erie R. R. Co. v. Collins, 253 U. S. 77, 40 Sup. Ct. 450, 64 L. Ed. ——. It appeared that—

"The plaintiff as an employé of defendant operated a signaling tower and water tank, * * * the tower being used for the operation of trains in interstate and intrastate commerce. The tank was used for supplying the locomotives of the trains with water, which was pumped from a closeby well into the tank by a gasoline engine which plaintiff ran. In the nighttime of December 25, 1915, while plaintiff was engaged in starting the engine the gasoline suddenly exploded, burning him."

The court continued:

"They [the cases relied upon below] all dealt with considerations dependent upon the distinctions of fact and law between interstate and intrastate commerce. A distinction, it may at once be said, is plain enough so far as the essential characteristics of the commerces are concerned, but how far instruments or personal actions are connected with either and can be assigned to either becomes in cases a matter of difficulty, and ground, it may be, of divergent judgments. * * * In Pedersen v. Del., L. & W. R. R. Co., 229 U. S. 146, it was held that one carrying bolts to be used in repairing an interstate railroad, and who was injured by an interstate train, was entitled to invoke the Employers' Liability Act. * * * And it was said, citing cases: *'The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?'* * * * In the Winters Case the work was repairing an engine. The engine, it was said, had no definite destination. 'It simply had finished some interstate business and had not as yet begun upon any other.' As to such instrumentalities the determining principle was said to be that their character depends upon their 'employment at the time, not upon remote probabilities or accidental later events.'

"In the Puckett Case an employé (car inspector), going to the relief of another employé, stumbled over some large clinkers in his path while carrying a jack for raising a derailed car. It was decided that he was engaged in interstate commerce, the purpose being to open the way for interstate transportation.

"These, then, being the cases, what do they afford in the solution of the case at bar? As we have said regarding the essential character of the two commerces, the differences between them is easily recognized and expressed, but, as we have also said, whether at a given time particular instrumentalities or employment may be assigned to one or the other may not be easy, and of this the cases are illustrative. What is their determining principle?

"In the Pedersen Case it was said that the questions which naturally arise: 'Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Or, as said in Shanks v. D., L. & W. R. R. Co., supra, Was the 'work so closely related to it (interstate commerce) as to be practically a part of it'? The answer must be in the affirmative. Plaintiff was assigned to duty in the signal tower and in the pump house, and it was discharged in both on interstate commerce as well as on intrastate commerce, and there was no interval between the commerces that separated the duty, and it comes therefore within the indicated test."

Erie R. R. Co. v. Szary, 253 U. S. 86, 40 Sup. Ct. 454, 64 L. Ed. —— (decided on the same day), was a case where the employé was injured while engaged in "sanding engines whose destinations were other states." It was held that he was engaged in interstate commerce.

In Phila. & R. Ry. Co. v. Hancock, 253 U. S. ——, 40 Sup. Ct. 512, 64 L. Ed. —— (June 1, 1920), the employé was killed while operating a train of cars loaded with coal. While "the duties of the deceased never took him out of Pennsylvania," nevertheless the coal which he was moving at the time of his death was consigned to another state. It was held that—

"The coal was in the course of transportation to another state when the cars left the mine. *There was no interruption of the movement;* it always continued towards points as originally intended. *The determining circumstance is that the shipment was but a step in the transportation of the coal to* real and ultimate destinations in *another state.*" (Italics ours.)

The award of compensation, under the state Workmen's Compensation Act, was therefore annulled.

From the foregoing authorities these principles are deducible: The general test as to the character of the employment is whether the employé was engaged in an act so directly and immediately connected with interstate business as substantially to form a part or necessary incident thereof. Thus, where the instrumentality upon which he was working was operating exclusively in interstate commerce, as in the Parker and Szary Cases; or where the work which he was performing at the time of the accident would have the immediate effect of furthering interstate traffic, as in the Carr, Rolfe, Butler, Porter, Smith and Collins Cases; or where the employé had not yet completed his day's work, which included both interstate and intrastate transportation, as in the Winfield Case; or where the instrumentality upon which he was laboring was a car loaded with commodities consigned to or from other states, as in the Horton and Hancock Cases —an action under the federal Employers' Liability Act is the exclusive remedy. But where the employé's work was only remotely connected with interstate commerce, as in the Yurkonis, Shanks, Harrington, Barlow, and Branson Cases; or where the employé had completed a task which involved interstate traffic, and had not yet commenced a new task, as in the Welsh Case; or where the instrumentality upon which the employé was working was, at the time of the injury, neither engaged in, nor loaded with, interstate traffic, as in the Winters Case, then compensation may be awarded under a state compensation act. As was said by this court in the Butler Case:

"The decisive consideration is always the closeness or remoteness of the particular work, as related to interstate transportation."

[3] Applying these principles to the facts herein, we think that, at the time Brizzolara received the injury which caused his death he was not engaged in interstate commerce. The engine which he was repairing was not used exclusively in such commerce. Indeed, as was said in the Winters Case:

"An engine as such is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined * * * to anything more definite than such business as it might be needed for."

It had been withdrawn from all traffic. To paraphrase the language of the Harrington Case, it is not important whether the engine had previously been engaged in interstate commerce or that it was contemplated that it would be so engaged after this immediate duty had been performed. And this further excerpt from the opinion in the Winters Case is pertinent:

"Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events."

We quote from Chicago, R. I. & P. R. Co. v. Cronin (Okl.) 176 Pac. 919:

"We cannot agree with the plaintiff in error that this broken down engine was in interstate commerce at the time of the accident; indeed, it was not in commerce of any kind. It was 'dead,' undergoing the repairs necessary to placing it in commerce."

It is urged by petitioner that—

"The denial of the petition for a writ of certiorari in the Ruth Case should be regarded as authority, and therefore the decision of this court should control in the case at bar."

[4] It seems plain that our holding in the Ruth Case cannot be reconciled with that in the Winters Case. It is true that a writ of certiorari in the former was denied some four months after the decision in the latter. Whatever the grounds may have been for the denial of the writ, we cannot, in the face of the clear and unequivocal statement of the rule in the Winters Case, wholly at variance with the conclusion in the Ruth Case, regard the latter as controlling here. In both cases the employé was injured while working on an engine which was customarily used in both interstate and intrastate traffic, and in both cases it had been withdrawn from such service for repairs. As we said in the Ruth Case:

"No fixed rule for the construction of this statute has been laid down by the Supreme Court of the United States."

But, as we have shown, that court has since had occasion to construe the federal Employers' Liability Act, and we must accept its declarations on the point in question as the settled law.

It follows that at the time of the accident Brizzolara was not "engaged in an act so directly and immediately connected with interstate business as substantially to form a part or necessary incident thereof."

The award is affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SHAW, J.; LENNON, J.; SLOANE, J.

WILBUR, J. (dissenting). I dissent. It is conceded that the facts of this case bring it squarely within the rule laid down in Southern Pacific Co. v. Pillsbury, 170 Cal. 782, 151 Pac. 277, L. R. A. 1916E, 916 (which will hereinafter be referred to as the Ruth Case), and that if we follow that case the award should be annulled. The Ruth Case, however, is overruled by the main opinion upon the theory that the Supreme Court of the United States in Minneapolis & St. Louis R. R. Co. v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54 (which will hereinafter be referred to as the Winters Case), has determined the same matter directly contrary to the rule laid down by us in the Ruth Case. This view is entertained, notwithstanding the fact that the Supreme Court of the United States declined to issue a writ of certiorari to review the decision of this court in the Ruth Case, and that this action was had after the decision in the Winters Case. It seems to me that there is a clear distinction between the Winters Case and the Ruth Case. The facts in the Winters Case were stipulated. It appears therefrom that the engine "had been used in the hauling of freight trains over defendant's line, * * * which freight trains hauled both intrastate and interstate commerce, and * * * it was so used after the plaintiff's injury." It will be observed that the stipulation does not cover the customary use of this engine. It had been used before and was used after the accident in hauling intrastate and interstate commerce. It was under this condition of the record that the court said:

"Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended upon its employment at the time, not upon remote probabilities or upon accidental later events."

Of course when an engine is laid up in a machine shop for repairs it is not actually engaged in interstate commerce, and if its character as an instrument of commerce is to be determined by what it is doing when it is doing nothing, it follows that no engine while undergoing repairs is engaged in interstate commerce. It is clear from the opinion that no such result was intended, for it is expressly inferred that had it been "interrupted in an interstate haul to be repaired and go on," it would have been held that the engine was employed in interstate commerce, and those repairing it engaged therein. Again it is said:

"This is not like the matter of repairs upon a road permanently devoted to commerce among the states."

The inference in this statement is that if the engine had been permanently devoted to interstate commerce, as is a bridge, that those in its repair would be engaged in interstate commerce. In this case we are dealing with a switch engine which, by reason of its construction and the character of its business, is permanently devoted to the handling of freight and passenger cars in the railroad yards in San Francisco, and which is used for both interstate and intrastate commerce. There is no time when it could be said that the engine while in actual operation was not engaged in interstate commerce. Why, then, is it any less an instrumentality of interstate commerce than a bridge in the main line of a railway which most of its time is unused, and when in use is traveled indiscriminately by interstate and intrastate commerce? As pointed out in the main opinion, in Philadelphia, B. & W. R. R. Co. v. Smith, 250 U. S. 101, 39 Sup. Ct. 396, 63 L. Ed. 869, the cook of a construction crew, engaged in repairing a bridge upon a railroad engaged in interstate business, was held to be engaged in such interstate commerce while serving as a cook. The court say:

"The significant thing, in our opinion, is that he was employed by the defendant to assist, and * * * was assisting, the work of the bridge carpenters by keeping their bed and board close to their place of work."

It is further said:

"Taking it to be settled by the decision of this court in Pedersen v. Delaware, Lackawanna & Western R. R. Co., 229 U. S. 146, 152, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, that the repair of bridges in use as instrumentalities of interstate commerce is so closely related to such commerce as to be in practice and in legal contemplation a part of it, it of course is evident that the work of the bridge carpenters in the present case was so closely related to defendant's interstate commerce as to be in effect a part of it."

If we turn to the case of Pedersen v. Delaware, Lackawanna, etc., Co., supra, we will see that the repair of engines and cars and the repair of bridges and tracks are placed upon exactly the same footing. It was there said:

"Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. *Tracks and bridges* are as indispensable to interstate commerce by railroad as are *engines* and *cars*, and sound economic reasons unite with settled rules of law in *demanding that all of these instrumentalities be kept in repair*. The security, expedition and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency * * * in its *cars, engines*, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment' used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? [Citing cases.] Of course we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such." (Italics ours.)

In the Pedersen Case the rule adopted by the Supreme Court of the United States applied with equal force to a bridge and an engine. In the Ruth Case we made the application of the principle there stated to an engine. I think that this case was correctly decided, and that the Winters Case was not a departure from the rule laid down by us or the rule laid down by the Supreme Court of the United States in the Pedersen Case, but depends upon its own peculiar facts and the narrowness of the stipulated facts. The whole point of the Winters Case is that the Supreme Court of the United States felt itself unable to say, under the admitted facts, that the engine there involved was permanently used in, or, if I may use the expression, dedicated to, interstate commerce. Here we have an engine which, by reason of its peculiar construction, is and at all times has been as much dedicated to interstate commerce as is a bridge upon the main track of a railroad. In the Pedersen Case it was assumed that engines and cars were obviously instrumentalities used in interstate commerce, and from that predicate it was argued that a bridge was equally such an instrumentality. The main opinion assumes that a bridge is such an instrumentality, but denies that an engine undergoing repairs is such an instrumentality, notwithstanding the fact that it was at all times used in interstate commerce.

I dissent for the further reason that we have expressly decided the very question involved in this case; that the principle involved is well settled and of universal appli-

cation; that the only difficulty is that of applying it to the specific facts in each case; that we have already made such an application; that the Supreme Court of the United States has never undertaken to change or modify the general rule; that the Winters Case is different in its facts, and that, so far as we can determine from the published opinions of the Supreme Court of the United States, they have distinctly approved our decision in the Ruth Case. I think we ought not to assume that the Ruth Case is reversed by reason of the holdings in the later cases of the Supreme Court of the United States, which merely apply the well-settled rule to the peculiar facts of each case, which are in every instance different from those in this case.

49 Cal. App. 136

HOLMGREN v. MADALENA. (Civ. 2123.)

(District Court of Appeal, Third District, California. Aug. 30, 1920. Hearing Denied by Supreme Court Oct. 26, 1920.)

Appeal and error ⊂=907(3)—Evidence presumed to support verdict on appeal on judgment roll.

Where the appeal is on the judgment roll alone it will be presumed by the appellate court that the evidence was sufficient to sustain the verdict.

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by Alex Holmgren against Luis D. Madalena. From a judgment for defendant, plaintiff appeals. Affirmed.

F. A. Kelley, of Susanville, for appellant.
L. H. Hughes, of Quincy, for respondent.

NICOL, Presiding Judge pro tem. This is an appeal by plaintiff upon the judgment roll alone from a judgment in favor of defendant. The action grew out of an alleged assault on plaintiff by defendant, as the result of which he lost the sight of his right eye. The case was tried before the superior court of the county of Plumas, with a jury, and the trial culminated in a verdict for the defendant.

The complaint alleges that the defendant wrongfully and unlawfully committed an assault upon the person of plaintiff, and wrongfully in the commission of such assault struck plaintiff in the right eye, and thereby destroyed the sight of said eye and rendered plaintiff permanently blind in said eye, to plaintiff's damage in the sum of $4,000; that by reason of said assault and injury committed as aforesaid plaintiff has incurred an indebtedness of $300 for and on account of medical attention and treatment; that the said assault was wrongful, unlawful, violent, and malicious. Plaintiff demanded judgment for the above-mentioned items, together with the sum of $2,000 for exemplary damages and costs of suit.

A demurrer to the complaint having been overruled, the defendant answered, and denied all the material allegations of the complaint, and set up the affirmative defense that—

"The plaintiff, while crazed from the excessive use of intoxicating liquors, first threatened and assaulted defendant, who thereupon necessarily committed the act complained of in defense of his person and property."

The evidence in the case is not before us, and it must be conclusively presumed on this appeal that the jury did its duty, and that there was ample and sufficient evidence to warrant the verdict.

The case is before us on the judgment roll alone, and there is no error in said judgment roll.

The judgment appealed from is affirmed.

We concur: HART, J.; BURNETT, J.

49 Cal. App. 165

JONES v. JONES. (Civ. 3419.)

(District Court of Appeal, First District, Division 1, California. Sept. 1, 1920.)

Divorce ⊂=296—Superior court has wide discretion with respect to custody of children of marriage.

Under Civ. Code, § 138, authorizing the court, during pendency, etc., of divorce suits to make orders with respect to the custody of minor children, the superior court has a wide discretion in that matter with respect to the varying conditions for the purpose of doing justice, not only to the parents, but especially to the helpless minor children.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action for divorce by Richard D. Jones against Dora Pauline Jones. From an order with reference to the custody of the minor child of the marriage, entered after an interlocutory decree in favor of plaintiff, defendant appeals. Order affirmed.

Ingall W. Bull and Harold Larson, both of Los Angeles, for appellant.

Wm. G. Griffith, of Santa Barbara, and Robert M. Clarke, of Los Angeles, for respondent.

WELCH, Judge pro tem. On May 20, 1918, plaintiff and defendant were husband and wife. On that day the husband commenced this action to obtain a judgment of divorce from his wife. She answered on the same day, and the court thereupon granted

an interlocutory decree of divorce in favor of plaintiff. The defendant offered no evidence. Findings were prepared (or already prepared), signed and entered on said May 20th. On that day also, by mutual agreement, in writing, the property rights of the parties were settled, which writing was immediately recorded.

The husband charged desertion—which was not the real cause of complaint, as is so often the case in this class of litigation. In her answer, the wife alleged that she "voluntarily" deserted and abandoned plaintiff, but "did so with good cause." Claiming, however, that she was a fit and proper person to have the care and custody of the minor child of the union, nine years old, she prayed the court for such care and custody. The court granted her prayer "subject to the further orders of the court respecting the minor child, and subject to the right of the plaintiff to visit and to be visited by said minor child at reasonable and suitable times and places."

In October of the same year the plaintiff moved the court for a modification of the interlocutory decree of divorce with respect to the care and custody of the said minor child; and after a full hearing, in which both parties introduced extensive testimony, the court granted the motion, and entered an order to the effect that the minor be sent for his education to the Deane School for Boys in El Montecito, Santa Barbara county (the county in which the parents lived, and in which the trial took place), and giving to each parent the right to visit the child at the school at all times, subject to the rules of the school. The order further provided that during the first half of each school vacation the mother was to have the custody of the minor, and the father during the second half, each parent to have the privilege of visiting the boy while in the custody of the other, all subject to the further order of the court. The father was adjudged to pay all expenses of the child's education. The defendant appeals from this order.

There is no merit in the appeal. A careful examination of the record before us has not disclosed any error of the trial court, and the evidence fully justifies the trial court in modifying its order. For this reason we do not set forth in detail the evidence in the case. In dealing with domestic troubles and the care, custody, and education of minor children of disagreeing parents, the superior court of the state more than ever before should have a wide range of discretion in order to be able to adapt its orders to varying circumstances and conditions for the purpose of doing justice, not only to the parents in their unfortunate differences, but especially to the helpless minor children. Not only in fact but in law was the order now under review modifying the interlocutory decree of divorce justified and authorized. Civ. Code, § 138; Baker v. Baker, 139 Cal. 626, 73 Pac. 469; Nave v. Nave, 35 Cal. App. 27, 169 Pac. 253; Bancroft v. Bancroft, 173 Pac. 582; Simmons v. Simmons, 22 Cal. App. 448, 134 Pac. 791; Crater v. Crater, 135 Cal. 633, 67 Pac. 1049.

Order affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

49 Cal. App. 89

LITTLE et al. v. ROOP. (Civ. 3411.)

(District Court of Appeal, First District, Division 1, California. Aug. 27, 1920.)

Waters and water courses ⟸156(5)—Deed giving right to use water on another's land did not give property right in pumping plant on the lands.

Where defendant and plaintiffs held parcels of agricultural land by deeds from common grantor, and plaintiffs' deeds gave them a perpetual water right to a specified number of miners' inches of water from a well on defendant's land, such deeds gave plaintiffs no such interest in the pumping plant connected with the well as to support an action of conversion by them against one dismantling or taking possession of the plant.

Appeal from Superior Court, Tulare County; Stanley A. Smith, Judge.

Action by F. L. Little and another against George Roop. From judgment for plaintiffs, defendant appeals. Reversed.

Guy Knupp, of Porterville, for appellant.

J. A. Chase, of Visalia, and Max B. Jamison, of Porterville, for respondents.

RICHARDS, J. This is an appeal by defendant from a judgment in favor of the plaintiffs for the sum of $540 in an action brought to recover damages for the alleged conversion of personal property.

But one question need be considered, namely, did the plaintiffs have such an interest in the property alleged to have been converted as could furnish a foundation for the present action?

It appears from the record that both of the plaintiffs and the defendant were severally the owners of parcels of agricultural land in a tract known as Grand View Heights Colony, deriving their title directly or through mesne conveyances from a common grantor, the Garden City Bank & Trust Company. The defendant's parcel was described as the south half of lot 3, and upon it was situated a well, together with a pump, engine, and casing used in connection therewith and firmly attached to the realty. The respective

deeds under which the plaintiffs each derained title contained the following language immediately after the description of the land conveyed:

"Together with the perpetual water right to * * * miners' inches of water from that certain well now located on lot 3 in block B of Grand View Heights Colony, said miners' inches of water above referred to to be equal to 1/50 part of one cubic foot per second continuous flow; also the right to lay and maintain pipes or conduits to convey water in the most direct course practical over the property of the party of the first part from the well above mentioned to the land herewith conveyed."

(In one case the number of miners' inches of water granted was two and in the other five.)

For several years the plaintiffs and the defendant each took water from the said well, using the pump, engine, and casing for that purpose, and taking it at such times as were mutually convenient. The immediate expense of pumping the water was borne by the party taking it, and the general expense of maintaining said machinery was borne in agreed proportions. On January 16, 1918, the defendant dismantled the pump, engine, etc., and sold them; and the plaintiffs claiming to be the owners of a three-fifths interest in said machinery, brought this action of conversion to recover that proportion of the proceeds of said sale. In support of the judgment in their favor it is their claim that the clause in their respective deeds above quoted should be construed to give them a specific interest in the pump and machinery attached to the well on defendant's land, entitling them to a like proportion of the value of such machinery upon its sale by the defendant. Plaintiff Little further supported his claim by evidence (which the court received over the objection of the defendant that it was incompetent) that at the time he purchased his land from the Grand View Heights Colony Company the defendant, being then an officer and agent of the company, represented and stated to him that in the event of his making the purchase he would be entitled to a two-fifths interest in said pumping plant. This representation was denied by the defendant, but whatever the fact may be as to this episode, we think it clear that Little's right to recover a proportion of the proceeds of the sale of the machinery in an action of conversion must, in the absence of a reformation of the instrument by which he obtained title, be based upon the terms of that instrument. The defendant's claim, of course, is that the pumping plant, being situated upon his land and firmly attached to the realty, was a part thereof, and that the plaintiffs owned by virtue of their respective deeds merely an easement consisting of a right to take the several quantities of water stated in their deeds.

We find it impossible to agree with the contention of the plaintiffs as to the construction of the provision of the deed above quoted. Its effect is plainly to confer the right upon the grantee to take or receive from the well situated on lot 3 of block B the quantity of water designated. Even if we go further and concede for the sake of argument that such clause of the deed, taken in connection with the practice pursued by the parties, was intended also to confer the right to use the pumping machinery attached to said lot 3, such a right would only enlarge the easement granted by increasing the burden imposed upon defendant's tract of land. Any interference by the defendant with such easement would doubtless give to the owner of the dominant tenement a right of action for damages; but there is nothing in the title deeds of the plaintiffs, or in any other evidence received on their behalf, transferring to them any such specific interest in the pumping plant which could give rise to an action in conversion in their favor against one dismantling or taking possession of such plant. The legal situation is no different from that presented in the case of an easement of right of way, upon which right of way might be a bridge used in connection with and forming part of it. If the owner of the servient tenement should tear down the bridge and sell the lumber of which it had been constructed, the owner of the easement could claim no interest in the lumber or the proceeds of its sale, but must pursue his remedy for damages for interference with his easement. We are of the opinion, therefore, that the trial court's finding that the defendant converted the property in question to his own use to the damage of the plaintiffs, the measure of which was three-fifths of the amount received from its sale, is contrary to the evidence, and its judgment, therefore, erroneous.

This defect being fundamental, it is unnecessary to consider other points urged by the respondents in support of the judgment.

Judgment reversed.

We concur: WASTE, P. J.; WELCH, Judge pro tem.

49 Cal. App. 148

CLAYES v. NUTTER et al. (Civ. 2169.)

(District Court of Appeal, Third District, California. Aug. 30, 1920. Hearing Denied by Supreme Court Oct. 26, 1920.)

Wills ⇐619—Bequest held not to create an "annuity," but a gift of income.

Under Civ. Code, § 1357, subd. 3, defining an "annuity" where a will gave testator's estate, with certain exceptions, to trustees to invest, and, out of the balance remaining after paying the expenses of the trust, to pay to testator's sister a certain sum per month during life, the bequest to the sister did not create an annuity, so as to commence, under section 1368, at testator's death, but a gift of income, so that the sister was not entitled to receive monthly payments, or any payments, during the time the estate was in course of administration or prior to the time it was distributed to the trustees.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Annuity.]

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by Flora B. Clayes against W. B. Nutter and another, trustees under the last will and testament of Maria S. Hubbard, deceased, and under the decree of distribution in the estate of said Maria S. Hubbard. From judgment for defendants, plaintiff appeals. Affirmed.

Harding & Monroe, of San Francisco, for appellant.

John Hancock and Newton Rutherford, both of Stockton, for respondents.

NICOL, Presiding Judge pro tem. This is an action brought by the plaintiff against the defendants who are trustees under the last will and testament of Maria S. Hubbard, deceased, and under the decree of distribution in the estate of Maria S. Hubbard, deceased, to recover the sum of $700 claimed to be due as an annuity from the date of the death of the said Maria S. Hubbard, which occurred on the 30th day of August, 1917, to the 1st day of November, 1919, when the trust estate finally came into possession of the defendants under the decree of distribution in said estate. Judgment was for the defendants in the trial court, and plaintiff appeals from said judgment.

Under the will of said Maria S. Hubbard, all of her estate, after the payment of her debts and expenses of administration (except personal effects, such as jewelry, wearing apparel, ornaments, and bric-a-brac) was given to defendants, as trustees, to invest and manage the same and collect all the profits thereof, and out of the balance remaining, after paying the expenses of the trust, to "pay to my sister, Mrs. Flora B. Clayes, the sum of fifty (50) dollars per month during her natural life." Other specific sums were to be paid to other parties; then the will provides:

"And the remainder of such income they shall pay in equal shares to my daughters. Maria Hubbard Cronise and Eliza Fitch Hubbard Middlecoff, during their natural lives," etc.

It is the claim of the appellant that these provisions of the will make the bequest to Mrs. Clayes an annuity, and therefore that it is payable from date of death. The appellant contends that the question involved in this case is clearly settled by subdivision 3 of section 1357 of the Civil Code, which provides as follows: "An annuity is a bequest of certain specified sums periodically; if the fund or property out of which they are payable fails, resort may be had to the general assets, as in case of a general legacy," and also, that if it be determined that this bequest is an annuity, the conclusion that it was to commence at the date of the testatrix's death is inevitable under section 1368 of the Civil Code, which is as follows:

"Legacies are due and deliverable at the expiration of one year after the testator's decease. Annuities commence at the testator's decease."

It is the contention of the respondents that "the last will and testament of Maria S. Hubbard, deceased, did not create an annuity in favor of appellant in legal contemplation, but created a gift of income," citing Corpus Juris, volume 3, at page 201, as follows:

"There is a distinction between an income and an annuity; the former embraces only the net profits and may be uncertain in amount; the latter is a fixed amount directed to be paid absolutely and generally without contingency. A simple gift of the interest upon a specific principal sum, although stipulated to be paid annually, is not an annuity but merely a gift of income. Much less can the gift of the income of a specified portion of an estate, including real as well as personal estate, be considered an annuity."

That the said Maria S. Hubbard did not intend to create an annuity in favor of her sister, Mrs. Flora B. Clayes, we think is quite apparent from the terms of her will.

As before stated, under the will of said Maria S. Hubbard, all of her estate, after the payment of her debts and expenses of administration (except personal effects, such as jewelry, wearing apparel, ornaments, and bric-a-brac) was given to the defendants, as trustees to invest and manage the same and collect all the profits thereof—

"and out of the interest and income derived from the moneys by them so invested and kept invested, and out of the rents, issues and profits by them received from such real property, they, said trustees, shall pay all taxes levied

and assessed upon the trust property either by state, county, city or other duly constituted and established authority, and such premiums for insurance as may be required to be paid in order to afford reasonable protection to any of such property as against loss or damage by fire, and such sums as may be required to be expended in the necessary repair, protection and improvement of any such property, and in the necessary expenses of this trust, including a reasonable sum for their services in the performance of the duties of their trust, and out of the balance of such interest, rents, issues, and profits, they, said trustees, shall pay to my sister Mrs. Flora B. Clayes, the sum of fifty (50) dollars per month during her natural life."

As will be observed it is expressly provided in said will that the trustees shall invest the trust property and "out of the balance," of the rents, issues, and profits, pay to Mrs. Flora B. Clayes the sum of $50 per month during the term of her natural life. Under this will it was necessary for the trustees to receive the trust property and invest the same, so as to obtain an income before it was possible for them to make any payment to Mrs. Clayes under the terms of the will.

It is true that the trustees named in the will of Maria S. Hubbard, deceased, were also the executors of said will and served in that capacity; but they did not qualify as trustees until they as executors had completed the administration of said estate and distributed the same. They did not become trustees under the will and decree of distribution before October 29, 1918, and no part of the estate came into their possession as such trustees prior to said 29th day of October, 1918, and the court found:

"That defendants did not receive nor did there come into the possession of said defendants as such trustees, any rents, issues or profits produced from the property of said estate prior to the first day of November, 1918."

The court further found:

"That the expenses of administration of the said estate, including taxes, state and national, exceeded the sum of one hundred thousand dollars ($100,000.00), and that the expenses of said administration consumed all the income arising from rents, issues and profits from said estate during the time of said administration, and that said expenses of administration, including taxes, state and national, also required the expenditure by said executors of a portion of the corpus of said estate."

In the Estate of Brown, 143 Cal. 450, 77 Pac. 160, the testatrix by her will gave to two trustees the sum of $5,000 in trust for the following uses and purposes, and not otherwise:

"(a) To invest the said money in some safe investment, in their discretion, with power, at all times to reinvest the same as they may deem best.

"(b) Out of the income arising from the investment of said fund, as aforesaid, to pay Kate Nowland, * * * monthly the sum of $20 for and during the term of her natural life."

The beneficiary in that case claimed that the testatrix had created an annuity in her favor, and that the same was payable from the date of the death of the testatrix. The court said:

"The appellant cites in support of her claim to payment from date of death section 1366 of the Civil Code, as follows: 'In case of a bequest of the interest or income of a certain sum or fund, the income accrues from the testator's death.' If this section was applicable, of course the appellant would be entitled to the monthly payments from the time of the death of the testatrix. But the bequest in this case was not of the interest or income of a certain sum to be paid by the executors of the estate. The testatrix bequeathed the sum of $5,000 to certain trustees, and the monthly income was to be paid by the trustees, and not by the executors. Necessarily, the trustees could not begin payment until they received the fund and invested it so as to produce an income. The intention of the testatrix must therefore have been that payments were not to begin until the fund from which it was to be produced was distributed to the trustees, who were to make the payments."

The above case is directly in point with the case at bar; for in that case the property from which the payments were to be made was distributed to trustees and the monthly payments were to be paid by the trustees and not by the executors, and the reasoning of the court in that case to the effect that the trustees could not begin payment until they received the fund and invested it so as to produce an income, and that "the intention of the testratrix must therefore have been that payments were not to begin until the fund from which it was to be produced was distributed to the trustees," applies with equal force to the case at bar.

In the Estate of Mackay, 107 Cal. 303, 40 Pac. 558, the testator bequeathed the sum of $15,000 to the executors of his will in trust, with directions that they invest said sum in such securities as they deemed advisable, and to pay the income to the beneficiary, during her life. The Supreme Court held that—

"The legacy in question is, by its terms, made to the executors named in trust for the purposes therein expressed. It is not a legacy payable direct to the respondent, and under no circumstances is she entitled to receive any part of the principal sum bequeathed. That sum is to be received and held by the trustees, and they are the only parties to whom the probate court can order it, or any part of it, to be paid. Such an order would constitute a distribution (partial or final).

"The right of the respondent is merely that of the beneficiary of the trust, and is confined, by the terms of the will, to the receipt of the income to be derived from an investment of the trust fund. This investment is directed to be

made by the trustees, and, until the fund is distributed to the latter and an investment of it made, there can be no 'income' to be paid to the respondent. * * * The will, as we have seen, gives her nothing directly from the estate, much less is she to receive anything from the general assets of the estate. All that she is entitled to is payment by the trustees of the income of the specific fund after distribution of such fund to them."

Appellant cites the case of Crew v. Pratt, 119 Cal. 131, 51 Pac. 44, "as determinative of the case at bar." But we do not think that this case sustains appellant's contention. In that case the will of the testator provided that the trustees should hold and manage the trust for seven years from and after the death of the testator, and the will also directed that the trustees should "provide and turn over to Mrs. Lizzie E. Pratt, my wife, the sum of seven thousand five hundred dollars ($7,500) each year for the following seven years, for her maintenance, the same to be paid in semi-annual installments of three thousand seven hundred and fifty dollars ($3,750) each, the first as soon after my decease as sufficient funds for the purpose shall come into their possession, and the remaining ones at the end of every six months afterward." Here it clearly appears from the will itself that the testator intended that the payment of $7,500 yearly to his wife should commence at the time of his death for the reason that the trust created by the will had but seven years to run from and after the death of the testator, and the trustees were directed to pay the first installment of $3,750 as soon after the death of the testator as sufficient funds for that purpose should come into their possession, and the remaining ones at the end of every six months afterward.

It is clear to us that under the will of Maria S. Hubbard the appellant was not entitled to receive monthly payments, or any payments during the time the estate was in course of administration, or prior to the time it was distributed to the trustees.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

49 Cal. App. 138

KEENE et al. v. BOARD OF DIRECTORS OF THE VETERANS' HOME OF CALIFORNIA et al. (Civ. 2096.)

(District Court of Appeal, Third District, California. Aug. 30, 1920.)

Descent and distribution ⇐⇒71(6)—Heirship of claimants not shown by evidence.

In action by alleged heirs of deceased inmate of a veterans' home to recover from the home moneys held by it, claimed by plaintiffs as heirs at law of said decedent, evidence *held* to support finding of the trial court against the claim of heirship.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by Henry Keene and others against the Board of Directors of the Veterans' Home of California and another. From judgment for defendants, plaintiffs appeal. Affirmed.

Henry G. W. Dinkelspiel, of San Francisco, and E. L. Webber, of Napa, for appellants.

U. S. Webb, Atty. Gen., and Frank L. Guerena, Deputy Atty. Gen., for respondents.

NICOL, Presiding Judge pro tem. This is an action by the plaintiffs, claiming to be heirs at law of one George W. Keene, deceased, to recover from defendants certain moneys held by them, that plaintiffs claim to be entitled to as heirs at law of said decedent.

The said George W. Keene died on the 27th day of August, 1916, and was, at the time of his death, a resident of Napa county, and an inmate of the Veterans' Home of California, located at Yountville, in the said county of Napa. Prior to his death, he turned over to defendants 16 pension checks representing $1,029.17 in money. These uncashed checks he left at the time of his death, and, in addition, there was on deposit with defendants belonging to George W. Keene at the time of his death the sum of $260.17. The public administrator of the county of Napa was appointed administrator of the estate of deceased. He administered upon his estate, and the probate court on the 19th day of November, 1917, made and entered its decree distributing the residue. Under the decree of distribution, the residue amounting to $876.23 was ordered paid "to the treasurer of Veterans' Home at Yountville as a trustee to be held in trust and disbursed in accordance with the laws of the state of California governing trust funds paid to the directors of the Veterans' Home at Yountville, or any officer of the Home, and upon filing proper receipts," etc.

Subsequent to the making of this decree of distribution, the plaintiffs demanded of defendants all of the moneys deposited by the decedent, together with the moneys distributed in the decedent's estate, except one-sixth thereof, that plaintiffs alleged belonged to a sister of decedent, Jane Keene, not a party to this action, which demand was refused by defendants upon the ground that, so far as the money distributed to respondents out of the decedent's estate was concerned, the probate court had no power or authority to so distribute said estate to them; that, on the contrary, the estate should have been distrib-

uted to the county treasurer, and suggesting that plaintiffs procure an order from the probate court directing respondents to deliver $876.25, so distributed to defendants to the county treasurer of the county of Napa.

The plaintiffs did make such application by petition for such order, and after a hearing by the court the same was denied. No appeal was taken from this order. It is stated in the briefs that the reason for such denial was the fact that more than six months had expired from the date of the entry of the decree, and the same had become final. Subsequent to the denial of said petition the plaintiffs instituted this action, and after a trial judgment was rendered in favor of defendants from which judgment this appeal is taken.

It is admitted by the respondents that the aforesaid sum of $260.17 is money which can be disposed of by the respondents without probate. (Stats. 1897, p. 106; amended 1911, Stats. 1911, p. 1447), but the said sum of $876.25 has not the same status. The latter sum represents the balance of the sum of $1,029.17 remaining after payment of expenses of administration, which sum was obtained upon cashing the check of the Treasury Department of the United States, which check was issued in favor of George W. Keene in place of 16 pension checks theretofore issued to him from the same source and in his possession, but unindorsed at the time of his death. The proceeds of this check were subjected to probate, and the proper procedure in the absence of heirs would have been to have ordered the residue paid to the county treasurer, under the provisions of section 1737 of the Code of Civil Procedure.

This court in construing the statute creating the Veterans' Home of California has decided that the only money belonging to an inmate of said Home which the directors of the institution can distribute to the heirs at law of the decedent directly and without probate is money belonging to the decedent and in the custody of the Home at the time of the death of the inmate. Brownlee v. Board of Directors, 22 Cal. App. 207, 133 Pac. 1158.

The appellants argue that if these moneys are the property of appellants the respondents are not entitled to retain the same merely because the probate court distributed the same to them instead of to the county treasurer. This argument is conceded by respondents to be undoubtedly correct. But it is claimed by respondents that, assuming that the appellants are entitled to said money in this proceeding, it still remained for the appellants to satisfy the lower court that they were the heirs at law to five-sixths of said money as alleged in the complaint. But that they failed to so satisfy the trial court and the court found that they were not the heirs at law of the said George W. Keene.

The proof offered by plaintiffs in support of their claim of heirship consisted mostly of depositions made by the claimants. These are about the same as far as the existence of a George W. Keene in their family is concerned, their relationship to a George W. Keene, their place of residence, the fact that a George W. Keene in their family left home a short time before the Civil War, following a dispute with his father about some money matters, that they received no word from him since the time of his leaving home, that they believe that the George W. Keene whom they knew is dead, and that he died an inmate of the Veterans' Home of California according to a notice published in a newspaper in the city of Utica, N. Y., advising of the death of a George W. Keene at said Home, which notice was seen by the claimant Edmund A. Keene.

The occupation of George W. Keene, according to the records of the Home, was that of a carpenter, while in the deposition of Edmund A. Keene it is stated that the George W. Keene to whom the deponent was related was a locksmith by occupation. That it appears from the records of the said Home, from information furnished by the decedent, George W. Keene had no relatives, that by the said records his birthplace is given as New York and in several of the depositions it is given as England. The army records give his birthplace as New York. Without entering into a full review of the evidence, suffice it to say that there is a sufficient conflict in the evidence upon the question of heirship as to render the finding of the trial court on that question conclusive. We are powerless to disturb said finding under the well-established rule of conflicting evidence, and the record in this case does not warrant us in substituting our judgment of the evidence for that of the trial court.

The judgment appealed from is affirmed.

We concur: HART, J.; BURNETT, J.

49 Cal. App. 133

FIRST NAT. BANK OF DIXON v. SPANGLER et al. (Civ. 2145.)

(District Court of Appeal, Third District, California. Aug. 30, 1920.)

1. Pleading ⊂⊃406(8)—Objection of misjoinder waived, unless urged by demurrer or answer.

The objection that causes of action are improperly joined must be taken advantage of by demurrer or answer in accordance with Code Civ. Proc. §§ 430, 433, or it is waived; consequently, where there was nothing on the face of the complaint to indicate that plaintiff had joined an individual cause of action with causes of action based on firm notes, the objection of misjoinder not having been presented by answer was waived.

2. Appeal and error ⊂⊃1039(3)—No reversal because of improper joinder of actions, where appellant could secure no different judgment.

Where plaintiff sued partners on three notes, and the court, finding that two of them were firm obligations and the other the personal obligation of the partner signing it, rendered judgment accordingly, the judgment will not be reversed on appeal of the nonsigning partner on account of the misjoinder, regardless of presentation of the matter below, for it would merely result in the striking of the individual cause of action from the complaint, and judgment as previously rendered.

3. Partnership ⊂⊃126—Acts of partner within apparent scope of authority binding, though not in good faith.

Under Civ. Code, § 2429, the acts of a general partner within the apparent scope of his authority are binding on his copartners in favor of third persons, regardless of whether he acts in good or bad faith.

4. Partnership ⊂⊃146(1) — That notes were not signed in firm name does not establish that they were individual obligations.

Though notes executed by general partner bore only his name without the firm name is not conclusive that they were his individual obligations, but is only a circumstance which does not relieve the firm of liability if the partner had power to bind it and the notes were executed with such intent and were so accepted; credit being extended to the firm.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by the First National Bank of Dixon against N. R. Spangler and Rose B. Spangler. From a judgment for plaintiff, the defendant last named appeals. Affirmed.

F. E. Boland and Fletcher G. Flaherty, both of San Francisco, for appellant.

Elmer W. Armfield and Arthur B. Eddy, both of Woodland, for respondent.

BURNETT, J. The action is on three promissory notes, for $2,000, $1,000, and $500, respectively—all executed by defendant N. R. Spangler. The theory of the plaintiff is that at the time of the execution of the notes the two defendants were copartners engaged in the butcher business, and that said notes represented the obligation of the firm although signed only by N. R. Spangler. The court found this theory to be true as to the two notes aggregating $3,000 but that the $500 note represents the sole obligation of N. R. Spangler, and judgment was rendered accordingly. The appeal is by Rose B. Spangler from the portion of the judgment against the firm, and she makes two points; one, that there was a misjoinder of causes of action, and the other, that the evidence does not support the finding that the money was borrowed for the use and benefit of the copartnership. As we view the matter, there is no merit in either contention.

[1, 2] In reference to the first, the position of appellant is that a cause of action against N. R. Spangler on the note for $500 was improperly joined with one against the partnership on the other two notes. But such defect must be taken advantage of either by demurrer or answer, or else it is waived. Sections 430, 433, Code Civ. Proc.; Baker & Hamilton v. Lambert, 5 Cal. App. 708, 91 Pac. 340. Nothing appearing on the face of the complaint to indicate that the causes of action were against different parties, it was incumbent upon appellant to present the question by the answer. This was not done. It is not sufficient to say that she could not know until the decision of the lower court that the partnership was liable on two of the notes, and N. R. Spangler alone on the other. There was evidence of that situation and of appellant's knowledge of it. We must assume, therefore, that she had sufficient information on the subject to enable her to set out said objection in the answer. At any rate, it would be preposterous to reverse the judgment on any such ground. If reversed for that reason, the result would be that the complaint would be amended by eliminating the count in reference to the $500 note, and the lower court would try the issue as to the other two notes, and render the same judgment as the one appealed from herein. That would be of no advantage to appellant and would only entail delay and additional cost.

[3, 4] As to the second question, it is sufficient to make the following observations: There is no doubt that at the time said obligations were incurred, a general partnership existed between the defendants for the transaction of said business; that "every general partner is agent for the partnership in the transaction of its business, and has authority to do whatever is necessary to carry on such business in the ordinary manner, and for this purpose may bind his co-

partners by an agreement in writing" (section 2429, Civil Code); if such partner acts within the apparent scope of his authority, whether he acts in good or bad faith, his acts and declarations are binding upon his copartners in favor of third persons, if said third parties believe in and rely upon his statements, and upon the strength of said confidence extend credit or advance money to said partner for the use and benefit of the partnership; there is substantial evidence in the record to bring the case fairly within the purview of the foregoing principle, it appearing that when N. R. Spangler obtained said loan and executed said notes he represented to the cashier that the money was to buy stock for the use of the firm and the cashier, acting in perfect good faith, believed said statement, and, relying upon it, advanced the money upon the credit of the firm; the fact that the notes were signed, not in the name of the firm but of N. R. Spangler individually, while a circumstance to be considered in determining the intention of the parties, does not relieve the partnership of liability if said Spangler had authority to bind the firm and the note was executed with such intent and was so accepted and credit extended thereto. Miller v. McCord (Tex. Civ. App.) 159 S. W. 159; Mills v. Riggle, 83 Kan. 703, 112 Pac. 617, Ann. Cas. 1912A, 616.

In other words, the evidence, which is set out in the briefs, brings the case clearly within the doctrine of agency as it relates to a general partnership. The principles covering such transactions are well settled, the evidence is ample to show their application to the situation in accordance with the finding of the trial court, and we are satisfied that no reason exists for disturbing the conclusion reached.

The judgment is affirmed.

We concur: HART, J.; NICOL, Presiding Judge pro tem.

49 Cal. App. 113

KONIG v. LYON et al. (Civ. 3422.)

(District Court of Appeal, First District, Division 1, California. Aug. 30, 1920. Hearing Denied by Supreme Court Oct. 27, 1920.)

1. Appeal and error ⟸1002—Verdict on conflicting evidence conclusive.

On appeal in personal injury action, a verdict based on conflicting evidence will not be disturbed.

2. Municipal corporations ⟸705(10)—Last clear chance doctrine held to have no application to case.

Where a collision occurred between motortruck and bicycle when one or other was on the wrong side of the street, the doctrine of last clear chance could have no application.

3. Municipal corporations ⟸705(2)—Bicyclist need not turn out for motortruck on wrong side of street.

A bicyclist on the right side of the street, seeing a heavy truck on the wrong side of the street approaching him, need not generally give way to it.

4. Trial ⟸236(3)—Instruction on credibility of defendant's truck driver not erroneous.

In view of Code Civ. Proc. §§ 1879, 1958, an instruction that jury might consider fact that plaintiff, suing owner of truck for injuries, was interested in case, and that driver of truck colliding with plaintiff was interested "on his side of the case" *held* not erroneous.

5. Municipal corporations ⟸706(5)—Evidence held to show negligence of driver of motortruck colliding with bicyclist.

In action for injuries resulting to bicyclist in collision with motortruck, evidence *held* sufficient to show that driver of truck was negligent.

6. Appeal and error ⟸930(2)—Presumed that jury found defendant's negligence proximate cause of injury.

Where, in action for injuries resulting to bicyclist in collision with motortruck, court instructed that if driver of truck was on wrong side of street, it was negligence per se, and if that was the proximate cause of injury, verdict should be for plaintiff, on appeal from verdict for plaintiff court would presume that jury found that negligence the proximate cause.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action for personal injuries by Carl Konig, by Evelyn Konig, his guardian ad litem, against Fred T. Lyon and the Magnet Lumber Company. Judgment for plaintiff, and defendants appeal. Affirmed.

Duke Stone, of Los Angeles, for appellants.

E. B. Drake, of Los Angeles, for respondent.

WELCH, Judge pro tem. For personal injuries received plaintiff by his guardian ad litem brings this action to recover damages for the negligence of defendants. The case was tried before the court with a jury, and plaintiff obtained a verdict. From the judgment defendants appeal.

The plaintiff, a boy of 12 years of age, was on December 28, 1917, riding a bicycle northerly on Fern street in the town of Watts, Los Angeles county, and the truck of the defendants was coming southerly on the same street when a collision took place between the boy and the truck. The boy's left arm was seriously injured, and his face cut. No question is raised as to the sufficiency of the evidence to sustain the verdict as

to the negligence of the defendants, but the appellants contend that the evidence shows that "plaintiff was guilty of contributory negligence, proximately contributing to some extent to the cause of the injury as a matter of law, and that the court erred in instructing the jury."

[1] On the question of contributory negligence the court fairly and correctly charged the jury. It instructed the jury on the law concerning every claim made by defendants as to the contributory negligence of plaintiff. Among other instructions on the subject of contributory negligence, it charged the jury that if it believed that plaintiff's collision with a companion's bicycle was the proximate cause—the efficient cause—of the accident, without which the accident would not have occurred, then the plaintiff would not be entitled to recover. "If the plaintiff was guilty of contributory negligence, no matter how slight, there can be no recovery, even though the defendant was guilty of negligence, because you cannot compare the negligence of the parties." Certainly these instructions cannot be objected to by the defendants and appellants. Under these instructions the jury found against the appellants on a conflict of direct and circumstantial evidence, and therefore the verdict and judgment cannot be reviewed here on that point.

[2] The doctrine of the last clear chance has no application in this case. If it has, the rule would apply with more pertinency to the acts of the driver of the truck than to those of the plaintiff. Each saw the other approaching at a distance of about four blocks, or 800 feet. Each held serenely to his course. If the driver was driving any part of his truck to the left of the center line of the road, in the line of travel of the plaintiff while on his right side of the street, it was his duty under express law to turn to his right and travel wholly on the right side of the road when he was within 300 feet of the plaintiff coming toward the truck. The driver of the truck sounded no alarm or warning of his intention to hold his course. The plaintiff testified that he did not change his course until within about 10 feet of the truck, for the reason that he momentarily expected the truck to turn out of his (plaintiff's) right of way and to get onto its own side of the street. This he had a right to expect. Sections 20a, 20b, Motor Vehicle Act, in force at that time (St. 1915, pp. 406, 407); Harris v. Johnson, 174 Cal. 55, 161 Pac. 1155, L. R. A. 1917C, 477, Ann. Cas. 1918E, 560; Medlin v. Spazier, 23 Cal. App. 242, 137 Pac. 1078; Scott v. San Bernardino, etc., Co., 152 Cal. 611, 93 Pac. 677. If, on the other hand, according to the version of the driver of the truck, he was driving on his right side of the road, and the plaintiff was coming in the opposite direction in a line of travel 8 or 10 feet to the left of the truck, the doctrine could have no application to such facts. Under no theory or claims of the plaintiff could the driver be to blame for the accident and injury, if he had been driving on his right side of the center line of the street when the collision took place.

[3] The specious argument of counsel for appellants that a bicyclist on his right side of the road, seeing a heavy truck on the wrong side of the street approaching him, should give way to it, is not the law of this state, as a general legal proposition. Of course, there are exceptions to the general rule. Doubtless at times it becomes the duty of any user of the highway to yield his right to a violator of some rule of the road under some peculiar or unusual circumstances or conditions, but such is not the case here. The Legislature may see fit in the future to provide that bicyclists (and possibly trucks) should be more strictly regulated in the use of our crowded public streets and highways, as is the rule in some other jurisdictions. Until then all users of the road must reasonably obey and observe the law as written. Drivers and owners of trucks—even heavy trucks—are equally amenable to these laws, and must respect the rights of other persons on our public highways.

Appellant takes exceptions to some of the instructions of the court and the court's refusal to give a proposed instruction. All these objections except one, which we will now proceed to consider, are more or less involved in what has already been said, and are not deemed of sufficient importance to require specific notice.

[4] The court instructed the jury as follows:

"The plaintiff as a matter of course is interested in the case. You will simply consider that fact, and the same with the driver of the truck. He is interested on his side of the case, and you can consider it in determining his credibility."

It should be noticed that the court did not tell the jury that the truck driver was interested in the case, nor did it infringe on the province of the jury as to deciding the credibility of the witness. It simply told the jury that the driver was interested "on his side of the case," and that they could consider such interest in determining his credibility. As a matter of law, was the driver interested "in the event of the action"? Section 1879, Code Civ. Proc. It was stipulated by respective counsel in the presence of the jury that the driver of the truck was acting in the scope of his employment at the time of the accident. Would it not follow under the admitted facts of this case that any omission of duty or negligent act of the driver proximately causing the injury to the plaintiff would make the driver

and the owner of the truck joint tort-feasors? Certainly. That the truck driver was interested on his side of the case "is a deduction which the reason of the jury" could have made from the facts admitted and proved without a statement from the court. Section 1958, Code Civ. Proc. He was accused by the pleadings of plaintiff of violating the laws of the road by negligently driving on the wrong side of the street, thereby causing the accident and the injury to plaintiff. The plaintiff was seriously injured by the alleged act of the driver. The driver could not have been indifferent to the proceedings or the outcome of the case. He was morally interested, even if not financially interested, on the side of the defense of the case, in establishing his blamelessness in mutilating the plaintiff. But, we repeat, the court did not intimate that the interest of the driver on his side of the case discredited such driver. The credibility of the witness was left wholly to the consideration of the jury. On this point the court further charged:

"You are the sole and exclusive judges of their (witnesses') credibility. Their conduct, their character as shown by the evidence, their manner on the stand, their relations to the parties, if any, their interest in the case, their bias and prejudice, if any, their degree of intelligence, the reasonableness or unreasonableness of their statements, and the strength or weakness of their recollection, may be taken into consideration for the purpose of determining their credibility. When I speak of these matters, it applies to both sides of the case. In referring to the interest of witnesses, you will note that I did not say that you are to disbelieve witnesses simply because they are interested. You are simply to take that interest into consideration in determining their credibility."

[5] The appellants complain specially of the instruction under consideration because it tends, they claim, to discredit the only eyewitness on behalf of the defendants to the accident. The court told the jury that plaintiff was interested in the case, and that the driver was interested on his side of the case, and that the jury could consider these respective interests in determining the credibility of these two witnesses. So it would appear that if the instruction discredited the truck driver it also more pointedly discredited the plaintiff. The testimony of the plaintiff was consistent and in accord with the physical facts surrounding the accident. The testimony of the truck driver was inconsistent, and not in accord with such physical facts. He discredited himself. The road was 32 feet wide from curb to curb, 8 feet of the street on each side next to the curb being rough, and consisting of sand and gravel. There remained 8 feet of smooth road on each side of the center line of the street. The driver of the truck testified that he was driving on the right side of the street, his right-hand wheels being about 3½ or 4 feet from the curb "right in the sand"; that he heard the contact clash of the wheels of the two bicycles about 8 or 10 feet to his left and about opposite him; that the plaintiff's wheel described a circle, coming towards his truck, whereupon he immediately turned his front wheels sharply to the right towards the curb, away from the on-coming boy; that the plaintiff first struck the front or corner of his radiator with the right side of his face; that he did not fall from his bicycle until he hit the truck; that the distance between his truck and the boy when he collided with his companion's bicycle was 8 or 10 feet "anyhow." With the truck going 8 miles an hour and the boys in an opposite direction, 5 miles, the position in reference to the truck in which this testimony placed the plaintiff at the time of the collision with the companion's bicycle makes witness' version of the accident most improbable in view of the physical facts. The plaintiff would have had to turn completely around and travel at least 10 or 12 feet in a circle, overtake the truck with its front turned from him going toward the curb, and then have fallen from his wheel against the corner of the radiator, striking the radiator with the right side of his face. The jury evidently believed that the truth of the matter is that the truck was not 4 feet to the left of the center line of the street, but that its left wheels were about 4 feet over the line on the wrong side of the street at the time of and before the accident; that the plaintiff was riding on the right side of the street in a line about 4 feet east of the center line of the street on or near a line being traveled by the left wheels of the truck; that the boy, thinking that the truck would turn out on its right side of the street at any moment, for this reason kept on his course until, realizing that the truck did not intend to give him the right of way which he was legally entitled to, and when within about 10 feet of the truck, suddenly swerved to the right to avoid being hit by the truck; that because of his being compelled to turn quickly to the right his front wheel caught on a nut of the rear wheel of his companion's bicycle, thereby unbalancing him and throwing him in front of the truck, from which collision he received his injuries.

[6] The court properly instructed the jury on the question of proximate cause of the injury. It told them inter alia that if they believed that the truck was on its right side of the street when the accident occurred, then the plaintiff could not recover, but if they believed that the truck was on the left-hand side it was guilty of negligence per se; and in such event it would be for them to determine whether such negligence was the

proximate cause of the injury. It defined the meaning of proximate cause to the jury. The court having submitted the question of proximate cause to the jury, calling to the attention of the jury the theory of plaintiff and the theory of the defendants and directing it to determine the question of fact between them, this court must presume that the jury determined that the proximate cause of the injury was the negligence of the defendants' truck being on the wrong side of the road, and its persisting in maintaining its course without warning to plaintiff that it did not intend to change its course, as required by law. Counsel for appellants, in commenting on the position of the truck in the street in their opening brief, say:

"It was a large truck and on or near, and perhaps a little to the left of, the center of the road, as it proceeded south."

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

49 Cal. App. 141

ULM v. PRATHER et al. (Civ. 2187.)

(District Court of Appeal, Third District, California. Aug. 30, 1920. Hearing Denied by Supreme Court Oct. 26, 1920.)

1. Evidence ⟸178(2)—Secondary evidence of contract admissible, where originals had been lost or destroyed.

A letter press copy of a contract of partnership was properly received in evidence, where it was shown that plaintiff was unable to discover his copy, that defendant's copy had been destroyed, while a memorandum left with the bank could not be discovered, secondary evidence of the contents of an instrument being admissible, where reasonable search for the instrument fails to produce it, as does inquiry of the persons most likely to have its custody or to have some reason to know its whereabouts.

2. Partnership ⟸84—Expense of fencing not within the scope of the partnership agreement.

Where partnership agreement provided that defendants should look after and care for all buildings and improvements on or connected with the ranch which was being operated by the firm, and should place fences and buildings in repair, the materials to be purchased in joint account, but the labor of fencing to be done by or at the cost of defendants, defendants cannot recover for the expense of labor of replacing a worn-out fence with a fence of a different kind.

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Action by John W. Ulm against Clarence M. Prather and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Taylor & Tebbe, of Yreka, for appellants.

Tapscott & Tapscott and B. K. Collier, all of Yreka, for respondent.

NICOL, Presiding Judge pro tem. This is an action brought by plaintiff for an accounting, and thereby a determination of the amount to which the parties to this action are respectively entitled by reason of a certain agreement of copartnership entered into by and between the plaintiff and defendants on June 1, 1909.

The said agreement was to run from the said 1st day of June, 1909, to the 30th day of September, 1913, and provided for the operating and farming on joint account, the premises known as the "Shasta View Ranch," situated in Siskiyou county, and containing about 2,600 acres of land.

The complaint alleges that the defendants did not farm the land as provided for by the said contract, and that plaintiff was damaged thereby in the sum of $6,780.70; that plaintiff advanced money to the copartnership in the sum of $3,289.70, and that the defendants owed the copartnership $3,850 for money drawn from the copartnership. The complaint further alleges that defendants removed from the property a large portion of the joint property of the parties to said agreement, without the consent of plaintiff, and that plaintiff, by reason of the failure of the defendants to render monthly statements as provided in said contract, was unable to ascertain the true condition of affairs of the respective parties to said agreement on September 30, 1913, or since said date. The plaintiff asked for the appointment of a receiver, and a receiver was appointed, who sold the property belonging to the copartnership.

The defendants answered and filed a cross-complaint, and upon the issues presented by the pleadings the case was tried and the court found that the plaintiff and defendants entered into the contract as described in the complaint; that on June 1, 1909, the plaintiff contributed to said copartnership property of the value of $3,729.72; that defendants at that time contributed property to the value of $1,212.10; that plaintiff on said date became a creditor to the copartnership in the sum of $2,517.62, which bore interest at the rate of 6 per cent. per annum from June 1, 1909; that at the time of the commencement of the action plaintiff had made loans to the partnership, which had not been repaid, and that defendants had removed from the Shasta View Ranch a large portion of the joint property of the parties to said agreement without the consent of plaintiff; that the amount received by defendants, being $75 per month, was $3,850, which together with interest at 6 per cent. per annum amounted to $5,260.50; that by

reason of the neglect of defendants the plaintiff was damaged in the sum of $500; that the net amount received from the receiver's sale totaled to $2,096.78.

The court rendered judgment for plaintiff in the sum of $3,021.49, and decreed that plaintiff have the money received from the receiver's sale of the property. The defendants by their answer admitted entering into a written contract, but denied that such agreement was the agreement described in plaintiff's complaint. The defendants claimed:

"That the said written agreement referred to in plaintiff's complaint, and a copy of which is attached to said complaint and marked 'Exhibit A,' is not the legal and true agreement which was entered into between plaintiff and defendants for the care and custody and management of said property, and in this regard these defendants show that they had an original of the true agreement entered into between plaintiff and defendants, but that the same was destroyed by fire on or about the month of July, 1913."

Appellants contend that the evidence was insufficient to sustain findings 6, 7, 9, 12, 13, 15, 16, 17, 18, and 19; their claim being that none of these findings can be upheld, unless the contract as set out in the plaintiff's complaint be proved. It appears from the evidence that the original contract that the plaintiff had was lost, and could not be produced, and a duplicate original which defendants had was destroyed in a fire which consumed their home and household goods; plaintiff was therefore compelled to resort to secondary evidence, and appellants' contention is that plaintiff failed to make the proof required by law.

[1] The plaintiff offered in evidence a letter press copy of the agreement as set out in plaintiff's complaint, to which defendants objected upon the ground "that it was incompetent, irrelevant, and immaterial, secondary evidence, not the proper way to prove the loss of a document." The objection was overruled, and this ruling is claimed to be error.

It appears from the evidence given at the trial that the original agreement which was signed by plaintiff and the defendants, and which was kept by plaintiff, was lost, and could not be found; that the plaintiff John W. Ulm and his wife, Mrs. Susan J. Ulm, had made diligent search for the same, and neither of them was not able to find it; that the duplicate of the original agreement signed by all the parties, and which was kept by the defendants, was burned on the 6th day of July, 1913, and that the copy that was left with the Montague Bank, which was unsigned by the parties, disappeared, and could not be found by the bank authorities.

It appears that the agreement was typewritten at the plaintiff's office in the city of Chicago, and that a letter press copy of the same was taken. This letter press copy was identified by the plaintiff at the trial, and under the showing made by the plaintiff we think the defendants' objection to the said letter press copy was properly overruled. This ruling of the court is clearly within the rule as announced in Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803, and Morison v. Weik, 19 Cal. App. 139, 124 Pac. 869.

In the case of Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803, secondary evidence was received to show the contents of a lost deed, and the Supreme Court, in passing upon the question of the amount of proof required in such matters, said:

"The general rule concerning proof of a lost instrument is, that reasonable search shall be made for it in the place where it was last known to have been, and, if such search does not discover it, then inquiry should be made of the persons most likely to have its custody, or who have some reason to know of its whereabouts.

"The party must show that he has in good faith, and to a reasonable degree, made an effort to discover the instrument and to that end has exhausted all sources of information and means of discovery which were open to him, and which in the nature of the case were possible. No fixed rule as to the necessary proof to establish loss, or what constitutes reasonable search, can be formulated. The terms 'reasonable search' and 'in good faith,' applied to proof of lost instruments, must be construed and defined under the facts in each particular case; there is no inflexible definition under which they can be applied to all cases. The sole object of such proof is to raise a reasonable presumption merely that the instrument is lost, and this is a preliminary inquiry, addressed to the discretion of the judge. On this subject it is said: 'The rigor of the common law * * * has been relaxed in this respect, and nonproduction of instruments is now excused for reasons more general and less specific, and upon grounds more broad and liberal than were formerly admitted. If any suspicion hangs over the instrument, or that it is designedly withheld, a rigid inquiry should be made into the reasons for its nonproduction. But where there is no such suspicion, all that ought to be required is reasonable diligence to obtain the original—in fact, courts in such cases are extremely liberal. And as far as the sufficiency of the proof so offered is concerned, the rule in questions of this character is that the trial judge is to determine the sufficiency of the proof. Under the facts and circumstances developed in the case, if they are sufficient to reasonably satisfy the mind of the court that the original is lost, and that it cannot be found after search made at the proper place, that is all that is necessary, and the sufficiency of the proof of the search being, in general, left to the discretion of the trial judge, this court will not review its rulings in that respect, unless the proof is manifestly insufficient to have warranted the secondary evidence.' "

In Morison v. Weik, 19 Cal. App. 139, 124 Pac. 869, secondary evidence of a lost deed

was received over plaintiff's objection, and the court in affirming the judgment said:

"Without entering upon a full discussion of the evidence, suffice it to say that it was sufficient to satisfy the mind of the court that the instrument was unintentionally mislaid or lost, and that after a diligent search made therefor it could not be found. Such preliminary proof is left to the discretion of the trial judge, and, unless manifestly insufficient to warrant the introduction of secondary evidence, his ruling will not be disturbed on appeal."

See, also, King v. Samuel, 7 Cal. App. 55, 93 Pac. 391; California National Bank v. Weldon, 14 Cal. App. 765, 113 Pac. 334.

[2] Complaint is made by appellants that the finding, "That all fence material used, and all fencing constructed upon the aforesaid property during the term of said agreement was under the provisions thereof a partnership expense," is not sustained by the evidence. The contract provides:

"That the parties of the second part will look after and care for all of the buildings and improvements on or connected with the ranch, and will proceed, at once, so soon as the present crop is cared for, to place fences and all the buildings in repair, the materials for such repair shall be purchased in joint account, but the labor of placing said fences and buildings in repair shall be done by or at the cost and expense of said parties of the second part."

Under this provision defendants argue that there was no agreement by which defendants should build new fences, and that they should have been allowed a credit of $1,100, the amount that it cost them to put in a Page wire fence, and that said $1,100 should not be a charge against the copartnership.

The defendant C. W. Prather testified that when he took the place in 1909, the fences had been built a long term of years; that the posts were rotted off, and the boards would not hold nails, and that while he was there he put in about a mile and a half of Page wire fence; that he thought it was in 1911; that the fences were in that condition that they would not hold large bodies of stock cattle; had to keep a rider with them all the time; sometimes had as high as 900 head of cattle, and one time he had 1,000 head of cattle on the ranch, and had to rent some land outside.

Because defendants put in Page wire fencing in place of posts that were rotted off and boards that would not hold nails does not take this matter out of the terms of the said agreement, and the said finding, in our opinion, is supported by the said contract and the evidence.

The matter of the granting of a receiver in this case was before this court in Ulm v. Prather, 29 Cal. App. 92, 154 Pac. 611, and the order appointing a receiver was there affirmed.

We think the evidence is sufficient to sustain finding No. 16, to the effect that—

"By reason of the failure, neglect, and refusal of said defendants to render to said plaintiff the statements and reports contemplated by said agreement, said plaintiff was unable, at the date of the commencement of said action, to ascertain the true condition of the affairs of the respective parties to said agreement on September 30, 1913, or thereafter."

The plaintiff testified that at the expiration of the contract he made an effort to have a settlement with Mr. Prather at the ranch, but he was not successful. He also, prior to bringing the action, caused a letter to be directed to the defendants, by which he sought information in regard to the accounts, and by this letter demanded from defendants a full and complete statement, showing the true status, on September 30, 1913, of the business transacted under the agreement.

The judgment appealed from is affirmed.

We concur: HART, J.; BURNETT, J.

49 Cal. App. 84

TEXTILE NAT. BANK v. LAWRENCE.
(Civ. 3396.)

(District Court of Appeal, First District, Division 1, California. Aug. 27, 1920.)

Limitation of actions ⊂=149(1)—Letter in evidence held insufficient to renew obligation by unconditional promise.

A letter in evidence *held* not to make such an unequivocal acknowledgment of an obligation or an unconditional promise to pay it as would be sufficient to keep the obligation alive beyond the time when it was otherwise barred by Code Civ. Proc. § 339, subd. 1.

Appeal from Superior Court, Alameda County; J. J. Jerome, Judge.

Action by the Textile National Bank against V. O. Lawrence. Judgment for plaintiff upon first count, and for defendant upon second, and defendant appeals. Reversed.

Charles C. Boynton, of Oakland, for appellant.

R. S. Norman, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff in an action brought to recover upon two certain promissory notes executed by the defendant in the year 1909 in the state of Pennsylvania. The complaint in two counts sets forth these two obligations, one in each count, and prays judgment for the aggregate sum alleged to be due thereon. The complaint as to each of these obligations also alleges that at various dates between the 30th of December, 1913, and the 15th of May, 1916, the defend-

ant acknowledged his said indebtedness in writing and promised to pay the same. The answer of the defendant denies his indebtedness upon each of those obligations and denies his acknowledgment and agreement to pay the same as set forth in said complaint, and further pleads that both causes of action are barred by various provisions of the Code of Civil Procedure relating to the statute of limitations. Upon the trial of the cause the court gave judgment in the plaintiff's favor upon the first count in his complaint, and in the defendant's favor upon the second count thereof. The defendant appeals from the judgment rendered against him upon said first count.

The evidence presented on the trial of the cause showed that the defendant had removed to the state of California in the month of June, 1912, and thereafter and up to the time of the institution of said action resided therein, and that his several letters, six in all, with relation to these obligations were dated and written respectively on December 30, 1913, January 24, 1914, June 2, 1914, November 21, 1914, January 4, 1915, and May 15, 1916, while the defendant was so residing in the state of California. The sole question involved in the case upon this appeal is as to whether the defendant has by these letters or any of them sufficiently acknowledged his indebtedness to the said plaintiff upon the obligation set forth in the first count of its complaint as to take the same out of the bar of the statute of limitations.

As to the first five of these letters it is not necessary to set forth herein their contents in full, for the reason that in our opinion they do contain a sufficient acknowledgment of the existence of said obligation to keep alive the original obligation during the period between the date of the first of said letters and a date two years after the last of said five letters so written. This action was therefore properly brought upon the original obligation, and had the same been instituted at any time during the above period it would not have been subject to the bar of the statute of limitations. The date of the commencement of this action, however, was April 6, 1917, which, as will be seen, was more than two years after the date when the last of the five letters above referred to was written; and it follows, therefore, that while the plaintiff may have been entitled to rely upon this series of acknowledgments for its right to bring this action upon the original obligation, it was not entitled to rely upon them for its right to maintain this action against the bar of the statute of limitations, for the reason that subdivision 1 of section 339 of the Code of Civil Procedure, as it read at the time of the institution of this action, required that action founded upon instruments in writing executed out of the state of California must be brought within two years after the right of action accrued in this state. This being so, the plaintiff's sole reliance for its right to maintain this action and to sustain the judgment rendered in its favor therein must depend upon the construction to be placed upon the sixth letter, written by the defendant to the plaintiff on May 15, 1916. This letter reads in full as follows:

"Mr. H. Brockelhurst, c/o Textile National Bank, Philadelphia—Dear Sir: I fully realize your position, but also know my own. I agreed to pay the Jones note at the rate of $25 a month, and did so until I received a peremptory demand from Mr. Darling to pay the collateral loan, advised that if not paid the bonds would be sold and you would immediately proceed against me for the difference.

"I want to pay you one hundred cents on the dollar, unless you destroy my ability to make the hundred cents, and a suit for either item would cause just as much damage as for both of them. I am perfectly willing to make a monthly payment of $25 now, and can do so. My prospects are getting better all the time, and my business has been developed by me from nothing to the point where it may interest outside capital. There is a project now to form a Bush terminal here, if so, my present plant is the natural nucleus. In any event, if you and your associates can see your way clear to accept a monthly payment at this time, you can depend upon it that my account will be eventually balanced without a penny of loss. I do not want any lawsuit at any time, as it can do only harm and cannot hasten matters.

"I am going to be in Cincinnati as a delegate in July, and expect to be in Philadelphia for a few days. I will be glad then to state to you frankly how I am situated.

"Yours truly, V. C. Lawrence."

It is the respondent's contention herein that the foregoing letter contains a sufficient acknowledgment of the obligation sued upon in the first count of its complaint to take the case out of the statute of limitations. We are unable to give our assent to its contention, since we cannot find in the terms of this letter any such unequivocal acknowledgment of said obligation or unconditional promise to pay the same as would suffice to keep alive said obligation beyond the time when it was otherwise barred by the provisions of section 339, subd. 1, of the Code of Civil Procedure.

The case of Rodgers v. Byers, 127 Cal. 531, 60 Pac. 43, would seem to be squarely in point sustaining this view. In that case the court held that such promises contained in a defendant's letters as "I will liquidate that note as soon as I can get the money," and "I wish it was in my power to send you money at this time, but it is not. Will send you some as soon as I can get it. I hope to get money soon. Will sell cattle at the first good offer," and "I have no intention of not paying the note, and will as soon as I can, but can't now"—do not constitute ab-

solute and unconditional promises to pay. In reference to these the court says:

"In none of these letters is there an absolute and unconditional promise to pay. The promise in each case is made conditional upon the promisor's financial ability."

In the case of Snyder v. Dederichs, 39 Cal. App. 628, 179 Pac. 535, the defendant's purported acknowledgment was in the following terms: "Your letter received in regard to the money I did get from Willard. * * * Still if I would make money, and see my way through, I would send you some money, and I will the first chance that I make something I will help you. * * * I loaned a party some money which he promised sure by next month I would get $300 of it. Should I succeed in this I will send you sure $150 or $200 of this. At the present time I cannot do anything on account I have not it. * * * You know if I got it I would help you, but it is impossible to do so at the present time."

In commenting upon the foregoing language, the court holds that it contains no such distinct, unqualified, and unconditional recognition of the obligation as would be sufficient to satisfy the provisions of section 360 of the Code of Civil Procedure.

In the case of Nixon v. Ramsey, 180 Pac. 649, the acknowledgment relied upon was in the following terms:

"It is impossible right at the present time for me to pay any part of the above amount—I hope to be able some time soon to hole thing up—I am not making any promises—I hope to be able to pay the whole thing up some day."

This, the court held, was not a sufficient acknowledgment to take the case out of the terms of the statute.

Each of the two last-cited cases referred to the case of Powell v. Petch, 166 Cal. 329, 136 Pac. 55, as authority for the conclusion arrived at. In that case the defendant wrote: "What is the status of my indebtedness to you regarding the lot you bought?" The Supreme Court held that the use of the term "my indebtedness" was not a sufficient acnowledgment to avoid the bar of the statute, and in so doing referred to the case of Bullion, etc., Bank v. Hegler (C. C.) 93 Fed. 890, in which case section 360 of the Code of Civil Procedure of this state was under review, and in reference to which two letters of a defendant were relied upon to take his note out of the statute of limitations. In the first of these letters the defendant, after referring to his notes, said:

"Beg to say that I cannot pay the note or interest time, nor until I can turn some realty or other property into cash, which seems impossible to do at present"

—and in the second of his letters wrote:

"Referring to the notes, I do not see any chance for me to pay anything on them just now, nor for certain until I can sell some realty. When I can do this, I can pay you at least a part."

In commenting upon these letters Judge Morrow said:

"There is an acknowledgment in both of these letters that the defendant is indebted to the plaintiff; but in neither case is it an acknowledgment from which a promise to pay the debt can be inferred. In other words, it is not an unqualified acknowledgment, since it is accompanied with the condition that he cannot pay, or he does not see any chance to pay, unless he can turn some realty or other property into cash."

It seems clear to us that the promise of the defendant in the case at bar as contained in his letter of May 15, 1916, cannot be held to be such a distinct, unqualified, and unconditional recognition of the obligation set forth in the first count of the plaintiff's complaint as to take the same out of the bar of the statute of limitations, and hence that the judgment of the trial court so holding must be held to have been erroneous. It follows that the judgment must be reversed; and it is so ordered.

We concur: WASTE, P. J.; WELCH, Judge pro tem.

184 Cal. 26

QUONG HAM WAH CO. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (S. F. 9090.)

(Supreme Court of California. Oct. 5, 1920.)

1. Constitutional law ⊜42—Employer can attack Workmen's Compensation Law as discriminating against nonresident employé.

In proceedings for compensation for injury to a resident employé received outside the state, the employer can raise the objection that Workmen's Compensation Act, § 58, authorizing such proceedings is void, under Const. U. S. art. 4, § 2, cl. 1, because it does not authorize similar proceedings by nonresident workmen.

2. Master and servant ⊜369—"Resident" injured outside state, within Compensation Act, includes only citizens and resident aliens.

Within Workmen's Compensation Act, § 58, authorizing compensation for injuries received outside the state, where the employés were residents of the state and the contract of employment was made therein, the term "resident" applies only to citizens or to aliens domiciled within the state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Resident.]

3. Courts ⊜8—Statutes have no effect as law beyond state boundaries.

Though other states may give effect to statutes outside the borders of the state enacting them, a state statute cannot have any effect as a law beyond the borders of the state which enacts it.

4. Action ⊜3—State can create right or obligation based on act occurring outside borders.

A state can by statute create a right or obligation enforceable within its borders, which is based on an act occurring outside its borders.

5. Master and servant ⊜347 — Compensation Act provision for injuries outside state within state's powers.

Workmen's Compensation Act, § 58, authorizing compensation to an employé for injuries received outside the state, where the contract of employment was made within the state, merely attaches an additional incident to a contract made within the state, and is within the powers of the state to enact.

6. Constitutional law ⊜207(1) — Compensation to residents only for injury outside state discriminates against citizens of other states.

The provision of Workmen's Compensation Act, § 58, allowing compensation for injuries outside of the state, where the contract was made within the state, only to residents of the state, gives citizens of the state a privilege denied to the citizens of other states, contrary to Const. U. S. art. 4, § 2, cl. 1.

7. Constitutional law ⊜207(1)—Equal privileges clause applies, unless regulation indirectly discriminates.

The provision of Const. U. S. art. 4, § 2, cl. 1, giving citizens of every state all privileges of citizens of the several states, applies without exception to all privileges, unless there is reasonable ground for restricting privileges to those acquainted with conditions in the state, as in the practice of law and in some other professions and occupations, in which case the restrictions can be imposed, though indirectly discriminating against citizens of other states.

8. Constitutional law ⊜207(1)—Statute discriminating against citizens of other states not invalid, but extended to such citizens.

Workmen's Compensation Act, § 58, authorizing compensation for injuries received outside of state, is not invalid because it authorizes such compensation only to resident

employés, contrary to Const. U. S. art. 4, § 2, cl. 1: but that provision of the Constitution merely operates to extend the privilege to nonresident employés.

9. Constitutional law ⟸207(1)—Discriminating burdens invalidated by federal Constitution, but not discriminating privileges.

Const. U. S. art. 4, § 2, cl. 1, giving citizens of each state rights and privileges of citizens of the several states, makes invalid a state statute imposing a burden on citizens of other states not imposed on its own citizens; but, in case of a statute giving benefits to the citizens of the states, the constitutional provision merely extends benefits to noncitizens.

In Bank.

Proceeding by Owe Ming under the Workmen's Compensation Act against the Quong Ham Wah Company. Compensation awarded by the Industrial Accident Commission, and the Quong Ham Wah Company brings certiorari against the Commission and others. Award affirmed.

Gorrill & Trowbridge and Delger Trowbridge, all of San Francisco, for petitioner.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

LENNON, J. Certiorari to review the action of the Industrial Accident Commission in making an award pursuant to the terms of section 58 of the Workmen's Compensation, Insurance and Safety Act. Stats. 1917, p. 870. Upon the first hearing in this court, the award was annulled upon the theory that said section 58 of the Workmen's Compensation Act granted to citizens of this state a privilege which it denied to noncitizens, and was, therefore, violative of section 2, cl. 1 of article 4 of the federal Constitution. Quong Ham Wah Company v. Industrial Accident Commission, 59 Cal. Dec. 18. Upon petition for rehearing, the judgment of this court in the first instance was set aside, and the cause set down for a hearing for the purpose of considering the following questions:

"(1) To what extent may the state give extraterritorial effect to its laws fixing the incidents of the relation of employer and employé, when such relation has its inception within the state?

"(2) Assuming that the state has the power to give extraterritorial effect to its laws in such a case, and assuming that a discrimination is made between residents and nonresidents of the state by the provisions of the Workmen's Compensation Act extending the incidents of the relation of the employer and employé therein provided for to residents, but not to nonresidents, when the relation has its inception within the state, but the injury to the employé occurs elsewhere, is such discrimination contrary to the federal Constitution, and, if so, does the federal Constitution have the effect of rendering invalid that portion of the Workmen's Compensation Act providing for such extension in the case of residents, or (a point not made in the original briefs) does it have the effect of allowing this portion of the act to stand as effective and valid, but of extending the incidents of the relation under similar circumstances to nonresidents, although there is no provision in the act for such extension to nonresidents?"

Minutes of the Court, 59 Cal. Dec. No. 3111.

In keeping with the order granting a rehearing, counsel for the respective parties briefed the case anew, painstakingly directing their efforts, in addition to a discussion of the points originally made, to an exhaustive exposition of the law appertaining to the subject-matters designated in the order granting the rehearing. Therefore, aside from the recognition due the commendable efforts of counsel to facilitate the avowed purpose of the order, a discussion, not only of the points originally made, but also of those designated in the order, would seem to be necessary to a decision of the case as now presented, even though the latter points were not necessarily involved in the case as prepared and presented in the first instance.

Section 58 of the Workmen's Compensation Act reads as follows:

"The commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state in those cases where the injured employé is a resident of this state at the time of the injury and the contract of hire was made in this state, and any such employé or his dependents shall be entitled to the compensation or death benefits provided by this act." Stats. 1917, p. 870.

[1] Petitioner, the employer of the injured workman, attacks the validity of this statute on the ground that it violates section 2 cl. 1, art. 4, of the Constitution of the United States, which provides that—

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

At the outset we are confronted again, as we were in the first instance, with the contention that the petitioner cannot be heard to question the constitutionality of the statute in controversy, because it is not one of the class claimed to be discriminated against by the statute. The provision of the Workmen's Compensation Act now under attack is identical in phraseology with that considered by this court in Estabrook Company v. Ind. Acc. Comn., 177 Cal. 767, 177 Pac. 848. In that case this court expressly declared that it was not required to pass upon the constitutional question sought to be raised, and declined to discuss that question upon the merits, because, as was held:

"A contention that a statute denies equal rights and privileges by discriminating between

persons and classes of persons 'may not be raised by one not belonging to the class alleged to be discriminated against.'" Estabrook v. Ind. Acc. Comn., supra.

Such, undoubtedly, is the general rule; but the Estabrook Case is fundamentally wrong, if it is to be taken as definitely deciding that there are no exceptions to the general rule enunciated therein, and, if that be its purport, it should be flatly overruled, as was done by a majority of the court in the opinion rendered in the first instance in the instant case. Quong Ham Wah Company v. Ind. Acc. Comn., supra.

Apparently, however, the court in the Estabrook Case did no more than declare and apply the general rule that a statute purporting to make an unconstitutional discrimination between persons or classes of persons cannot be assailed on the ground of unconstitutionality by a person not belonging to the class discriminated against. This general rule, however, is not a hard and fast rule which must be arbitrarily and inflexibly applied to every situation involving the constitutionality of a statute, regardless of contingencies which may extend its operation beyond the confines of the classes which it was aimed to cover and control and which ultimately culminates in a grievance against persons not originally within the contemplation of the statute. In other words, the general rule under discussion and decision in the Estabrook Case must necessarily be subject to certain well-defined exceptions which, in so far as a persual of the record in the Estabrook Case shows, were not, in that case, pressed upon the attention of the court. Clearly the petitioner in the instant case has brought itself within the scope of one or more of the recognized exceptions to the general rule enunciated in the Estabrook Case.

Thus, where no member of a class alleged to be unlawfully discriminated against by a statute is in a position to raise the constitutional question, then any person affected by the application of the statute can urge its unconstitutionality In Greene v. State, 83 Neb. 84, 119 N. W. 6, 131 Am. St. Rep. 626, the plaintiff in error was convicted under a statute making it a penal offense to commit "blackmail" against citizens or residents of the state of Nebraska. On appeal he urged that the statute was unconstitutional by reason of the fact that it operated to protect only citizens and residents of the state of Nebraska, and therefore unlawfully discriminated against the citizens and residents of all other states. In upholding this contention the court said:

"We have not overlooked those cases which hold that a court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has, therefore, no interest in defeating it. Where the constitutional objection is that the penalties of the law are directed against a certain class without any just reason for such discrimination, it is safe to leave the question of the constitutionality of such laws to be raised by the parties against whom the discrimination is made; and such have been the facts in all the cases we have examined laying down this rule. It is inapplicable to a case where the vice of the law consists in an unwarranted discrimination between the individuals against whom the aggression thereby forbidden is committed. In such cases there is no way by which any person within the jurisdiction of the state denied the protection of its criminal law could bring the question before a court for its determination. If the Legislature should enact a law amending our Criminal Code, so that the crimes therein specified should be crimes only when committed against citizens or residents of the state, such an act would be absolutely void; but its invalidity could never be brought before the court by any person belonging to the classes thereby denied the protection of the criminal law. If we apply to such a law the rule that its constitutionality would only be considered when the objection was made by a party discriminated against, there could be no objection to its validity. When such a law is sought to be enforced against any person, whether belonging to the classes discriminated against or not, it should be declared void."

Respondents suggest that the reasoning of this case is based upon an inaccurate conception of the nature and effect of an unconstitutionally discriminatory statute. Such statute is, they contend, not merely presumptively valid until it is set aside by the courts; but, unlike other statutes which offend against the Constitution, it is actually and legally valid until set aside. Were this view of the nature of a discriminatory statute to be accepted, the doctrine of Greene v. State, supra, might be paraphrased thus: That such a law is in fact valid as to all classes except the class discriminated against, unless that class is precluded from making a complaint, in which event the law is invalid as to every class. Such a doctrine would assuredly be strange and indefensible. The truth of the matter is, however, that a discriminatory law is, equally with the other laws offensive to the Constitution, no law at all. Buchanan v. Warley, 245 U. S. 60, 72, 38 Sup. Ct. 16, 62 L. Ed. 149, L. R. A. 1918C, 210, Ann. Cas. 1918A, 1201. Whatever validity it may be said to possess, it has such validity merely by virtue of the presumption of validity attaching to the acts of the legislative branch of the government. This presumption, being rebuttable, may be attacked by a litigant whenever it is material to his case, unless he is prevented from doing so by some special exception. Such exceptions possess no peculiar sanctity, and invest the law with no actual validity; they should naturally be confined by the limits of the reasons which occasioned their adoption, and should give

way to considerations of policy paramount to those reasons. Such an exception exists in the matter of attack upon the presumptive validity of a discriminatory statute, and is to the effect that only a member of the class discriminated against can attack the presumption. The reason for the exception is to be found in the rule that the courts will consider questions of the constitutionality of statutes only when such consideration is a necessity in the determination of a real earnest and vital controversy between individuals. The exception, if literally accepted in its general form, is broader than the reason upon which it is based; but, independently of this consideration, it must yield to a policy paramount to the reason itself where no member of the class discriminated against can raise the question.

The reason for the exception is in the nature of a rule developed for the regulation of the ultimate and supreme function of the courts to declare unconstitutional statutes to be void and of no effect; and such a regulatory rule must itself be subject to exception where it would otherwise operate to prevent altogether the exercise of this function, a function which it is the most solemn duty of the courts to exercise in a state governed under a written Constitution which is the supreme law of the land. Where no member of a class discriminated against could ever attack the constitutionality of the discriminatory statute, the rule reserving to such persons the right to raise the constitutional question would totally prevent the exercise by the court of its function of passing upon that question, and would place it in a position where it would for all time enforce rights and obligations created by an obviously void enactment. In such case any litigant to the determination of whose claim the constitutional question is fairly relevant should be permitted to raise the constitutional question. In the instant case, the Compensation Act does not give the commission jurisdiction over controversies arising out of injuries sustained abroad by workmen who are not residents of California. It is clear, therefore, that a nonresident would have no standing before the commission or before any court to make a claim under the act; and, not having jurisdiction over his injury, neither the commission nor the courts could entertain or adjudicate his claim for compensation, nor the constitutional question involved. Since, therefore, no member of the class discriminated against can ever raise the constitutional question, the petitioner is entitled to assail the constitutionality of the statute, since a determination of that question is clearly relevant in determining its rights herein.

Moreover, the fact that the constitutional rights of petitioner are directly affected by the statute here in question shows that the determination of the constitutionality of a discriminatory statute may be a necessity in the determination of a real and vital controversy between parties, neither one of whom is a member of the class discriminated against, and that, therefore, the general rule that only members of the unfavored class may attack the enactment is broader than the reason upon which it is based. In this behalf respondents suggest that the cases indicate that the constitutionality of a discriminatory statute can be raised only by one injured by the *discrimination*, and in no case by one whose constitutional or other rights are injured by the *legislation*. A careful analysis of the cases presented fails to support this theory.

Moreover, the Supreme Court of the United States has announced and acted upon the contrary rule in Buchanan v. Warley, supra, a decision which is precisely in point in the instant case. In that case a vendor of land, a white man, sued to compel the vendee, a colored person, to receive and pay for a certain parcel of land which he had agreed to buy. Defendant had judgment in the lower court solely because of the effect of an ordinance making it illegal for colored persons to reside upon the property in question. Plaintiff contended that the ordinance was unconstitutional, for the reason that persons of color were unlawfully discriminated against. His right to assail the statute on the ground stated was questioned, on the theory that he was not a member of the class discriminated against. The court clearly recognized, as it has done both in earlier and in subsequent cases, that in general one cannot assail the constitutionality of a statute in reliance upon the grievance of another; but it pointed out that, while plaintiff had no grievance by reason of the discrimination, he had a grievance by reason of the legislation, which by narrowing the market for his land deprived him of property; such deprivation being without due process of law in event the statute was for any reason unconstitutional. The court proceeded, therefore, to consider the merits of the constitutional question of discrimination.

That case is precisely in point here, for, in the instant case, while petitioner has no grievance by reason of any discrimination, it has a grievance by reason of the legislation, which, by imposing upon it the liability of an insurer for certain classes of its employés, operates to deprive it of property; such deprivation being without due process of law in event the statute is for any reason unconstitutional. The constitutional question of discrimination must therefore be discussed and decided.

[2] Section 58 of the Workmen's Compensation, Insurance and Safety Act of 1917 restricts the right to claim the benefit of the act in the case of injuries suffered abroad to

employés who are residents of California at the time of the injury. Since the act assumes that at the time of the injury the employé will be beyond the boundaries of the state, the word "residents" must necessarily have been used to designate "persons domiciled in" California. Citizens of the United States domiciled in California are citizens of the state. Pol. Code, Cal. § 51. The benefits of the act are therefore extended solely to citizens of California and to aliens domiciled within the state. It follows that there is a direct discrimination against aliens not domiciled in California, with which we are not concerned, and against citizens of other states of the Union, which, if without legal justification, renders the statute unconstitutional. Blake v. McClung, 172 U. S. 239, 247, 19 Sup. Ct. 165, 43 L. Ed. 432; Id., 176 U. S. 59, 67, 20 Sup. Ct. 307, 44 L. Ed. 371.

Respondents contend that the discrimination is justified upon the ground that the obligation imposed upon employers by the act is created as an incident to the status of master and servant, and is therefore an obligation which can be created only by the law of the place of injury or by the law of the place of the servant's domicile. Were this reasoning sound, it would follow that, in making the discrimination in section 58 of the act upon the basis of domicile, the Legislature was merely recognizing a jurisdictional limit upon its power. Respondents' theory is based, however, upon a misconception of the nature of the statute and of the meaning of the term "extraterritorial," as that term is used in describing the operation of the statute.

[3, 4] The theory of territorial sovereignty has been too long established as a principle of international law to admit of question at this time. Rights created by one state may be recognized and enforced by another state at its pleasure, and likewise a status attached to a person by one state may be recognized by another state, into which that person may travel, at the pleasure of the latter state; but as law the mandates of the sovereign of a given state can have no effect beyond the territorial limits to which his rule is extended. When, therefore, it is said that a statute, such as the Workmen's Compensation Act, has an extraterritorial effect, it cannot mean that the law does, or attempts to, create rights abroad; it can only mean that an act occurring beyond the geographical limits of the state is recognized as the basis for the creation, or condition for the enforcement, of a right created and enjoyed within this state. The power of an absolute sovereign to thus sanction the enforcement, within the territory subject to the jurisdiction of that sovereign, of rights based upon acts occurring abroad cannot be questioned upon the ground of any inherent deficiency. It is therefore a power which may be exercised by this state, subject only to the restrictions of the state and federal Constitutions.

We may assume, in accordance with the contention of respondents, that if the imposition of the obligation to compensate a servant, not domiciled within the state, for injuries sustained without the geographical limits of the state, were an attempt to create an obligation merely as an incident to a status, such legislation would conflict with well-defined legal principles. Whether such a law would amount to a mere regulation of status, or to an expression of a positive duty, the breach of which would be tantamount to a tort, it may be conceded that a law of that nature would not lie within the law-making province of a state which was neither the domicile of the servant nor the locus delicti. The effect and purpose of the act now under consideration, however, cannot be held to be the regulation of a status or imposition of a tort liability. It is true that the extension of the liability imposed by the act to acts occurring beyond the territorial limits of the state cannot be supported on the simple theory that the obligation so imposed is, strictly speaking, purely a contractual liability, for the proposition that a compulsory statute is a contract has been definitely repudiated by this court. North Alaska Salmon Co. v. Pillsbury, 174 Cal. 1, 162 Pac. 93, L. R. A. 1917E, 642.

[5] But the statute which is now before us assumes to extend its effect only to those cases where the contract of hire was made in this state. It is therefore not an attempt to create an obligation merely as an incident to a status, but is, in form and substance, a genuine regulation of contracts subject to the sovereignty of the state. The liability which it imposes is, so as to speak, in a class by itself, being neither strictly contractual nor delictual, and it may, for want of a better term, be described as quasi ex contractu. Post v. Burger, 216 N. Y. 544, 550, 111 N. E. 351, Ann. Cas. 1916B, 158; Berton v. Dry Dock Co. (D. C.) 219 Fed. 763. The contract creates a relationship under the sanction of the law and the same law attaches as an incident thereto an obligation to compensate for injuries sustained abroad, amounting to a sort of compulsory insurance. The Legislature may lawfully impose that right and duty upon those operating under a contract subject to the legislative power, and no principle of law is defeated by attaching to such contracts the same duties and rights as incidents to acts abroad that are lawfully imposed as incidents to the same acts occurring within the geographical limits of the state. Angell on Recovery under Workmen's Compensation Law for Injuries Abroad, 31 Harvard Law Review, 16; Smith v. Heine Safety Boiler Co., 224 N. Y. 9, 119

N. E. 878, Ann. Cas. 1918D, 316; Jenkins v. T. Hogan & Sons, 177 App. Div. 36, 163 N. Y. Supp. 707.

It is at once apparent that the Legislature has equal power to provide for the creation of a compulsory obligation to compensate for injury suffered elsewhere as a regulation of contracts subject to the sovereignty of the state whether the contracting employé be domiciled in this state or not. Story on Conflict of Laws (8th Ed.) p. 375; Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 416, 156 Pac. 491, Ann. Cas. 1917E, 390. Since, therefore, the right is created only in favor of citizens of the state and domiciled aliens, there is a direct discrimination against citizens of sister states.

[6] The right of the Legislature to impose reasonable regulations upon contracts subject to its sovereinty is unquestioned. When, however, the Legislature attempts to provide that a substantial privilege shall be incident to certain contracts of employment when entered into in this state by citizens of this state, and that that privilege shall not be incident to identical contracts of employment when entered into in this state by citizens of other states of our Union, the enactment is clearly in contravention of section 2, cl. 1, art. 4, of the federal Constitution.

"Different states may have different policies, and the same state may have different policies at different times. But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states. The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other states is void, because in conflict with the supreme law of the land." Chambers v. B. & O. R. Co., 207 U. S. 142, 28 Sup. Ct. 34, 52 L. Ed. 143.

It is true that many procedural discriminations between citizens and noncitizens have been upheld, but the rule applied in such situations has no application where a substantial substantive right is granted to citizens and under like circumstances is denied to citizens of other states. The statute here in question provides for the creation within this state of a right to accident insurance as an incident to certain contracts of employment in favor of citizens, and opens the doors of its courts and commissions to citizens to enable them to enforce that right. This right is not accorded to citizens of other states. A privilege and protection of the laws of a substantial nature is thereby accorded to citizens of this state and denied to citizens of other states. This is forbidden by the federal Constitution. Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432.

[7] The Constitution provides that—

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

The provision appears without qualification. Its effect is not limited to those cases where its operation will not interfere with the internal policy of the state or with considerations which appear to affect the general welfare. Its mandate is absolute. It is true that a state may, in the valid exercise of its police power, limit the right of individuals to engage in certain professions or callings. Such regulations will be upheld, even though their effect is indirectly to place noncitizens at a disadvantage, but the regulation must be inherently reasonable. Ex parte Spinney, 10 Nev. 323; La Tourette v. McMaster, 248 U. S. 465, 39 Sup. Ct. 160, 63 L. Ed. 362. The principles applied in these cases cannot be invoked under the facts presented here. No reasonable ground can be found for the classification.

Respondents make the contention that the court should uphold the right of the state to require compulsory compensation for its citizens alone, inasmuch as it is only citizens or their families who are likely to become a public charge upon the state as a result of injuries sustained abroad. The argument expresses a very excellent reason for requiring compulsory compensation for citizens, but it expresses no reason at all for denying the same right to citizens of other states. In the cases of which Ex parte Spinney and La Tourette v. McMaster, supra, are examples, restraints upon engaging in certain occupations which bore more heavily upon citizens of other states were upheld, upon the ground that the public good required that the occupations in question be opened only to those having had business or professional experience within the state; the general safety and welfare necessitating the exclusion of others. In none of these cases was the rule sanctioned that a privilege could be granted to a citizen of one state and denied to citizens of other states, for the reason that public policy did not require that the privilege be entended to the latter class of persons. Such a rule would be manifestly unsound, and altogether in conflict with the constitutional provision here in question. No consideration of public policy requires that citizens of sister states be excluded from the benefits of the act here under consideration. The fact that considerations of public policy do not affirmatively require the extension of the benefits in question to citizens of sister states as strongly as they require their extension to citizens of this state furnishes absolutely no sound reason for the exclusion of the former, and affords no reasonable basis for the discrimination.

It follows that the discrimination made in section 58 of the Workmen's Compensation

Act contravenes the provisions of the federal Constitution.

[8] It is contended, however, and correctly, that the provisions of the federal Constitution do not have the effect of rendering invalid that portion of the Workmen's Compensation Act providing for an extension of its benefits to residents who are injured abroad, but that it allows this portion of the act to stand as effective and valid, and automatically and without regard to the intent of the state Legislature extends the benefits created by the act to nonresidents, or rather to such nonresidents as are citizens of sister states. In support of this contention respondents rely upon Estate of Johnson, 139 Cal. 532, 73 Pac. 424, 96 Am. St. Rep. 161. No good reason has been advanced for departing from the doctrine therein declared as follows:

"It will be noted, not only that the constitutional provision is not restrictive, but that it is neither penal nor prohibitory. It nowhere intimates that an immunity conferred upon citizens of a state, because not in terms conferred upon citizens of sister states, shall therefore be void. Some force might be given to such an argument, were the constitutional provision couched in appropriate language for the purpose. If, for example, it had said, 'No citizen of any state shall be granted any immunity not granted to every citizen of every state,' or had it begun its declaration by saying that 'it shall be unlawful to grant to citizens of any state any privilege or immunity not granted to citizens of every state,' it might then have been argued that a legislative attempt so to do would be declared violative of the express mandate of the Constitution, and therefore void. But such is neither the scope, purpose, nor intent of the provision under consideration. It leaves to the state perfect freedom to grant such privileges to its citizens as it may see fit, but secures to the citizens of all the other states, by virtue of the constitutional enactment itself, the same rights, privileges, and immunities. So that, in every state law conferring immunities and privileges upon citizens, the constitutional clause under consideration, ex proprio vigore, becomes an express part of such statute. * * * The Constitution itself becomes a part of the law. And this, in giving operation to that constitutional provision, is what the courts have always done. They have never stricken down the immunity and the privilege which a state may have accorded to its own citizens. They have never annulled the exemption. They have always construed the law so as to relieve the citizens of other states, and place all upon equal footing."

This is in harmony with and declaratory of the principle laid down by the United States Supreme Court in the Slaughter-House Cases, 16 Wall. 36, 77 (21 L. Ed. 394) in the following words:

"The constitutional provision there alluded to did not create those rights which it called privileges and immunities of citizens of the states. * * * Nor did it profess to control the power of the state governments over the rights of its own citizens. Its sole purpose was to declare to the several states that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

[9] The discrimination complained of in the instant case is to be found in the fact that the state statute under consideration confers upon the citizens of the state privileges and immunities which are not extended by the terms of the statute, either expressly or impliedly, to nonresidents of the state, and clearly the statute in question does not impose nor attempt to impose upon noncitizens of the state burdens or exactions not imposed upon citizens of the state. This difference is all important in controlling the construction and application of that provision of the federal Constitution which declares that—

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

For, where a state endeavors to place a burden upon noncitizens of the state which is not put upon citizens of the state, obviously the effect of the federal constitutional provision is to abort the endeavor of the state. On the other hand, however, where a state by statute endeavors to confer and does confer upon its citizens privileges and immunities not accorded by the statute to citizens of other states, the federal Constitution operates, by the very force of its own language, to place citizens of other states in the same category and upon the same footing as citizens of the state, in so far as concerns the right to have and enjoy the privileges and immunities conferred by the state upon its own citizens. In other words, the federal constitutional provision was designed for the protection of noncitizens, and therefore, in any given case calling for its application, the case and the application must be considered from the viewpoint and in the light of the welfare of the noncitizen.

Viewed in this light, it is clear that, when a state statute imposes a burden on a noncitizen which is not imposed on the citizen of the state, the noncitizen may have relief from the burden thus imposed by invoking the provision of the federal Constitution for the nullification of the discriminatory legislation. But, when a privilege is granted to a citizen and withheld from a noncitizen, the latter finds relief in the provision of the federal Constitution which, by operation of law, so to speak, extends the privilege to him. The obvious resulting difference in the operation and effect of the federal constitutional provision under discussion, is the paramount point of the decision in the Estate of Johnson, supra, and it cannot be said that the extension to noncitizens of a statutory privilege granted only to citizens is judicial legislation, for clearly it is the federal Con-

stitution itself, and not the courts, which declares that, if citizens of a state are by statute granted privileges and immunities, noncitizens of the state shall likewise be "entitled" to them. The case of Spraigue v. Thompson, 118 U. S. 90, 6 Sup. Ct. 988, 30 L. Ed. 115, which enunciates the principle that the courts cannot eliminate a discriminatory statutory exception, and thereby make the statute effective as to a class which the Legislature did not have in mind, has application only to that class of cases where it is attempted by the state to put a burden upon nonresidents. That case has no application to the extension to nonresidents of a privilege granted to residents, and, apparently, has never been applied to the latter situation.

The very recent case of Travis v. Yale & Towne Mfg. Co., 252 U. S. 60, 40 Sup. Ct. 228, 64 L. Ed. ——, is relied upon in support of the contention that Estate of Johnson, supra, has been overruled by the Supreme Court of the United States. At first blush this case would seem to weaken the ruling of this court in Estate of Johnson. However, upon a close analysis of the Travis Case, it will be found that it in no wise affects the doctrine of Estate of Johnson. The facts of the former case, substantially stated, were that the state of New York had imposed an income tax upon residents and nonresidents, but granted an exemption to residents of the state on the first $1,000 of their incomes, and further provided that every "withholding agent" (including employers) should deduct and withhold 2 per centum from all salaries, wages, etc., payable to nonresidents, where the amount paid to any individual equaled or exceeded $1,000 in a year, and should pay the tax to the state comptroller. The court held, in affirmance of the judgment of the District Court of New York made in the first instance, that in granting to residents exemptions denied to nonresidents the statute violated the provisions of section 2, cl. 1, art. 4, of the federal Constitution; but a careful reading of the decision in that case reveals the fact that the court did not hold that the entire statutory scheme involved in that case was altogether void and nugatory. That is to say, the court did not declare that the statute was invalid in so far as it related to the imposition of a tax which, when freed and cleared of the attempted unwarranted discriminations, operated uniformly upon residents and nonresidents alike. True it is the court did not, in holding the attempted discrimination unwarranted, declare in terms that the exemptions granted to residents should by the conjunctive operation of the state statute and the fundamental law of the land be extended to nonresidents; but in this behalf it is important to note that neither did the court decide that the statute was wholly invalid—that is to say, that residents and nonresidents entirely escaped the burden of taxation because of the attempted discrimination. That it was not the purpose of the court to so declare is manifest, we think, by the decree rendered in the first instance by the United States District Court of New York and affirmed by the Supreme Court of the United States.

That decree, although not set out in the opinion of the Supreme Court, is before us by the courtesy and consent of counsel for the respective parties in the instant case, and may therefore, we take it, be rightly referred to in aid of the ascertainment of the scope and effect of the opinion of the Supreme Court. The decree mentioned does not, as counsel for the petitioner here contend, enjoin the state of New York from in any way collecting all or any part of the tax in question from nonresidents. While it does enjoin the collection of the state tax from the complainants, who were the "withholding agents" and the source of the income upon which the tax was levied, nevertheless it does not purport to enjoin the collection of the tax, with the discriminations eliminated, directly from resident and nonresident taxpayers. In short, the decree and its affirmance indicate that the court intended to do no more than declare that the discrimination in the granting of exemptions to residents and denying them to nonresidents was, in the language of the Supreme Court itself, "an unwarranted *denial* to the citizens of Connecticut and New Jersey of the privileges and immunities enjoyed by the citizens of New York." (Italics ours.) In other words, it was the denial to residents of other states of exemptions provided in the statute for residents of the state of New York which was declared to be invalidated by the provision of the federal Constitution. Inasmuch as the court did not strike down the exemptions in so far as they applied to residents, it follows by necessary implication that, if the exemptions could not be denied to nonresidents, and were still extant as to residents, they must be available to nonresidents. This conclusion is confirmed by a perusal of the opinion rendered in the first instance by the District Court, where it was carefully said that—

"Nothing herein * * * is meant to be decided as to the validity of the statute so far as it relates to residents of the state of New York." Yale & Towne Mfg. Co. v. Travis, 262 Fed. 576.

This can mean but one thing, and that is that the act was valid as to residents, and binding to the same extent, and only to the same extent, upon nonresident citizens of other states. While the opinion of the District Court cannot, of course, control the interpretation to be put upon the opinion of the Supreme Court, nevertheless it is illuminating and persuasive when considered in conjunction with the unqualified affirmance by the court of last resort of the decree of

the lower court, despite the limitations which the latter court explicitly put upon its judgment.

In any event, it cannot be said from anything contained, either expressly or impliedly, in the Travis decision, that the court there went so far as to say that the act in its entirety was invalid and could not be enforced against residents of the state of New York. Therefore it seems that the Travis Case in no way contravenes the rule and the reason for the rule enunciated in Estate of Johnson, supra, and, bound as this court is by the authority of the decision in that case until definitely overruled by the Supreme Court of the United States, it must apply the rule thereof to the instant case. It follows that, despite the invalidity of the discrimination, the statute itself is valid, and may be made to apply uniformly to citizens of California and the citizens of the other states.

The award is affirmed.

We concur: LAWLOR, J; SLOANE, J.

OLNEY, J. I concur. I agree, for the most part, with the main opinion, but I am not in accord with its discussion of Estabrook Co. v. Industrial Accident Commission, 177 Cal. 767, 177 Pac. 848, and I would prefer to state as briefly as possible my own views for concurring in the result reached.

The law under discussion extends the benefits of the Workmen's Compensation Act to citizens of this state, but not to others, who are injured abroad in the course of their employment, when the employment was originated by contract within the state. The general questions are as to the power of the state to pass such a statute, and, if its power is limited, the exact effect of the limitation upon the statute. These general questions resolve themselves into a series of more particular questions:

First. Has the state any power whatever to prescribe the incidents of the relation of employer and employé, when the employment —that is, the actual rendition of services by the employé—is without the state? If the state has no such power, then the present law is wholly void. That a state has no power to prescribe what the law of another sovereignty shall be is, of course, plain. In this sense, and the true sense, a state can give no extraterritorial effect to its laws whatever. But the present law does not attempt to do this. What it attempts to do is to prescribe what shall be the incidents within this state and according to its own law of a relation existing without its boundaries. So far as I know, an independent sovereign state has the power to prescribe what incidents it pleases shall attach within its own boundaries to any relation, or to any set of facts or happenings, whether existing or occurring within or without its own boundaries. This is nothing more than saying that it has the power to determine what shall be the law within its boundaries. As to this, there is no one to say it nay as a matter of legal right. There is a decided practical limitation, that of the comity of nations; but this is not a limitation imposed by superior law and binding upon the state, but is only a limitation by way of policy, which the state may or may not observe.

The present law, therefore, does not transcend the power inherent in a wholly independent sovereign, and if the state of California has no right to prescribe what shall be the incidents within its borders of an employment abroad, it must be because of some limitation upon its sovereignty. The only limitations of this character are those imposed by the federal Constitution upon it as a constitutent member of the Union, and, so far as I know, there is no general limitation in the federal Constitution upon the power of a state to prescribe the incidents which shall attach within its boundaries and by its own laws to happenings or events occurring elsewhere. I conclude, therefore, that the state had the power to pass the law in question, subject only to such special limitations as the federal Constitution may contain.

Second. Is the law in conflict with any special limitation of the federal Constitution? The only limitation of the federal Constitution which it is claimed the law transcends is that which provides that a citizen of one state shall be entitled to have within another state all the rights and privileges of citizens of the latter. Putting it in a negative way, this constitutional provision means that no state shall discriminate in favor of its own citizens as against those of other states. By the present law our state extends the benefits of its Workmen's Compensation Act to employés who are its own citizens and are injured abroad in an employment originating here, but not to the citizens of other states injured under similar circumstances. It is apparent at once that there is present just the discrimination which the federal Constitution seeks to prevent, unless:

(1) There is valid reason for making in this case a distinction between citizens of this state and those of other states, or

(2) The state was without power to pass such a law effective as to citizens of other states.

As to the first of these alternatives, the only reason advanced to justify the distinction is that it is only in the case of injuries to citizens that they or their families are likely to become public charges. There might be some ground, possibly, for this contention, if the primary object of the law were to prevent injured employés or their families from becoming public charges. But this is not its purpose, except in a very remote degree, and, since it is not, the argument entirely fails.

As to the second alternative, it seems to me clear enough from what has already been said that the state has the power to prescribe what shall be the incidents within its own borders and according to its own laws as to every one within it, citizens or noncitizens, of the relation of employer and employé, whether that relation be engaged in abroad or not. Certainly our attention has been called to no provision of the federal Constitution to the contrary, and in the absence of such provision I can see no reason why the inherent sovereign power of the state to make what laws it chooses respecting the rights and obligations of those within its jurisdiction should be limited in this particular. The necessary conclusion, or rather the statement in a slightly different way of what has already been said, is that since, so far as the objects of the act are concerned, there is no reason for making a difference between citizens and noncitizens, and since it was within the power of the state to make the law apply to the latter as well as to the former, the act purports to make a discrimination which is not permitted by the federal Constitution. This leads to the third question, which is:

Third. What, under these circumstances, is the effect of the provision of the Constitution upon the act? Does it destroy it, so that neither citizens nor noncitizens shall have its benefits, or does it operate to extend the benefits to noncitizens, so that they, as well as citizens, are "entitled" to its privileges, and the unlawful discrimination is thus removed? Upon this point I agree thoroughly with both the discussion and the conclusion of the main opinion, and with the Estate of Johnson, 139 Cal. 532, 73 Pac. 424, 96 Am. St. Rep. 161, to which it refers, and upon which it relies. The constitutional provision is couched in the affirmative, that—

"The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."

When a state endeavors to place a burden upon noncitizens, but not upon citizens, the necessary effect of the provision is to strike down the burden, to nullify the law which imposes it. But when the state endeavors to confer upon its citizens privileges or benefits not conferred on others, the effect is just the opposite. The citizens of other states become "entitled" to those privileges or benefits, not by the operation of the statute, but by operation of a superior legislative enactment, the federal Constitution, which declares in so many words, that they shall be so entitled. The constitutional provision, in other words, is a declaration that, whatever rights or privileges the citizens of a state may enjoy, the same rights or privileges shall likewise be extended to and enjoyed by the citizens of other states, regardless of the desire of the state that they shall or shall not enjoy them. The result is that employés, both citizens of this state and those of other states, are entitled to the benefits of the act.

Fourth. In the answer just given to the third question lies, it seems to me, the true explanation of such decisions as those of Estabrook v. Industrial Accident Commission, supra. It is there said that an employer may not question the validity of such a law as the present, because he does not come within the class discriminated against, to wit, noncitizen employés. Now, it cannot, in the very nature of things, be true that, when it is attempted to charge a man, an employer for example, with liability under an invalid statute, a statute void because unconstitutional, he cannot question the validity of the statute upon which his liability depends, simply because he is not one of the class discriminated against. If the law is a nullity and void, he of necessity is not liable, and is entitled in all reason so to claim and show. If there are decisions to the contrary, nothing can be said of them, except that they are fundamentally wrong. But the point in such instances as the Estabrook Case is that the statute is not void. It is perfectly valid. It is true it contravenes the federal Constitution in attempting to withhold its benefits from noncitizens. But it is its attempt to withhold, not to confer, that alone contravenes the Constitution, and is therefore invalid and ineffective. The law stands as a valid enactment as to citizens, and the Constitution operates to destroy its attempt to withhold its benefits from noncitizens and to extend those benefits to them. This being the true operation of the Constitution upon the law which attempts to contravene it, it is plain that it is properly said in such a case that one not a member of the class discriminated against may not raise the question of constitutionality. It does not affect his liability in the slightest if the law is unconstitutional in the respect claimed, for the effect of the unconstitutionality is not to destroy the law, but to extend it. As to him, the constitutional question is purely moot.

The recent decision of the Supreme Court of the United States in Travis v. Yale & Towne Co., referred to in the main opinion, is an exceedingly good illustration of this. New York passed an income tax law allowing certain exemptions as to citizens, not allowed to others. Plainly, no citizen of New York could complain of this discrimination, because it was in his favor. The law was valid as to him. It was invalid as to noncitizens only, and as to them only to the extent of the discrimination. This much, and nothing more, was held in that case, and to this the decree was carefully limited, as the main opinion shows.

SHAW, J. I concur on the ground that the statute merely confers upon employés residing in this state the privilege of resorting to the Workmen's Compensation Act of this

state to obtain compensation for injuries received while in the course of their employment, in all cases where the contract of employment was made in this state, whether the injury was received within or without this state, and that the provision of the Constitution of the United States, ipso facto, carries this privilege to and confers it upon every citizen of any other state whose contract of employment is made in this state, and thus prevents the statute from being discriminatory in effect. It must be observed that the statute does not purport to withhold this privilege from citizens of other states; it is merely silent with regard to them. If it had contained a clause withholding it from others than residents, such clause would be void. But, as it does not, the result is that the federal Constitution prevents the statute from having the effect of withholding the privilege to citizens of other states. Estate of Johnson, 139 Cal. 532, 73 Pac. 424, 96 Am. St. Rep. 161.

To the objection that the statute in effect withholds the privilege from persons who are neither citizens of any state nor residents of this state, the answer is that no provision of the federal or state Constitution contains any limitation upon the power of the state Legislature to make such discrimination, and that, unless it is so limited, the power is plenary. Const., art. 4, § 1; Mitchell v. Winnek, 117 Cal. 525, 49 Pac. 579; Sheehan v. Scott, 145 Cal. 686, 79 Pac. 350; Mendenhall v. Gray, 167 Cal. 236, 139 Pac. 67.

I am also satisfied that it is within the legislative power of the state, by appropriate laws, to attach to any personal relation created in this state, such as that of employer and employé, or master and servant, liabilities upon one party to such relation to the other, and corresponding rights relating thereto, in addition to the mutual liabilities and rights arising from such relation at common law. The provision of the Workmen's Compensation Law extending its benefits to employés injured outside of this state, where the contract of hire is made in this state, merely attaches to the relation created by such contract rights and liabilities additional to those arising under the common law, and it is therefore valid. This was decided by this court in Western Indemnity Co. v. Pillsbury, 170 Cal. 698, 699, 151 Pac. 398; and Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 415, 156 Pac. 491, Ann. Cas. 1917E, 390.

I agree with the conclusion that the petitioner has the right to attack the validity of section 58 of the act. These propositions are in my opinion decisive of the case.

Upon other matters stated in the opinion of Mr. Justice LENNON in his argument upon these questions I prefer to express no opinion.

I concur: ANGELLOTTI, C. J.

WILBUR, J. (concurring). I adhere to the views expressed in Estabrook v. Industrial Accident Commission, 177 Cal. 767, 177 Pac. 848. I do not, therefore, agree with that portion of the opinion of Mr. Justice LENNON discussing that case and the rule of law which it announces. I concur with what is said by Mr. Justice LENNON in reference to the jurisdiction of the state of California. I concur in that portion of his opinion in which he bases the constitutionality of the statute upon the principle announced in Estate of Johnson, supra. I agree with the majority of the court in holding that, notwithstanding the language of the statute with reference to residents, by virtue of the federal Constitution a nonresident of California, if a citizen of the United States, is entitled to the same remedies as a resident, and for that reason the Industrial Accident Commission had jurisdiction of the complaint of a resident of California, and would also have jurisdiction of a similar complaint by a nonresident, and that there is therefore no such discrimination as is prohibited by the federal Constitution.

49 Cal. App. 94

JOHNSON v. NELSON et al. (Civ. 3424.)

(District Court of Appeal, First District, Division 1, California. Aug. 28, 1920. Rehearing Denied Sept. 27, 1920. Hearing Denied by Supreme Court Oct. 25, 1920.)

1. Mortgages ⊂⊃491—Claim against mortgagee on foreclosure could not be made lien against land.

In a mortgage foreclosure proceeding, a claim by defendant, in a cross-complaint, for money promised by the mortgagee, but not advanced, could not have been made the basis of a lien upon the property in favor of the mortgagor, but could at most have only taken on the character of a personal judgment against the plaintiff.

2. Mortgages ⊂⊃491—Agreement by plaintiff in foreclosure no basis for lien on land in favor of defendant.

In a mortgage foreclosure, where defendant filed cross-complaint and obtained a judgment for a certain amount of money against plaintiff, an agreement whereby plaintiff agreed, "in case of a deed or redemption of said property, said P. will pay to said H. and her attorneys one-half the amount of her judgment, without interest," could not be the basis of a lien upon the premises in favor of the defendant, being merely a personal agreement to pay defendant a certain sum of money.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action to quiet title by Peter Johnson against Hedvig Nelson and others, in which the named defendant filed a cross-complaint.

From a judgment in favor of the named defendant, plaintiff appeals. Reversed.

See, also, 184 Pac. 501.

Harold E. Thomas, of Los Angeles, for appellant.

C. C. McWhinney, of Long Beach, and R. C. Noleman, of Los Angeles, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants in an action to quiet title, wherein the trial court undertook to hold that, while the plaintiff had title to the property in question, it was subject to a certain judgment lien, which the defendants held by virtue of a judgment in a prior action between certain of the parties to this suit. The facts of the case, in so far as they can be extracted from the very unsatisfactory record before us, appear to be these:

The defendant and cross-complainant Hedvig Nelson at one time owned the premises in question, upon which she desired to construct an apartment house. She applied to the plaintiff herein for a loan of money for the purpose of such construction, and executed to him two notes and mortgages, one for the sum of $7,200, and the other for the sum of $9,000; the said mortgagee agreeing that he would advance the amount of these two loans as needed in the construction of the building. He failed to make certain payments for labor and material as they fell due, and in consequence mechanics' liens were filed against the building, which were in due course foreclosed, and the property bought in at the foreclosure sale by one C. A. Decoo, who was the trustee of the lienholders. Thereafter the mortgagee brought an action to foreclose upon his two mortgages against Hedvig Nelson, making all of the lienholders parties to said foreclosure suit. In that action Hedvig Nelson filed a cross-complaint against the plaintiff therein, Peter Johnson, seeking to recover from him the amount he had failed to pay over to her, or the materialmen, according to the agreement in said mortgages. That cause went to trial, and upon the trial the plaintiff therein, Peter Johnson, was awarded a judgment of foreclosure of said mortgages for the full amount of his two notes, with interest and costs, amounting to $22,429.93; but the court, in passing upon the cross-complaint of Hedvig Nelson, rendered the following judgment thereon:

"And it is further ordered, adjudged, and decreed that the defendant and cross-complainant, Hedvig Nelson, have judgment against the plaintiff, Peter Johnson, for any sum which he may receive from out of the proceeds of said sale in excess of the costs and expenses of said sale, his costs of suit herein, and the sum of $22,429.93, together with interest thereon at the rate of 7 per cent. per annum from the date of entry of judgment herein to the time of said sale, such judgment for said defendant and cross-complainant, Hedvig Nelson, however, not to exceed the total sum of $2,582.65, together with interest on said sum of $2,582.65 at the rate of 7 per cent. per annum from and after the date of entry of judgment herein to the time of said sale."

The order of sale was issued upon the general judgment of foreclosure in that action, and at the sheriff's sale conducted in pursuance of said order the said plaintiff, Peter Johnson, bid in the property for the sum of $25,854.70, and the same not having been redeemed from such foreclosure sale, a deed in due course was issued to Peter Johnson as the purchaser at said sale. Upon obtaining said deed Peter Johnson brought the present action to quiet his title to the property, making Hedvig Nelson, and also C. C. McWhinney and R. C. Noleman, to whom she had assigned certain interest in her aforesaid judgment, parties defendant thereto. These defendants to this action filed their cross-complaint therein, wherein it was asserted that by virtue of the aforesaid conditional judgment rendered in favor of Hedvig Nelson in the foreclosure suit she had acquired and measurably assigned to her codefendants a judgment lien upon the premises in question, which she was entitled to have protected by the judgment in this case. The trial court undertook to recognize and establish such lien in its judgment herein, and from such judgment so doing the plaintiff prosecutes this appeal.

[1] We are unable to comprehend upon what possible theory the trial court in this action could hold that the judgment attempted to be rendered in favor of Hedvig Nelson in the former foreclosure suit could constitute a judgment lien affecting the premises in this action. It does not upon its face purport to create such a lien, and it could not well do so, for the reason that it was apparently founded upon a personal claim which the defendant, Hedvig Nelson, in that action, had against the plaintiff, Peter Johnson, in that action, for money to which she claimed to be entitled, and which he had failed to pay over to her or for her benefit; but, even conceding such claim to be well founded, it could not possibly in that action have been made the basis of a lien upon the property in question, but could at most have only taken on the character of a personal judgment against Peter Johnson, which might be satisfied by an execution issued against any property which he might own. No such method, however, was ever pursued by Hedvig Nelson; and it is plain from the nature of her so-called conditional judgment that no such method ever could have been pursued, for the reason that the condition contained in such judgment was such that the judgment could never ripen into an absolute one. The condition was that Hedvig

Nelson should have judgment against Peter Johnson—

"for any sum which he may receive out of the proceeds of said sale in excess of the costs and expenses of said sale, his costs of suit therein and the sum of $22,429.93, together with interest thereon at the rate of 7 per cent. per annum from the date of entry of judgment herein to the time of said sale."

How it would be possible for Peter Johnson to receive out of the proceeds of said foreclosure sale any sum whatever in excess of the full amount of his judgment, with accrued interest and costs to the time of the sale, passes our comprehension, since if any sum was bid at said sale, either by Peter Johnson or any other bidder, in excess of the full amount due upon Peter Johnson's judgment, it would be the sheriff or commissioner conducting such sale who would receive such excess, and who would upon the satisfaction of the Peter Johnson judgment pay the same over in due course of law to Hedvig Nelson, or to which of the other defendants in said action who might be entitled thereto. The only possible way in which Peter Johnson could ever receive any sum whatever in excess of his judgment would be in the event of a redemption of the property by some one or other of the defendants or their assigns in said foreclosure proceeding; but even in that eventuality (which never in fact occurred) Hedvig Nelson would be entitled to no portion of the redemption money, either under the terms of her so-called judgment or under the law relating to redemptions of property from foreclosure sales. For these reasons it is clear that the so-called conditional judgment of Hedvig Nelson could never ripen into an absolute judgment, so as to be the basis of a lien upon the premises in question. When, therefore, Peter Johnson received title thereto through the deed issued to him as a result of said foreclosure sale, he became the owner thereof free and clear of any such lien as the defendants and cross-complainants attempt to assert in this action.

[2] In their cross-complaint herein the defendants and cross-complainants, however, set forth an additional set of facts out of which they claim their asserted lien arose. They contend, and the trial court found, from the evidence adduced before it, that on the day on which the foreclosure sale in said former action was to occur one of the attorneys for Hedvig Nelson caused to be prepared and presented in triplicate for the signature of Peter Johnson an agreement whereby Peter Johnson agreed that at the time of said sale he would bid an amount sufficient to cover his judgment, together with the judgment awarded said Hedvig Nelson, upon the following terms and conditions:

"In case of a deed or redemption of said property said Peter Johnson will pay to said Hedvig Nelson and her attorneys one-half the amount of her judgment without interest."

There was some controversy before the trial court as to the identity and terms of said agreement, one of which triplicate copies only was offered in evidence, and which Peter Johnson claimed differed in certain respects from the original which he had signed. The court resolved this controversy in favor of the cross-complainants, but we are entirely at a loss to see how such an agreement, assuming the same to have been made by Peter Johnson, could be the basis of a lien upon the premises in question, since at most it could be nothing more than a personal agreement of Peter Johnson that in the event of his receiving a deed to the premises, or of the redemption of the same, he would pay to Hedvig Nelson or her assigns a certain sum of money. These cross-complainants might have enforced such an agreement in a personal action against Peter Johnson after the receipt by him of his deed to the property, but they could not enforce it in this suit to quiet title.

The foregoing views indicate the proper disposition of this case, and render unnecessary a consideration of the matters involved in the plaintiff's motion for a new trial.

Judgment reversed.

We concur: WASTE, P. J.; WELCH, Judge pro tem.

49 Cal. App. 184

TILLMAN v. GIBSON. (Civ. 3431.)

(District Court of Appeal, First District, Division 1, California. Sept. 1, 1920.)

Brokers ⊂=44—Commissions cannot be recovered where proposal to broker was revoked before acceptance.

In a real estate broker's action for commissions based on the production of a purchaser in answer to a written offer made by defendant to plaintiff, there could be no recovery where it appeared without contradiction that before defendant's proposal had been accepted defendant had revoked it.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by O. S. Tillman against R. H. Gibson to recover commissions on the sale of real estate. Judgment for defendant, and plaintiff appeals. Affirmed.

Minor Moore, of Los Angeles, for appellant.

Willis I. Morrison, Ward Chapman, and L. M. Chapman, all of Los Angeles, for respondent.

WELCH, Judge pro tem. Plaintiff is a real estate broker, and the defendant the

owner of an orange grove in the San Fernando valley, Los Angeles county. This action for commissions is based upon a letter from defendant to plaintiff, of which the following is a copy:

"November 1, 1918.

"Mr. Tillman, Of San Dimas Realty Co., Huntley Hotel, City—Dear Sir: As indicated in my conversation with you the other day, it was my intention to give to your firm the sole handling of my orange grove located at San Fernando, which I have decided to sell. Unfortunately, every one in the state of California apparently considers himself a real estate agent, and the night previous to my meeting with you I mentioned in the presence of two or three men that I intended putting price and terms on my property such as would be certain to insure a sale; and as a result of my indiscriminate talking I have already had not less than a dozen would-be purchasers, two or three of whom have, as I understand it, actually visited the grove. This situation is rather unpleasant, and I have decided to absolutely withdraw the same from sale, always, however, recognizing the fact that you and your associates of whom you spoke to me, may consider that you have an option on the property for a few days. This must be limited to a very short period, as in addition to would-be buyers I have an offer to rent the grove which will pay me more money per annum than I advised you I would sell it for. For this reason I must limit your option to Monday, November 4th, which I realize is altogether too short to enable you to do business, but at the same time if you indicate a desire to close it does not mean that it must be closed by that date.

"The price, as indicated by me to you, is $1,250.00 per acre, and in figuring up my different purchases I find that I own 67.691 acres, which at $1,250.00 per acre would come to $84,615.00, out of which you are to receive a commission of 5%. I also indicated to you that the payments for this property might be strung out on the basis of $5,000 per annum, with 7% on deferred payments, always provided that the would-be purchasers would either give me additional security or that their notes were of such unquestionable character as to eliminate the necessity of this.

"Yours truly, [Signed] R. H. Gibson."

At the close of the trial the court gave defendant judgment for his costs. From the judgment the plaintiff appeals upon the judgment roll and a transcription of the proceedings of the phonographic reporter.

The record contains no specifications of insufficiency of the evidence to support the decision of the court. However, we have taken the time to read the pleadings, evidence, findings, and judgment, and find that the decision is not only supported by the evidence in the case, but is founded upon evidence with little or no conflict.

The court found that on November 4, 1918, plaintiff produced a prospective purchaser to defendant, who signed and delivered to defendant "what purported to be a written acceptance of defendant's proposal to sell said property on the terms set forth in the letter hereinbefore set forth; but the court finds that, before said written acceptance was signed and delivered to defendant as aforesaid, the said proposal had been revoked, withdrawn, and was not binding upon defendant or in force, nor in effect." There were other findings just as fatal to appellant's cause of action as the one just quoted. The four points made by appellant in his opening brief are all on the theory that there is a valid authorization of his agency to sell the land. His premise being false, it could serve no useful purpose to review his argument.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

49 Cal. App. 167

FARWELL v. SAN JACINTO & PLEASANT VALLEY IRR. DIST. (Civ. 3425.)

(District Court of Appeal, First District, Division 1, California. Sept. 1, 1920.)

1. Waters and water courses ⟸230(5)—Irrigation district bonds held negotiable.

Irrigation district bonds and coupons in the form provided by the Wright Act (St. 1887, p. 29), as amended by St. 1891, p. 147, being negotiable instruments, a condition in the bonds and in the law that an assessment be levied and collected by the board of directors sufficient to meet the annual and maturing obligations is not one destroying negotiability, especially where the act makes the instruments negotiable by express language.

2. Limitation of actions ⟸48(6)—Nonexistence of fund for payment does not excuse conversion of irrigation district bonds to judgment.

A holder of irrigation bonds will not be excused as against a plea of the statute of limitations for not converting his claim into judgment merely because there was no fund in the treasury or because the directors of the district had failed to provide a fund out of which the bonds could be paid.

3. Limitation of actions ⟸48(6) — Statute runs from maturity of irrigation bonds and coupons.

The statute of limitations begins to run from the maturity of irrigation district bonds.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Action by Flora Farwell against the San Jacinto & Pleasant Valley Irrigation District to recover on irrigation district bonds. Judgment for defendant, and plaintiff appeals. Affirmed.

H. E. Gleason, of El Centro, for appellant.
O. I. Kennedy and C. C. Haskell, both of San Bernardino, for respondent.

WELCH, Judge pro tem. The plaintiff is the owner and holder of certain bonds issued by the defendant corporation. She instituted this action September 7, 1917, to recover about $83,000, principal and interest owing to her on said bonds. The defendant and intervening landowners of the district made two principal defenses to the cause of action of plaintiff, namely, that the cause was barred by the limitation of subdivision 1, § 337, Code of Civil Procedure, and that by a judgment of the superior court in and for the county of Riverside given, made, and entered on June 17, 1899, in a quo warranto proceeding, the defendant corporation was adjudged to have no existence, and that it was never duly organized or brought into being, and further that it was usurping the rights and franchises of a public corporation. The court decided the cause herein in favor of the defendant and the interveners. The appeal is from the judgment upon the judgment roll alone. For the facts of the case we must look to the pleadings and findings of the court.

Under what is known as the Wright Act, approved March 7, 1887 (St. 1887, p. 29), and an act amendatory thereof (St. 1891, p. 147), defendant in the early part of the year 1892 organized itself into an irrigation district, comprising land then wholly within the county of San Diego, but now entirely within the county of Riverside; said Riverside county having since been created out of a portion of San Diego county. It thereupon began to and did transact business as a public corporation, and in good faith held itself out to the public as such. It issued bonds to the amount of $350,000 in various denominations, with interest-bearing coupons as provided by said act. The plaintiff purchased certain of such bonds, and at the commencement of the suit was the owner and holder thereof. There was then due and owing her the amounts claimed by her above mentioned. The bonds bore date July 1, 1892. Two months before this date the board of directors of the defendant irrigation district commenced an action in the superior court in and for the county of San Diego to determine the validity of such bonds. (The law provides that the action should be commenced after the issuance of the bonds). In due time a judgment was made and entered on June 22, 1892, adjudicating that the said district was duly organized; that all the proceedings had and taken for the issuance of said bonds were approved and confirmed.

The unpaid coupons herein of said bonds were presented to the defendant for payment on January 2, 1897, July 1, 1897, and July 3, 1898, and January 3, 1899, and demands made on these respective dates for the payment of same. In each case payment was refused, and the treasurer stamped upon the back of each presented coupon these words, "Not paid for want of funds," giving the date of each respective presentation.

Since the year 1899 defendant has not maintained any office within the boundaries of said district, and plaintiff, since said year, has been unable to find any office or officer to which or to whom to present said coupons for payment. At no time since the presentation of said coupons for payment or since the maturity of said bonds have there been any funds in the treasury of said corporation defendant to pay said bonds and coupons, and there is now due and owing and unpaid to plaintiff the principal sum of $51,500 together with interest in the sum of $31,447.50, the amount of unpaid coupons.

The parties on the trial stipulated that the San Jacinto and Pleasant Valley irrigation district carried on business as an irrigation district, issued bonds, levied and collected taxes, distributed more or less water within the district for a period of about three years, during which time the coupons of said bonds were paid as they fell due down to the year 1899. While stipulating that during this period of time when the district functioned the defendant was a de facto corporation, it "was not the intention of such stipulation to concede that the district was a de jure corporation, and that subsequent to July 11, 1899," the district ceased to perform the functions of an irrigation district or corporation. When this action was commenced, the board of supervisors of Riverside county appointed a board of directors of defendant for the purposes of this suit.

For reversing the judgment of the trial court, it is maintained that the statute of limitations is not available to the defendant corporation for the reason that said corporation has failed since the year 1899 to provide a particular fund out of which said bonds and coupons could and should be paid as provided by law, and because of such failure of the defendant corporation to provide such fund it will not be permitted to set up the statute in support of its own dereliction of duty. Greer County v. Clark & Courts, 12 Okl. 197, 70 Pac. 206. Section 33 of the Wright Act provides that such bonds as are here under consideration, together with the interest thereon, shall be paid by revenue to be derived from an annual assessment upon the real estate of the district, which shall be and remain liable to be assessed therefor. By the act the board of directors of such district corporation is directed to levy an assessment sufficient to pay the annual interest on said bonds and the bonds themselves as they may become due. The bonds themselves contain this sentence:

"All of said bonds and the interest thereon are to be paid by revenue derived from an an-

nual assessment upon the real estate of the district, and the assessment upon real property is by said act of the Legislature made a lien upon the property assessed."

All the bonds herein sued upon matured on different dates between July 1, 1903, and July 1, 1912. Every bond and coupon therefore matured more than five years before the commencement of this action. Hence the defense of the four-year limitation is squarely presented on the theory of appellant.

[1] The bonds and coupons herein sought to be collected are in the form provided for in said Wright Act as amended. Stats. 1891, p. 148. Such bonds and coupons, by statute and by decision of the Supreme Court (Ham v. Grapeland Irrigation District, 172 Cal. 611, 158 Pac. 207), are negotiable instruments. It follows that, since the bonds and coupons are negotiable instruments, the provisions in the law and in the bonds themselves that an assessment be levied and collected by the board of directors sufficient to meet the annually maturing obligations of these instruments is not a condition such as to destroy the negotiability of the bonds and their coupons especially since the particular act providing for these bonds makes the instruments negotiable in form by express language. The special provisions control the general statute as to their negotiability.

While it is true that the Wright Act laid upon the board of directors of the district a duty to levy assessments upon the realty of the district and collect the same for the purpose of paying the bond liability of the corporation, nevertheless it cannot be held that the board was limited exclusively to this mode or means of payment. Section 41 of said act authorized the board to call a special election and submit to the qualified electors of the district the question whether or not a special assessment should be levied for the purpose of raising money to be applied to the payment of such bond indebtedness.

The payment of the bonds by a special assessment is quite a different mode or means of payment than that provided for by an annual assessment. Said section 41 does not require this special levy to be paid into the "bond fund" as in the case of the annual assessment.

[2] Such bonds and coupons are general obligations of the district. They are unconditional promises to pay money and money only. They are made payable to bearer and in gold coin of the United States, as provided in the act, and are payable, not when a fund is provided for their payment, but at a time and place certain, fixed in each instrument. Just because there was no fund in the treasury or because the directors of the district had failed to provide a fund out of which these general obligations could be paid furnished no sufficient excuse to the holders of such bonds for not converting their claims into judgments against the corporation. The want of funds with which to pay such judgments is a question of execution, and not of indebtedness alone.

[3] Both our state Supreme Court and the federal courts have decided that the statute of limitations begins to run from the maturity of bonds and coupons such as are involved in this action. Stowell v. Rialto Irrigation District, 246 Fed. 294, 159 C. C. A. 24; Cal. Safe, etc., Co. v. Sierra, etc., Co., 158 Cal. 690, 112 Pac. 274, Ann. Cas. 1912A, 729. And more than four years have run from their maturity before the commencement of this action.

The conclusion we have reached on the question of the bar of the statute makes it unnecessary to consider what effect, if any, the judgment of the superior court in and for the county of Riverside, before mentioned, in the quo warranto proceeding, may have had on the legal existence of the defendant district.

The judgment of the lower court is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

49 Cal. App. 71

RYAN et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR SACRAMENTO COUNTY et al. (Civ. 2203.)

(District Court of Appeal, Third District, California. Aug. 25, 1920. Hearing Denied by Supreme Court Oct. 21, 1920.)

1. Nuisance ⊂=85—Red Light Abatement Act, providing that court "may" reopen premises gives court discretion as to so doing.

Under Red Light Abatement Act, § 9, providing that the court, if satisfied of the good faith of the applicant, may order the premises reopened, the entry of such order is in the trial court's discretion; the word "may," as used, not being intended to be construed to mean "must."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, May.]

2. Nuisance ⊂=85—Red Light Abatement Act requires proof of good faith of applicant for reopening premises.

Under Red Light Abatement Act, § 9, the burden rests on applicants, seeking an order to reopen the premises, to establish good faith.

3. Mandamus ⊂=28—Issued only on violation of duty, and not in discretionary matter, in absence of abuse.

Before the Supreme Court is authorized to issue a writ of mandamus, it must appear that the lower court has violated a duty imposed by statute; but it will not issue upon a matter in which the trial judge had a discretion as to being satisfied of a party's good faith, where

the judge did not act capriciously, arbitrarily, or without reason.

4. Mandamus ⇐154(2)—Petition should not allege conclusion, but basic facts.

In petition for mandamus, it can avail nothing to allege that the lower court's action "was and is without good or sufficient reason, or any good or any reason," etc., since this constitutes a mere conclusion, without value when independent of its basic facts.

5. Mandamus ⇐14(1)—Facts entitling to relief denied must have been presented in court sought to be coerced.

On application for mandamus, before it can be claimed the trial court acted contrary to law or abused its discretion, it must appear that all facts entitling petitioners to the relief denied were presented and proved in the trial court, or that it refused to permit such showing.

6. Nuisance ⇐85—Party seeking cancellation of order of abatement must show good faith.

To justify a demand for cancellation of an order of abatement under the Red Light Abatement Act, it was incumbent on the owner to show that he "had not been guilty of any contempt of the court in the proceedings," and satisfy the court of his good faith.

7. Mandamus ⇐168(4)—Evidence held insufficient for relief sought.

On petition for mandamus for failure to cancel an order issued under the Red Light Abatement Act, evidence *held* insufficient to satisfy the court that the order should be canceled.

8. Mandamus ⇐40—Error of trial court in considering evidence not reviewable on mandamus.

Even if the trial court was in error in considering, on petition to cancel an order under the Red Light Abatement Act, evidence given on the original trial, such error could not be reviewed on application for mandamus.

9. Mandamus ⇐14(1)—Necessity of showing situation requiring order denied.

The extraordinary writ of mandamus is "to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station" (Code Civ. Proc. § 1085), and before it may be ordered it must clearly appear that the situation was such before the inferior tribunal, and that the facts were so presented and proved or admitted that the law demanded a certain course of action from the tribunal, which it declined or failed to pursue.

On Application for Citation for Contempt.

10. Contempt ⇐9—Facts held to require denial of petition.

Where an open letter was sent to a court regarding a pending red light abatement proceeding, and before petition in contempt was filed, the party stated that there was no thought of attempting to influence the court, but merely to petition for decision as soon as possible, although such act may have been ill advised, where the court believes no useful purpose will be subserved by further proceedings, the contempt petition will be denied.

Petition by Ella Ryan, as executrix of the estate of Mary Sweeney, deceased, and another, for mandamus to the Superior Court of Sacramento County and C. O. Busick, as Judge thereof, to require delivery of property and cancellation of order of abatement upon giving bond. Petition dismissed.

Meredith, Landis & Chester and White, Miller, Needham & Harber, all of Sacramento, for petitioners.

Hugh B. Bradford, Dist. Atty., and J. R. Hughes, Asst. Dist. Atty., both of Sacramento, for respondents.

PREWETT, Presiding Judge pro tem. The people of the State of California, on the relation of the district attorney of said county, brought an action against said petitioners under the provisions of the "Red Light Abatement" Act (St. 1913, p. 20) to enjoin the maintenance of a nuisance on certain premises known as the "Casino Dance Hall." The court, on the trial, found that the nuisance existed and in due course entered its decree for the abatement thereof. This decree was subsequently affirmed on appeal. Thereafter the petitioners made application to said superior court for an order directing the delivery to the owners of the property affected by the decree and canceling the order of abatement. The petitioners offered to execute the bond required by said act and to pay the costs theretofore incurred.

[1] Section 9 of said act provides that the court, if satisfied of the good faith of the applicant, "may" order the premises reopened. The entry of such an order is in the discretion of the trial court. While it is true that the word "may" is sometimes construed to mean "must," where it is evident that the Legislature so intended it, still, in view of the purposes of the "Red Light Abatement" Act, the character of the evil to be dealt with, and the difficulty in establishing evasion of the decree, it is evident that the Legislature intended to vest discretion in the trial court in granting or refusing an application to reopen.

[2] Moreover, the trial court must be satisfied of the good faith of the applicant. No showing of such good faith was attempted. Indeed, no evidence was offered upon the point. The burden rests upon the petitioners to show their good faith. The court is required to determine the existence of this good faith, the same as it would determine any other question of fact.

The demurrer is sustained and the petition dismissed.

BURNETT, J. (concurring.) I concur in Judge PREWETT'S opinion and in the con-

clusion reached by him, but as the matter is of considerable importance I desire to express my views a little more fully.

An action was brought in the superior court of Sacramento county under the provisions of the so-called Red Light Abatement Act to enjoin the maintenance of a nuisance on the premises known as the "Casino Dance Hall" and to abate the use of such property for any purpose. The action was tried in said court, Hon. Charles O. Busick presiding, and judgment was rendered in accordance with the prayer of the complaint. The cause was carried through the higher courts and the judgment was affirmed. The remittitur was received and filed by the clerk of the trial court, and a few days thereafter petitioners herein made application to said court: (1) To fix and establish the full value of the property involved; (2) to accept the payment of all the costs as taxed in said action; (3) to accept a bond, conditioned as in section 9 of the Red Light Abatement Act provided, with sureties satisfactory to said judge; (4) thereupon to order the cancellation of the abatement portion of such judgment so as to permit the use of the premises involved for all lawful and legitimate purposes.

Petitioners base their claim upon the provisions found in section 9 of said act (Stats. 1913, p. 22), as follows:

"If the owner of the building or place has not been guilty of any contempt of court in the proceedings, and appears and pays all costs, fees and allowances which are a lien on the building or place and files a bond in the full value of the property, to be ascertained by the court with sureties, to be approved by the court or judge, conditioned that he will immediately abate any such nuisance that may exist at such building or place and prevent the same from being established or kept thereat within a period of one year thereafter, the court, or judge thereof, may, if satisfied of his good faith, order the premises, closed under the order of abatement, to be delivered to said owner, and said order of abatement canceled so far as the same may relate to said property."

The petition herein alleges that neither of said petitioners has been or is now guilty of any contempt of court in said matter. It sets out the amount of costs, etc., which is a lien upon said building, the full value of the property involved herein, avers that no nuisance, as the same is defined in said Red Light Abatement Act, now exists on said premises or property, and proceeds:

"That heretofore, and on the 10th day of May, 1920, the petitioner, Ella Ryan, as executrix of the estate of Mary Sweeney, deceased, appeared in said superior court, and before the said Hon. Charles O. Busick, judge, in said proceeding No. 22797 hereinbefore more particularly referred to, and offered to pay all costs, fees, and allowances which were then or are now a lien on the building and property hereinbefore described, and tendered the said court and judge the sum of $77, which the said court and the said Hon. Charles O. Busick, judge thereof, then and there refused to accept; that thereupon and then and there said petitioner paid the said sum of $77 to the clerk of said court in said proceeding in full payment of all the costs, fees, and allowances in said action; that thereafter, and on the said 10th day of May, 1920, in said proceedings and in said court and before said judge thereof, the said petitioner, Ella Ryan, as executrix of the estate of Mary Sweeney, deceased, requested and demanded of said court and judge" that he ascertain and fix the full value of said property, and promised that thereupon said petitioner would execute a bond in such sum with sureties satisfactory to and to be approved by said judge, "conditioned that she would immediately abate any nuisance, as defined in said Red Light Abatement Act, that might exist at said building or property hereinbefore described, and would prevent any nuisance, as the same is defined in said Red Light Abatement Act, from being established or kept thereat or thereon within a period of one year thereafter; that said petitioner did at said time and place petition said court, in the event of said bond, in the amount to be specified by said court and with the sureties satisfactory to and to be approved by said court, being presented to said court, to order the said order of abatement cancelled, so far as the same related to the said property hereinbefore described and in said action involved; that the said application of said petitioner to said court was and is made in absolute good faith, and with the full and true intention and desire to prevent the establishment or maintenance of any nuisance, as the same is defined in said Red Light Abatement Act, on said premises for the term of one year."

Then follows an allegation that said petitioner at the same time and place offered in open court to furnish a watchman or watchmen to be approved by said court and to be paid by petitioners to see that the conditions of said bond were observed. The petition herein proceeds:

"That no evidence, oral or documentary, was offered or received by the court, other than is herein set forth, and there was no evidence, oral or documentary, offered or received, tending to show any lack of good faith on the part of said petitioner in said proceedings had and done by her as hereinbefore set forth."

It is further alleged that said judge refused and still refuses to ascertain and fix the value of said property, or to accept any bond in said matter, or to order said premises delivered to said petitioner, or to cancel said order of abatement as far as the same relates to said property, but, on the contrary, has ordered the sheriff to sell the personal property and to close said building against its use for any purpose for the term of one year; that said action of the court and of the judge thereof—

"was and is without good or sufficient reason, or any good or any reason, and was and is will-

ful, capricious, and without any authority of law, and in direct violation of the plain provisions of the statute in such cases made and provided."

[3, 4] The principles that control the issuance of the writ of mandate have frequently been considered by this and other reviewing courts, and there is no need herein for a full exposition of them. It is sufficient to say that, before we are authorized to issue the writ, it must appear that the lower court has violated a duty imposed upon it by statute. That duty may consist in obedience to a plain mandatory direction of the law, wherein there is no room for discussion or option, or the statute may be formulated and projected in such terms as to confer upon the officer facultative or discretionary authority. Herein it is manifest that the trial judge is called upon to exercise his conscientious judgment in each particular case. This follows from the use of the term "may" and also the provision that the court "must be satisfied" of the good faith of the owner. Unquestionably this does not mean that the judge may act capriciously, or arbitrarily, or without reason; but it contemplates what the law recognizes as a just discretion, and if the decision of the court upon the case presented may be justified upon any reasonable ground, then the court's action is not subject to successful attack, at least by writ of mandate. However, if there has been what is denominated in the law an "abuse of discretion," that is, if it appears clearly that the court has decided arbitrarily and without reason, the decision may be undone through the office of this writ. But, to reach this result, facts must be presented to the higher tribunal from which the inference necessarily follows that the lower tribunal has so acted capriciously and without reason. It can avail nothing to allege that the action of the lower court "was and is without good or sufficient reason, or any good or any reason," etc., as this constitutes a mere conclusion, and is without value independent of the facts upon which it is based.

[5, 6] The particular vice of the petition herein is in assuming that the precedent facts upon which the right of petitioners to have said property restored to their use for lawful purposes must be alleged and shown in this court rather than in the court below. The truth is, however, that before it can be claimed that the trial court has acted contrary to the law, or has abused its discretion, it must appear that all the facts entitling petitioners to such relief were presented and proved in the court below, or else that said court refused to permit such showing to be made. There is no allegation of such refusal; therefore we look to the petition to see what facts were presented to said court. We have already set them forth, and it is clear that they are utterly insufficient to show that it was the trial court's duty to grant the relief that was asked by petitioners. To justify a demand for the cancellation of the order of abatement, it was incumbent upon the owner to show that he "had not been guilty of any contempt of court in the proceedings." It is true that such allegation is made in this court, but there is no specific averment that he either made such allegation in the court below or offered any evidence to prove it. Again, the court below must be "satisfied of the good faith" of the owner. How can the court be satisfied without a showing? It is difficult to say just what proof should be offered to produce that result, but at least it should have appeared by suitable averment and been established by proof that the owner was then conducting a lawful business in a lawful manner. Nothing of the kind occurred, judging from the allegations of the petition herein. The presumption is, of course, that they have stated their case as strongly as possible, and if such showing had been made we would be apprised of it. Moreover, they have expressly negatived any such condition, by alleging, as we have seen:

"That no evidence, oral or documentary, was offered or received by the court other than is herein set forth."

[7, 8] The fact is that, if we may look to the transcript of the proceedings before the trial court, which was submitted at the oral argument herein, we find that the only evidence on these important questions considered in the court below was the showing made at the trial of the main action. As to that the court said:

"The evidence was very strong showing that the place was openly conducted in violation of the Red Light Abatement Act, and the testimony taken, offered in behalf of the defense, was, openly presented in court, perjured testimony"

—and further that the witnesses who thus perjured themselves did so with the knowledge and acquiescence of the proprietors; that these witnesses testified to many things that were conclusively established in the action to be false and it must have been within the knowledge of the owners of said property. Even if it were conceded that it was an error for the trial judge to consider in this proceeding such testimony as was received in the original trial such error could not be reviewed on an application for this writ. The fact remains that the only evidence offered or considered as to the good faith of the owners could hardly be said in the most charitable view to be likely to make a favorable impression upon the mind of a judge disposed to enforce the law.

[9] In a word this extraordinary writ is issued "to compel the performance of an act which the law specially enjoins as a duty re-

sulting from an office, trust or station." Section 1085, Code Civ. Proc. Before it may be ordered, it must clearly appear that the situation was such before the "inferior tribunal"—in other words, that the facts were so presented and proved or admitted that the law demanded a certain course of action on the part of such tribunal, which it declined or failed to pursue. Such is not the case here, as has been shown. Said omissions from the petition are vital, and, as all intendments and presumptions are in favor of the regularity and validity of the proceedings in the court below, petitioners have utterly failed to make out a case herein.

I am authorized by Justice HART, who is temporarily absent, to state that he concurs in this conclusion.

On Application for Citation for Contempt.

PER CURIAM. [10] A verified petition had been filed herein by the said Ella Ryan, wherein it is claimed that certain parties, who are officers of a certain corporation known as the Sacramento Church Federation, have by an open letter attempted to influence improperly this court in the determination of the above-entitled cause, and have in an unwarranted manner aspersed the integrity of the justices thereof. Before said petition was filed the justice of this court, to whom said open letter was addressed, received from said federation a written communication in which it disclaimed any intention or desire to treat the court or members thereof contumaciously or disrespectfully, stating that "there was not a thought of attempting to influence the court in any way, merely a petition for a decision as soon as possible"; and, believing that no intentional wrong was contemplated by said federation, although its said action may have been ill advised, the court is of the opinion that no useful purpose would be subserved by any further proceeding in the matter, and the petition is therefore denied.

49 Cal. App. 204

ALBERTSEN v. ALBERTSEN. (Civ. 3550.)

(District Court of Appeal, First District, Division 1, California. Sept. 2, 1920.)

Appeal and error ⇐640—Appeal from order dismissed where notice to clerk was applicable to appeal from judgment and record was insufficient.

An appeal in a proceeding to annul a marriage from an order allowing alimony and expenses pendente lite will be dismissed, where it appears that appellant, after giving notice of appeal, served on the clerk the notice required by Code Civ. Proc. § 953a, in the form applicable to a final judgment, and failed to enumerate the particular papers and records to be incorporated in the transcript, so that the certificate of the judge as to the transcript was rendered uncertain in meaning.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Suit by Lauritz Albertsen against Hansine Albertsen for annulment of marriage. From an order allowing alimony, counsel fees, and costs pendente lite, plaintiff appeals. Appeal dismissed.

F. W. Sawyer, of San Francisco, for appellant.

Leon A. Clark, of Oakland, and M. J. Clark, of Livermore, for respondent.

PER CURIAM. This case is presented to us for determination upon the preliminary objection made by the respondent that there is no sufficiently authenticated record of the proceedings before us to enable us to pass upon the merits of the appeal. In our opinion this objection must be sustained. The appeal is from an order allowing alimony, counsel fees, and costs pendente lite in an action brought to annul or declare void a marriage between the parties to the action. The appellant, after giving notice of appeal, served upon the clerk the notice required by section 953a of the Code of Civil Procedure for the purpose of having a transcript on appeal prepared as required by that section. This, however, not being an appeal from a judgment, but from an order, and being therefore an appeal in a case in which there is no judgment roll, the appellant was required by the express provisions of section 953a to insert in his notice to the clerk an enumeration of the particular papers and records which he desired incorporated in the transcript. This the appellant did not do, but only gave to the clerk the notice in the form required by section 953a in cases where the appeal is from the judgment—cases, consequently, in which there is a judgment roll. The record leaves us somewhat in doubt as to whether the certificate of the judge appended to the end of the bound transcript herein is a certificate merely to the reporter's transcript, which appears to be a part of this volume, or is a certificate to the entire transcript, but in either event it merely amounts in form to the certificate which is required by section 953a to be appended to reporter's transcripts, and does not in form or substance include in its terms the certificate which is required to be made in a case where there is no judgment roll, in which case the judge is required to certify as to the papers used upon the hearing of the motion. This certificate does not purport to be of that character.

In the case of Thompson v. American Fruit Co., 21 Cal. App. 338, 131 Pac. 878, this question was considered, and it was there said:

"If it was appellant's purpose to present his appeal to this court under the original method of appeal he should have prepared and presented to the judge of the lower court for settlement a bill of exceptions, showing the papers, evidence, pleadings, and proceedings used and had upon the making of the order appealed from. That this was not his purpose, however, is apparent from the record before us, which does not purport to be an authenticated bill of exceptions as required by the rule of the Supreme Court. Apparently it was the purpose of appellant to take his appeal under the alternative method; but he failed to prepare and perfect the record in the manner and to the extent required by the Code provisions creating that method. After filing his notice of appeal under the provisions of section 941b of the Code of Civil Procedure, the appellant neglected to do any of the things required by section 953a of the same Code. In order to avail himself of the alternative method of appeal it was incumbent upon appellant, in addition to giving the notice of appeal, to file with the clerk a request for a transcript as provided by the section last mentioned, which would have consisted of copies of the moving papers, the evidence taken upon the hearing of the motion, and the rulings of the court thereon. Upon the completion of such a transcript it would have been the duty of the judge of the lower court to examine the same and certify its correctness to this court. * * * Inasmuch as we have not before us under either method of appeal a duly authenticated record of the proceedings had in the lower court upon the making of the order appealed from we are precluded from considering the matter upon its merits."

In a later case in the same volume (Pouchan v. Godeau, 21 Cal. App. 365, 131 Pac. 879) this court, again passing on the same question, held that the record there presented did not measure up to the requirements of section 953a, Code of Civil Procedure, and hence that the appeal in that case should be dismissed.

We regard these two cases as conclusive as to the sufficiency of the record before us, and our conclusion therefore and order is that the objection which the respondent makes to the sufficiency of this record be sustained, and the appeal dismissed. It is so ordered.

49 Cal. App. 92

GENTA v. ILLINGWORTH & DUNNELL.
(Civ. 3421.)

(District Court of Appeal, First District, Division 1, California. Aug. 28, 1920.)

1. Negligence ⟸136(9)—Question of fact.

Not every case involving negligence wherein the facts are undisputed presents simply a question of law, but only cases wherein the facts which are undisputed are those from which reasonable minds can rationally draw but one conclusion on the issue.

2. Warehousemen ⟸34(9) — Negligence of lessors of safety vaults held question of fact.

Defendants' negligence in failing to keep safely a vault containing rented safety deposit boxes, from which the contents were stolen when defendants' store was burglarized, *held* a question of fact for the trial court, so that its conclusion in favor of defendants was not reviewable on appeal.

Appeal from Superior Court, Kern County; W. W. Kaye, Judge.

Action by John Genta against Illingworth & Dunnell. From judgment for defendants, plaintiff appeals. Affirmed.

E. J. Emmons, of Bakersfield, for appellant.

Charles L. Chandler, of Los Angeles, and W. A. McGinn, of Bakersfield, for respondents.

RICHARDS, J. This is an appeal from a judgment in the defendants' favor. The facts out of which the case arose are these: The defendants on and for some time prior to May 10, 1916, had been doing a general mercantile business in the town of Randsburg, county of Kern, and some time previous to said date had installed in their store a large concrete vault containing a safe, and within said safe a series of 16 safety deposit boxes. These they had advertised for rent and had rented to a number of persons, who had deposited their private papers and various sums of money therein. On the night of May 10, 1916, the store of said defendants was burglarized, the vault broken into, the locks upon these safety deposit boxes also broken, and the contents of the boxes stolen. The renters of these boxes demanded reimbursement from the defendants, which being refused, they assigned their claims to the plaintiff herein, who was one of the largest losers through the burglary, and he brought this action on behalf of himself and his assignors to recover from the defendants their total loss, amounting to $5,333.

The appellant here contends that upon the facts of the case the defendants had so negligently and carelessly conducted themselves in relation to the said safety deposit boxes that the amounts of money contained therein had been taken and lost by the burglary of their said store. The trial court found against this contention, and from its judgment, based upon such finding, the plaintiff prosecutes this appeal.

[1, 2] The appellant here contends that upon the facts of the case the defendants were guilty of negligence as a matter of law, and that the trial court was in error in not so determining. It is true that the facts of the case are in the main undisputed; but it does not necessarily follow that the question

as to whether or not the defendants were negligent became thereby a question of law which it is the duty of this court to review and resolve upon this appeal. It is not every case involving negligence wherein the facts are undisputed that presents simply a question of law; but it is only those cases wherein the facts which are undisputed are those from which reasonable minds could rationally draw but one conclusion upon the issue in respect of the negligence of the party charged. Walgren v. Market Street Ry. Co., 132 Cal. 656, 62 Pac. 308, 64 Pac. 993; Hampton v. Occidental S. S. Co., 139 Cal. 706, 73 Pac. 579; Loftus v. Pac. Elec. Ry. Co., 166 Cal. 464, 137 Pac. 34; Henderson v. Northam, 176 Cal. 493, 168 Pac. 1044. We are of the opinion that this is not such a case, but that upon the facts of this case, as shown before the trial court, the question of the defendants' negligence was one concerning which reasonable minds might rationally disagree, and hence that the conclusion arrived at by the trial judge, with the parties before it and dealing directly with the testimony educed at the trial, cannot be made the subject of review upon this appeal.

No other error being urged by the appellant, the judgment is affirmed.

We concur: WASTE, P. J.; WELCH, Judge pro tem.

(49 Cal. App. 154)

MONK et al. v. MORGAN et al. (Civ. 3400.)

(District Court of Appeal, First District, Division 1, California. Sept. 1, 1920. Rehearing Denied Oct. 1, 1920. Hearing Denied by Supreme Court Oct. 28, 1920.)

1. Courts ⟸202(1)—Statutory notices given by probate court binds parties interested whether they appear or not.

The proceeding for the probate of an estate being in the nature of a proceeding in rem, the giving of a notice as directed by the statute calls the entire world before the court, which thereby gains jurisdiction over the estate and over all persons for the purpose of determining the rights to any portion of the estate, and any person who may assert any right or interest therein is required to present his claim, and the court's determination is conclusive upon him whether he appears or not.

2. Courts ⟸202(1)—Where constructive notice is defective, subsequent proceedings subject to attack.

Where there is any defect in the constructive notice to persons interested in a decedent's estate to appear, given by the issuance of the statutory notices, and parties interested fail to receive such constructive notice, all subsequent action of the court based thereon is subject to attack either in that or in a later equitable proceeding.

3. Courts ⟸202(1)—Probate court acquired jurisdiction over nonresident heirs by constructive notice regardless of fraud of administrator.

Where an administrator caused the necessary statutory notices of administration to be given, the probate court acquired full jurisdiction over nonresident heirs and their interest in the estate, notwithstanding that the administrator falsely pleaded and testified that he and his sister were the sole heirs to the exclusion of such nonresidents.

4. Courts ⟸202(1)—Duty of administrator as to notice of proceedings of probate court stated.

All an administrator is required to do in giving notice to heirs and others interested in the estate is to give the requisite statutory notices.

5. Executors and administrators ⟸315(4)—Fraud in enumerating heirs held not ground for relief against decree for distribution.

That an administrator falsely represents to the court that he and his sister are the sole heirs of decedent, and thereby procures a decree of distribution to be made on that basis, does not entitle omitted heirs to relief in equity; the fraud being intrinsic merely.

6. Trusts ⟸102(2)—Fraud of administrator procuring decree for distribution justified imposition of trust in favor of omitted heirs.

Where an administrator, by falsely representing to the court that he and his sister were the sole heirs of decedent, procured a decree of distribution to be made on that basis, and it appeared that, by sending a remittance to a third person according to a custom of decedent, he prevented other heirs living in the vicinity of such third person from discovering the fact of death and administration, his act constituted such extrinsic fraud as to justify a decree imposing upon the decedent's property in administrator's hands a trust in favor of such omitted heirs.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Suit by Emma Monk and another against George Morgan and another to impose a trust upon certain property distributed to defendants by a decree of distribution of the estate of Henrietta M. Cox, deceased. Decree for plaintiffs, and defendants appeal. Affirmed.

Frank J. Murphy, of San Francisco, for appellants.

Maurice R. Carey, of San Francisco, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiffs in an action brought by them against the defendants to impress a trust in plaintiffs' favor upon certain property which had been distributed to the defendants by a decree of distribution

in the matter of the estate of Henrietta M. Cox, deceased; the basis of said action being certain alleged fraudulent acts and conduct on the part of said defendants during the course of probate of said estate.

The averments of the plaintiffs' complaint in that regard may be summarized as follows: Henrietta M. Cox died intestate on April 3, 1915, at Long Beach, Cal., where she had resided for a number of years, leaving an estate consisting of real and personal property and having for her sole surviving heirs her first cousins, the plaintiffs and defendants in this action. The defendants at the time of the death of said Henrietta M. Cox were living in California and at or near the place of her decease. The plaintiffs then and for many years prior thereto lived at several places in or near the city of Brooklyn, state of New York. Shortly after the death of Henrietta M. Cox the defendant George Morgan filed a petition for letters of administration upon the estate of said decedent and for his appointment as the administrator of said estate, and in his said petition asserted that his sister and codefendant, Louisa Arnold, and himself were the sole surviving first cousins, next of kin, and heirs at law of said decedent. Having been appointed such administrator, he proceeded with the administration of said estate up to and including the distribution thereof, in his petition for which he again alleged that his said sister and himself were the sole surviving next of kin and heirs at law of Henrietta M. Cox, and as such entitled to distribution to themselves of the whole of said estate. At all times during the progress of the administration of said estate, whenever it was requisite so to do, the said defendant, George Morgan, testified in support of these averments of his several petitions, and during all of said times suppressed and concealed from the probate court wherein such administration of said estate was being had the fact that the plaintiffs herein were also first cousins, next of kin, and heirs at law of said decedent, and as such were entitled to have distributed to them their proportionate share of her estate. The plaintiffs allege that these various acts of fraud and concealment and perjury on the part of said defendant George Morgan were committed in the course of a conspiracy and agreed collusion between himself and his codefendant, having for its purpose the perpetration of a fraud upon said court and upon the plaintiffs herein, as a result of which said plaintiffs were defrauded out of their just share in said estate.

The defendants demurred to the plaintiffs' complaint setting up the foregoing averments as to the defendants' conspiracy, fraud, and concealment in connection with the administration of said estate, and the complaint was several times amended. In their second amended complaint the plaintiffs for the first time inserted averments to the effect that during the course of the administration of said estate the said defendant, George Morgan, had caused to be sent to one Henrietta Morris at Southampton, Long Island, state of New York, a certain remittance in the sum of $60 in the form of a draft, which did not disclose on its face from whom it came, but which appeared to be the last of a course of annual remittances of a like amount which the decedent, Henrietta M. Cox, had been accustomed to send during the month of September of each year to said Henrietta Morris, who was her second cousin; and said plaintiffs alleged that the sending of said remittance by said George Morgan was done in such a manner as to induce said Henrietta Morris to believe that said Henrietta M. Cox was still alive, and was sent with intent to induce such belief, and that the same did induce said Henrietta Morris to believe that Henrietta M. Cox was still alive, and was sent with the intent of keeping and did keep said Henrietta Morris in ignorance of the death of said Henrietta M. Cox, thereby preventing her from communicating or causing to be communicated to the plaintiffs herein, who resided in her vicinity, any knowledge or notice of the death of said Henrietta M. Cox and of the fact that her estate was being administered upon, until such time as a decree of distribution therein had been made and had become final.

To the averments of the plaintiffs' pleading as finally amended the defendants made their specific denial, and the cause proceeded to trial upon the issues thus presented. Much testimony was produced on both sides in relation to the alleged fraudulent acts of the defendants; and upon the conclusion of the trial and the submission of the cause the trial court made its findings of fact in favor of the plaintiffs substantially sustaining the averments of their second amended complaint with respect to the several acts of collusion, conspiracy, fraud, and concealment alleged to have been committed by them during the course of the probate of said estate. In respect to the averments of the plaintiffs' second amended complaint concerning the sending of said remittance to said Henrietta Morris, the court made the following finding of fact:

"That it is true that after the death of Henrietta M. Cox, deceased, and prior to the 1st day of October, 1916, defendant, George Morgan, did voluntarily and without any request, order, or claim of any kind being made therefor, make a remittance in the sum of $60 to Henrietta Morris at Southampton, Long Island, state of New York; that said defendants, George Morgan and Louisa Arnold, at the time said remittance was made as aforesaid, did each know that said Henrietta Morris was a surviving second cousin of said Henrietta M. Cox, deceased, and related as a second cousin to

each of the plaintiffs above named and defendants, George Morgan and Louisa Arnold; that said remittance was made by said George Morgan as aforesaid in such a manner and with the intent and design to induce and which did induce said Henrietta Morris to believe that said Henrietta M. Cox was still alive, and to keep and which did keep said Henrietta Morris in ignorance of the death of Henrietta M. Cox, and thereby preventing and which did prevent said Henrietta Morris from communicating or causing to be communicated to plaintiffs above named or either of them notice of the death of said Henrietta M. Cox, deceased, until after said decree of distribution had become final, and such remittance was so made and said defendant George Morgan did conduct himself and affirmatively act for the purpose of keeping each of said plaintiffs in ignorance of the death of said Henrietta M. Cox, deceased, and that her estate was being administered upon and distributed, as well as all proceedings taken or resorted to in connection with the administration of said estate. * * *"

Judgment of the trial court following said findings of fact was in favor of the plaintiffs decreeing that the defendants, George Morgan and Louisa Arnold, took and held the property of the estate of Henrietta M. Cox awarded to them by the decree of distribution therein charged with a trust in favor of the plaintiffs, Emma Monk and Lydia Y. Wallwork, to the extent of a one-fourth interest in favor of each in said estate, and for an accounting thereof and in relation to the properties affected thereby, and the rents, issues, and profits thereof, to said plaintiffs. From such judgment the defendants have prosecuted this appeal.

The contention of the appellants herein is threefold: First, that the second amended complaint of the plaintiffs herein upon which said cause went to trial failed to make out a cause of action based upon extrinsic fraud, and hence that the demurrer to said complaint should have been sustained; second, that the findings of the court show that the defendants' fraud, if any such was proven, was intrinsic, and that such findings were for that reason insufficient to support the judgment; and, third, that the evidence in the case is insufficient to sustain the findings of the court. For these several reasons the appellants contend that the judgment should be reversed, and that a judgment in favor of the defendants should be rendered and entered herein.

[1, 2] Before entering upon the discussion of the questions raised by the foregoing contentions, it may be well to touch upon certain matters discussed by respective counsel in their briefs and arguments before this court, since these have their bearing upon the application of certain cases cited by respective counsel in support of their respective contentions. In entering upon this preliminary discussion it is to be noted that the plaintiffs do not assert in their pleadings nor attempt to show by their proof that any or all of the probate notices required to be given in the course of the probate of the estate were not duly and regularly given in accordance with the law relating to the giving of the same. The proceeding for the probate of an estate is, under our statutes, in the nature of a proceeding in rem; and, this being so, it has been frequently held that by the giving of the notices directed by the statute the entire world is called before the court, and the court acquires jurisdiction thereby over the estate and over all persons for the purpose of determining their rights to any portion of the estate, and that by virtue thereof every person who may assert any right or interest in said estate is required to present his claim to the court for its determination, and that, whether he appear and present his claim or fail to so appear, the action of the court is equally conclusive upon him. William Hill Co. v. Lawler, 116 Cal. 359, 48 Pac. 323; In re Griffith, 84 Cal. 113, 23 Pac. 528, and 24 Pac. 381; Estate of Aldrich, 147 Cal. 343, 81 Pac. 1011; Lynch v. Rooney, 112 Cal. 279, 44 Pac. 565; Estate of Leonis, 138 Cal. 194, 71 Pac. 171; Estate of Allen v. Elliott, 176 Cal. 632, 169 Pac. 364; Cunha v. Hughes, 122 Cal. 111, 54 Pac. 535, 68 Am. St. Rep. 27; In re Maxwell, 74 Cal. 384, 16 Pac. 206; Warren v. Ellis, 39 Cal. App. 542, 179 Pac. 544; Beltran v. Hynes, 180 Pac. 540; Mulcahey v. Dow, 131 Cal. 73, 63 Pac. 158. On the other hand, it has been held that where, by reason of any defect in the procedure attending the issuance or giving of such constructive notice as is required to be given, either in probate or other cases, to give the court jurisdiction, the parties affected did not receive such constructive notice, all subsequent action of the court based thereon is subject to attack either in that or in a later equitable proceeding. Such are the cases of Dunlap v. Steere, 92 Cal. 344, 28 Pac. 563, 16 L. R. A. 361, 27 Am. St. Rep. 143, Parsons v. Weis, 144 Cal. 420, 77 Pac. 1007, and Doyle v. Hampton, 159 Cal. 733, 116 Pac. 39, in each of which cases the procedure for acquiring jurisdiction over the parties affected by such constructive notice as was required to be given was defective.

[3] In the instant case, however, it cannot be contended on the part of the respondents that the probate court did not acquire full jurisdiction over them and over their interest in said estate through the giving in due form of the probate notices required to be given by posting during the several stages in the probate of said estate in which, through the false and fraudulent pleadings on the part of the administrator and the false testimony given by him in support thereof, the probate court was misled and the interests of said plaintiffs were injuriously affected.

[4] It may be further stated in limine that the defendant George Morgan, either in his capacity as a coheir with said plaintiffs in said estate or in his capacity as administrator thereof, owed to the plaintiffs herein no further duty in the way of informing them either of the death of Henrietta M. Cox or of the fact of his appointment to be the administrator of her estate, or of the various steps taken by him as such administrator or by the court in such administration up to and including the entry of the decree of distribution therein, other than that which would have been afforded to them and each of them through the giving of the notices required by law to be given during such administration, and which, having been duly given, constituted constructive notice to said plaintiffs as to the death of the decedent and as to all proceedings taken and had in the course of the administration of her estate. Mulcahey v. Dow, supra; Beltran v. Hynes, supra.

These preliminary matters having been thus disposed of, we are brought face to face with the main questions which have been presented and strongly urged by the appellants in their elaborate and very well presented briefs upon this appeal. The first of these questions is as to whether the defendants' alleged acts and conduct in presenting to the probate court the petition of the defendant Morgan to be appointed administrator of said estate, and the subsequent acts and conduct of said Morgan, concurred in by his codefendant, during the course of administration of said estate, wherein it was repeatedly and falsely asserted and repeatedly and falsely testified to by said Morgan that he and his sister were the sole heirs of Henrietta M. Cox, deceased, by which continuous course of false and fraudulent assertions and concealments the said court had kept from it all knowledge of the existence and rights of the plaintiffs as heirs of said decedent and as persons equally entitled with said defendants to have distributed to them the undivided one-half of said estate, constituted such extrinsic fraud as would have entitled the trial court, sitting as a court of equity in the instant case, to render the decree which it did render in favor of the plaintiffs herein.

[5] This question is not free from difficulty; for, while it must be conceded that the defendants herein owed to the plaintiffs herein no further duty in relation to the probate of said estate than that which was fully performed by the administrator thereof in causing to be given from time to time the probate notices required by law, it must also be conceded—or at least must be held to have been sufficiently supported by the evidence in the case to justify the court's finding—that the plaintiffs at no time during the probate of said estate had any actual knowledge either of the death of Henrietta M. Cox or of the fact of said probate proceedings or of any of the steps being taken therein, and that their first actual knowledge of these facts was of a date after such decree had become final, and that by reason of their total lack of such notice or knowledge they had no opportunity to present themselves in the probate court and to there resist the fraudulent designs of said defendants to secure to themselves the whole of said estate. The respondents contend that upon the showing and finding of this absence of actual knowledge in respect of the foregoing matters, and of the necessary absence, therefore, of any opportunity on their part to appear in court during the various stages of the probate of said estate to resist the defendants' fraudulent claims and to expose to the court their false and fraudulent assertions and concealments therein, there was at no time an actual issue, contest, or trial before said probate court as to the respective rights of the parties to this case in and to the estate of Henrietta M. Cox, deceased; and they therefore urge that the case of Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159, and the other cases in the main above cited, upon which the appellants strongly rely, are not to be given application to the case at bar. While there is much cogency in this contention, we are constrained to hold, in the light of the foregoing cases so relied upon by the appellants herein, that were the respondents to place their reliance solely upon the fact that the defendants herein, in seeking and proceeding with the probate of said estate, indulged in the various acts and assertions and engaged in the giving of the false testimony attributed to them, and thereby so far imposed upon the court as to induce it to make and enter its decree of distribution giving to said defendants the whole of said estate to the exclusion of the plaintiffs herein equally entitled to an undivided one-half thereof, they could not be held to have made a sufficient showing herein to have justified the judgment in their favor, since all of the aforesaid acts and conduct of the defendants must be held, in the light of the foregoing authorities, to have constituted intrinsic fraud from the effect of which the plaintiffs cannot have relief in a court of equity.

The respondents herein, however, do not rely solely upon the foregoing facts in relation to the false and fraudulent pleadings and proofs of the defendants during the progress of the probate proceedings; but they set forth and rely upon the additional facts to which we have above adverted in relation to the sending of the remittance for $60 to Henrietta Morris while the estate was in process of probate, and which it is claimed had the purpose and effect of concealing from Henrietta Morris and from

these plaintiffs the fact of the death of Henrietta M. Cox, and hence the fact that any proceedings in probate were pending, thereby beguiling these Eastern relatives and heirs of Henrietta M. Cox into the belief that she was still living, and thus preventing them from appearing in the probate court to contest the defendant's false and fraudulent assertions and to claim their rightful share in her estate. We are satisfied, from a careful examination of the record herein, that the finding of the trial court upon this episode which is above set forth in part finds full support in the evidence in the case, from which it appears that the draft in question was sent to Henrietta Morris at just that time of the year at which remittances in similar amounts had been theretofore regularly and annually transmitted by Henrietta M. Cox while alive. It was sent by the defendant George Morgan while he was administrator of the estate, and its amount was charged by him against the estate in his final account. The draft, however, upon its face did not purport to come from him as such administrator, nor from him at all in fact, nor was there anything about it to indicate that it was not a bank draft procured and sent by Henrietta M. Cox while still living, nor was the remittance accompanied by any letter or other indication showing that she was dead or that it was being sent by the administrator of her estate. The receipt of this draft by Henrietta Morris resulted in the sending of a letter by her addressed to Henrietta M. Cox, which in both its direction and substance showed that Henrietta Morris believed that Henrietta M. Cox was still living and in conformity with her annual custom had transmitted to her said remittance. To this letter, which George Morgan received in his capacity as administrator, he made no reply. These facts, taken in connection with the additional facts that Henrietta Morris lived in such propinquity to the plaintiffs herein and to other of the Eastern relatives of Henrietta M. Cox that, had the sending of this remittance been attended by any letter or other indication showing the fact of her death and of the pending probate of her estate, such facts would have been transmitted to the Eastern relatives of Henrietta M. Cox and to these plaintiffs, who, having thus received actual notice and knowledge of the death of Henrietta M. Cox, would have been in a position to make their timely appearance in the probate court and set forth their claims to an interest in her estate.

[6] The trial court has found, as we have seen, that the acts and conduct of George Morgan in relation to the sending of this remittance were undertaken with the fraudulent design on his part of concealing the fact of the death of Henrietta M. Cox and of the pending proceeding in probate for the administration of her estate from her Eastern heirs, and of thus preventing them from making their timely appearance in the probate court to contest his false and fraudulent representations being made therein, and to claim and prove their right to receive in distribution an undivided one-half of the decedent's estate. There can be no question but that such acts and conduct on the part of the defendant herein, done with the knowledge and concurrence of his codefendant, and having the effect which they are thus found by the court to have had, would constitute extrinsic fraud within the definition of that term found in the case of Pico v. Cohn, supra, and in the long line of later decisions, most of which are above cited and which follow and restate the doctrine declared in that early case. We are therefore of the opinion that the contention of the plaintiffs in relation to the matters last above considered was sufficiently pleaded, amply proven, and correctly found by the trial court, and that the same constitutes such a sufficient showing of extrinsic fraud on the part of the defendants herein as to justify and uphold the judgment entered herein and from which this appeal has been taken.

The judgment will therefore be affirmed.

WELCH, Judge pro tem., concurs.

WASTE, P. J. I concur. The defendant Morgan, as administrator of the estate of Henrietta M. Cox, deceased, occupied a trust relation towards the plaintiffs, who were entitled to share in the estate. Robins v. Hope, 57 Cal. 497. Other than the plaintiffs, he and his sister, the defendant Louisa Arnold, were entitled to distribution to themselves of the whole of the estate. That was what they were seeking. Whatever they could withhold from the plaintiffs was so much gained to them. The action of Morgan, fully described in the majority opinion, was a device intended to prevent the plaintiffs from submitting their claims to the probate court for determination. It was extrinsic fraud which entitled the plaintiffs to the intervention of a court of equity to set aside the decree, or, as is being sought here, to impress the property with a trust in plaintiffs' favor. Bacon v. Bacon, 150 Cal. 483, 489, 89 Pac. 317.

49 Cal. App. 103

MOORE et al. v. FRANKLIN et al.
(Civ. 3413.)

(District Court of Appeal, First District, Division 1, California. Aug. 30, 1920.)

1. Appeal and error ⊜731(5)—Sufficiency of evidence will not be considered where not specified particularly.

In an action to construe an escrow agreement, where appellants in their bill of exceptions failed to specify wherein the findings were unsupported by evidence, the question of sufficiency of evidence cannot be raised on appeal, in view of Code Civ. Proc. § 648.

2. Appeal and error ⊜732—Rule that insufficiency of evidence must be specified particularly applies to order denying new trial.

The rule that, under Code Civ. Proc. § 648, when the exception is to the verdict or decision upon the ground of insufficiency of evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient, applies to an order denying a new trial.

3. Appeal and error ⊜724(5)—Failure to specify insufficiency of evidence not cured specifications on new trial.

Where the bill of exceptions fails to specify the particulars of insufficiency of evidence as required by Code Civ. Proc. § 648, a specification in appellant's notice of motion for new trial as to wherein the evidence preponderated in favor of certain allegations of their complaint against which the court found does not remedy the defect; such notice being no part of the bill of exceptions nor incorporated therein nor referred to thereby.

4. Trusts ⊜284—Evidence sustaining finding that beneficiary under trustee's deed owned certain part of realty under escrow agreement.

In a suit to construe an escrow agreement involving an interest in real estate devised to trustees and by them conveyed to the beneficiary to extinguish the trust, wherein the amount of the interest of such beneficiary was in issue, evidence *held* to support a finding that the beneficiary received under the deed and owned an undivided one-fifth part in the property involved.

5. Evidence ⊜415—Parol evidence held admissible to support written instrument to relieve grantor from charge of fraud.

In a suit to construe an agreement whereby certain conveyances were held in escrow and to determine the shares to be apportioned to each of certain distributees on the distribution of the estate which formed the subject of the escrow, wherein it appeared that a trustee who was also a distributee had conveyed to the beneficiary his interest, and that charges of fraud had been made against such trustee as to representations concerning the ownership of the property involved, parol evidence was admissible to explain the whole transaction; a fiduciary relation existing between the trustee and the other distributees.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Anna B. Moore and others against Belle O. Franklin and others for the construction of escrow agreement. Judgment for defendants, and plaintiffs appeal. Affirmed.

Balaam, Balaam & Garnett and B. F. Thomas, all of Santa Barbara, for appellants.

Wm. G. Griffith, of Santa Barbara, and Robert M. Clarke, of Los Angeles, for respondents.

WELCH, Judge pro tem. Action concerning an escrow agreement involving an interest in real estate and in the proceeds of sales under said agreement. The facts had better be stated chronologically.

In December, 1893, Agnes B. Oglesby died testate in the city of Santa Barbara. She left a large estate, a part of which was block 70½ of land in the city of Santa Barbara. She had five children, three daughters and two sons. To each of the three daughters she gave an undivided one-fifth interest in and to said block of land, and the other two-fifths she willed to two of her daughters in trust for her two sons, D. F. Oglesby and A. A. Oglesby. The names of the trustees were Belle O. Franklin, a defendant, and Frances W. Oglesby, since deceased. Each of the sons was to have an undivided one-fifth interest in the residue of said estate, which included said block. The terms of the trust are not stated, and the will is not brought up in the record. The block was distributed "in accordance with the ninth paragraph of said will" in September, 1895.

Just before the mother's death she called the two trustees, her daughters, to her and told them that she was going to dispose of her property by deeds instead of by will, and that the trust features in the will regarding her two sons must be released. She instructed her attorney to draw up deeds to that effect. She died, however, before her purpose was consummated. A. A. Oglesby was then city attorney of Santa Barbara. This fact was stated by the mother as a reason for releasing the trust. Soon after the distribution of the mother's estate, under the terms of the will, the trustees and beneficiaries agreed to deed back and forth like they had done in the matter of the estate of their father and thereby straighten out the title and do away with the trust.

On November 6, 1895, two months after the distribution of their mother's estate, the trustee sisters and their brothers agreed orally to end the trust according to their mother's wish. D. F. Oglesby, unskilled in conveyancing, drafted the two deeds with the aid of his brother, A. A. Oglesby. These

two deeds are dated November 6, 1895. They are grant, bargain, and sale deeds and each recites a consideration of $2,000. Both of these deeds are signed by the sisters. They contain no recital of the trust. One deed is to Gideon E. Franklin, Jr., and described some of the residue of the property distributed to the grantors to be held by them in trust for A. A. Oglesby under his mother's will, but not all of it. Nor does the deed correctly describe the interest which he was to receive in some of the property. It did, however, describe an undivided one-fifth part in block 70½ of the city of Santa Barbara. This deed was acknowledged November 9th and recorded at the request of A. A. Oglesby December 3d. The other deed is to Edwards Franklin and describes some property that does not appear in the decree of distribution of the mother's estate, but does contain a description of a block which was distributed to the grantors in trust for D. F. Oglesby. Like the other deed above mentioned, the interest in some of the property therein described did not correspond to those of the decree of distribution in said estate. This deed, however, contained a description of an undivided one-fifth interest in said block 70½, but differed slightly from the description of the deed to Gideon from the trustees. This deed to Edwards was not acknowledged until March 23, 1896, and was recorded at the request of D. F. Oglesby April 10, 1896, three months after the transaction herein involved. These are the only deeds of conveyance shown to have been made by Belle O. Franklin and Frances W. Oglesby. It is evident on its face, taken in connection with the decree of distribution creating the trust, that the deed recorded by D. F. Oglesby was intended by the grantors and beneficiaries as an execution of the trust in favor of D. F. Oglesby. The grantors had no interest in some of the property therein conveyed, and neither had A. A. Oglesby. It should be stated that by the agreement of all the parties these deeds were to be made to Franklin, a relative, for the purpose of his conveying to the brothers the respective properties conveyed to him. Gideon E. Franklin, Jr., and Edwards Franklin is one and the same.

On December 3d, the day A. A. Oglesby recorded the deed above mentioned from the sisters to Gideon E. Franklin, Jr., he also recorded another deed from Gideon to himself of the same property. Again on December 9th Gideon, by and in the name of Edwards Franklin, made another deed to A. A. Oglesby, in which deed the same property which the trustees had conveyed to him and which he had deeded to A. A. Oglesby by deed dated six days before was described, with one important change, of course, and some minor changes of the spelling of Spanish names of streets. This last-named deed was made to correct the grantor's former deed of a few days before. This fact was established not only by the testimony of the surviving trustee, but by the internal evidence found in said deeds and decree of distribution. What became of D. F. Oglesby's interest we are not informed, nor are we concerned with it. His interest is thus far traced to the extent of the record to show that the deed he recorded was meant for him and no part of it for his brother A. A. Oglesby.

A. A. Oglesby died about two years after receiving and recording the three deeds above mentioned, one from his sisters to Gideon, one from Gideon to himself, and another from Edwards to himself, all describing the identical property with some differences in description and spelling above noted. A. A. Oglesby's heirs were plaintiffs herein, Mildred, his wife, and Anna B. and Frances, his daughters. His estate was administered and his interest in said block 70½ was inventoried and distributed as an undivided one-fifth interest therein. Before his death A. A. Oglesby dealt with his interest in said block as an undivided one-fifth interest only, as his heirs did from the time of his death down to the time of the commencement of this action.

After their father's death, and long before the bringing of this suit, Frances W. Oglesby, who was one of the trustees above mentioned, died, and her estate was probated. The one-fifth interest which was inherited from her mother, Agnes B. Oglesby, and which interest was distributed to her under her mother's will, was administered upon and one-fourth of this one-fifth interest was distributed to the two daughters of A. A. Oglesby, who are plaintiffs herein. If Frances W. Oglesby had parted with her individual interest in said block 70½, as claimed by appellants, by the deeds above mentioned, instead of the interest she held in trust for A. A. Oglesby, then she would not have had any interest in said block at the time of her death. This is conceded by counsel for appellants in their brief. Yet these plaintiffs took by distribution from their aunt's estate an undivided one-fourth interest in the estate's one-fifth interest in said block, the very property which they now claim the aunt parted with to the father 25 years ago.

Believing that they owned the undivided one-fifth interest administered in their father's estate and the one-twentieth interest received from their Aunt Frances' estate, the two daughters of A. A. Oglesby, plaintiffs herein, in February, 1915, joined with their two living aunts in signing the escrow agreement to sell said block 70½. After this agreement had been placed in the Santa Barbara County National Bank, as an escrow holder, and after it had been partially executed by a sale of several lots of the block, plaintiffs brought this suit for an adjudi-

cation that, instead of being the owners of an undivided one-fourth part of said block, they are the owners of an undivided three-fifths of said block, and are therefore entitled to three-fifths of the proceeds of the sale of said block, instead of one-fourth only. And this is the way they arrive at their interest: Belle O. Franklin and Frances W. Oglesby held an undivided one-fifth part in said block 70½ in trust for their father, which trust they assert has never been executed, and which interest went to them on the death of their father. The other two-fifths they claim was received one-fifth from Gideon E. Franklin, Jr., to their father, and the other one-fifth from Edwards Franklin to their father, making three-fifths owned by him at the time of his death instead of the one-fifth administered upon. They fortify this plausible claim by maintaining that the written evidences of their title are "clear in meaning and intent and do not require extraneous testimony to add to or detract from the terms of the deeds, in order to make their parts clear, and any extraneous testimony which may have been introduced upon the trial for that purpose is irrelevant, incompetent, and immaterial."

In their complaint plaintiffs allege that they were the owners of an undivided three-fifths interest in and to said block 70½. The court found that they were and are the owners of an undivided one-fourth interest only; the same being the proportional claim of the proceeds of the sale as set forth in the escrow agreement.

[1-3] Appellants chose to appeal on a bill of exceptions. In the bill they failed to specify wherein the findings are unsupported by the evidence. They also moved the court for a new trial, and in their amended notice of motion they made certain specifications wherein they claim that by a preponderance of evidence they had established certain facts opposite to those found by the court. The bill of exceptions purports to set forth the evidence adduced at the trial, but contains no specifications whatever. This being the state of the record the point made by appellants that the evidence is insufficient to support the decision cannot be raised here. "No particular form of exception is required, but when the exception is to the verdict or decision upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be sufficient." Section 648, Code Civ. Proc. And this same rule applies to an order denying a new trial. Hawley v. Harrington, 152 Cal. 188, 92 Pac. 177. Nor have appellants bettered their condition by undertaking to specify in their notice of motion for a new trial wherein the evidence preponderates in favor of certain allegations of their complaint against which the court found; for that notice, while a part of the record on appeal by the certificate of the clerk, is no part of the bill of exceptions, nor is it incorporated in or referred to by such bill. Sprigg v. Barber, 122 Cal. 573, 55 Pac. 419; Carver v. San Joaquin Cigar Co., 16 Cal. App. 761, 118 Pac. 92.

The bill of exceptions does not contain any particular specifications of errors. It does, however, contain exceptions to certain rulings of the trial court. These rulings more or less involved the question of the sufficiency of the evidence to support the findings. We shall consider these rulings, and in doing so have examined the record, and have concluded the findings of the court are supported by the evidence.

The complaint alleged that soon after the death of the father of said plaintiffs the defendant, Belle O. Franklin, falsely and fraudulently represented to these two plaintiffs that they each owned a one-eighth part or interest only in said block of land. The court found that said defendant made no false or fraudulent representations whatever to said plaintiffs or either or any of them.

Appellants point out in their opening brief no particular exception to any oral testimony introduced or adduced concerning the deeds upon which they rely to establish their claim of title. In their brief they state generally that the language in the deeds is clear, the intent of the parties is fully expressed, and that parol evidence upon the hearing was not admissible to prove that the parties intended something different from what the language of the deeds themselves expressed. Dealing with the objections in the same general way as presented in the opening brief of appellants, suffice it to state generally what occurred on the trial of this branch of the case. The court sustained objections of appellants to questions put to the surviving trustee, Belle O. Franklin, asking her the occasion of making the deeds and what were their consideration. Afterwards witness was allowed to testify over the objection of plaintiffs as to the circumstances of the making of the deeds. Without objection, however, witness was allowed to testify:

That the deeds at first "did not make title," and in making other conveyances she "was simply conveying a one-fifth interest to correct a mistake in the first deed.

"Q. What one-fifth interest were you conveying to your brother A. A. Oglesby? A. An undivided one-fifth in block 70½."

She further testified without objection that the conveyances were made to Franklin so that A. A. Oglesby, her brother, should have the property absolutely divested of the trust. What trust did she refer to was asked her without objection.

"A. It was the trust clause in the will my mother made leaving brother Gus' [A. A. Oglesby] property in trust to sister Fannie [Frances] and myself.

"Q. Now is that the property you were conveying? A. That one-fifth interest, undivided one-fifth."

But if there was any doubt surrounding the transaction between the witness and her cotrustee and the father of said plaintiffs, it was cleared up on cross-examination of the witness. Under a wide range of examination she explained in detail the transaction, the intention of the parties, the object of the deeds, and the interests and estates they conveyed. For example:

"Q. Have you ever signed any deeds as trustee to this property yourself? A. As trustee?

"Q. Yes. A. I made a deed to my brother to release his property from this trust. * * *

"Q. Now, when you deeded this one-fifth Mrs. Franklin, did I understand you to say you were deeding the trust interest? A. Absolutely.

"Q. You were acting as trustee at the time? A. No; I was releasing myself. My mother had asked me to do it. * * *

"Q. You were then attempting to destroy the trust? A. Of course I was Mr. Balaam. I was trying to give my brother his property. That was my only endeavor.

"Q. You were trying to give your brother his property by deeding that property to Gideon Franklin; was that the idea? A. It was only a vehicle. * * *

"Q. Then you had an understanding with Gideon Franklin that you were going to destroy the trust? A. I will tell you, Mr. Balaam, I did not make these deeds. My brother D. F. Oglesby said, 'Now, I will make the deeds, and Gus will help me in his office.' Our friendship was perfect; our confidence was absolute in each other. They made these deeds, and I signed them, and it was signed for that one purpose alone. Brother Gus never bought that property. He didn't pay taxes on it, and the heirs didn't pay. * * *

"Q. When you made this deed to Gideon Franklin, you mean to say you and your sister made it as trustee under the will of your mother? A. We made it to release, so he would have it entirely and it could be at his absolute use and disposal. * * *

"Q. You gave it to him under this deed [deed to Gideon]; you got no consideration for it? A. No I did not; I did not get a thing."

And on direct examination, without objection, this question was asked and this answer given in regard to the other trustees receiving a consideration for the deed:

"Q. Did she receive any consideration? A. She did not."

[4] The foregoing excerpts from the testimony, taken in connection with the decrees of distribution and the deeds in evidence, clearly show, exclusive of the testimony received over the objections of appellants, that A. A. Oglesby, at the time of his death, owned an undivided one-fifth part only of said block 70½. Mrs. Franklin and her sister received, to hold in trust, two-fifths only of said block for their two brothers. The decree distributed this interest to them in their individual names. They parted with but two-fifths interest in said block by said deeds. The deed which went to Edwards Franklin must be eliminated from consideration, for it dealt with property, or at least some property, which belonged individually and exclusively to D. F. Oglesby. The court had a right to disregard it. The record shows that D. F. Oglesby drafted the deed, and as late as April 10, 1896, he still had it in his possession. When Gideon Franklin, under the name of Edwards Franklin, made his second deed on December 9, 1895 (a duplicate of his first deed to A. A. Oglesby), there is no evidence that the deed recorded by D. F. Oglesby at a later date had been delivered or was in effect on December 9, 1895, or has ever been delivered to the grantee, Edwards Franklin, or ever was vitalized. The other deed to Gideon was a deed by the trustees conveying to the grantee for A. A. Oglesby the one-fifth interest in said block, which interest was then held in trust for "Gus." The first deed from Gideon to A. A. Oglesby was found defective, and Gideon thereupon promptly made another deed to A. A. Oglesby of the same identical property described in his first deed. He executed it by and in the name by which he was commonly known.

[5] Nor do we refrain from holding that, under the circumstances of the case, parol testimony was admissible to explain the whole transaction as revealed by the decrees of distribution of the three estates and the four deeds introduced in evidence by plaintiffs. There existed a fiduciary relation between sisters and brothers, not only in blood, but in a business way. Besides, the complaint charged that the defendant Belle O. Franklin, the surviving trustee, had been guilty of fraud in certain representations concerning this very one-fifth and alleged three-fifths interest in said block. Certainly it is not the law under such circumstances that she must sit silently by and not be allowed to orally explain a transaction which on the face of the written evidence of plaintiffs contains uncertainties and inconsistencies, just because, forsooth, she had made and signed a writing 25 years ago.

The trial court did not abuse its discretion in denying appellants a continuance during the trial of the cause. No sufficient diligence was shown. Besides, plaintiffs' title depended largely upon records and writings. Even if the testimony of the absent witnesses would have established that Mrs. Belle O. Franklin had represented that the heirs of A. A. Oglesby had a one-fifth interest only in their father's estate, it would have been the truth.

The judgment is supported by the findings.

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

49 Cal. App. 100

SPRING v. TAWA. (Civ. 3427.)

(District Court of Appeal, First District, Division 1, California. Aug. 28, 1920.)

1. Municipal corporations ⟸705(1)—Automobilist colliding with pedestrian held not negligent.

In an action for injuries received when pedestrian ran against and struck the side of defendant's automobile, plaintiff having done the unexpected thing of apparently losing her head and rushing into an open space which defendant was about to occupy, *held*, that defendant was not guilty of negligence.

2. Municipal corporations ⟸706(7) — Court justified in concluding that pedestrian was guilty of contributory negligence.

In an action for damages for personal injuries received when pedestrian ran against and struck the side of defendant's automobile, *held*, that the court did not abuse its discretion in refusing to submit the question of contributory negligence to the jury, and in directing a verdict for defendant.

3. Appeal and error ⟸973—Ruling as to negligence not disturbed in absence of abuse of discretion.

The ruling of a trial court as to whether a given state of facts presented before it does or does not amount to negligence as a matter of law will not be disturbed on appeal, in the absence of a clear showing of an abuse of discretion.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Katharine Spring against I. Tawa. Judgment for defendant, and plaintiff appeals. Affirmed.

John M. Hall, of Pasadena, for appellant.
L. B. Stanton and E. J. Fleming, both of Los Angeles, for respondent.

RICHARDS, J. This is an appeal from a judgment based upon a directed verdict in favor of the defendant in an action brought by the plaintiff to recover damages for injuries sustained by her as a result of being struck by an automobile driven by the defendant upon one of the streets of Los Angeles on the evening of December 21, 1918, at about the hour of 8:20 p. m. The answer of the defendant denied any negligence on his part causing said accident, and alleged that the same occurred through the contributory negligence of the plaintiff herself.

The facts of the case are practically undisputed and may be briefly summarized as follows: On the evening in question the plaintiff, accompanied by her daughter, was standing upon or near the intersection of Stephenson avenue and Jane street in said city, at or near the northeast corner of such intersection. She was awaiting the approach of a street car which was proceeding in a westerly direction along Stephenson avenue and on the northerly rails of the double street car track, occupying the center of said avenue. When said street car was approximately 300 feet away the plaintiff left her position and proceeded in a southerly direction out into Stephenson avenue toward the point where the approaching street car had its usual stopping place. When about 2 feet from the sidewalk she glanced up and down Stephenson avenue, and testifies to then having seen no approaching vehicle except said car. She walked out into the street, and in doing so did not further look for approaching vehicles until she reached a spot near the center of the street, when she suddenly observed the automobile, which the defendant was driving, approaching the spot where she was standing and only a few feet away. The southerly side of Stephenson avenue was rough and in such a condition as to make impracticable passage over it with automobiles, and in consequence the automobiles which at that time traveled along said street were accustomed to drive either in the space between the two tracks or along the northerly track. The defendant was apparently driving on the northerly car track, and as he appoached his car was well lighted, but otherwise than by such lights he did not give notice by any warning of his approach. He was traveling at a rate of from 10 to 12 miles an hour. When the plaintiff discovered the defendant's car and its nearness to the spot at which she, with some five or six other people, was standing, she screamed and ran southerly into the space between the two tracks. The defendant also swerved his car southerly and into the space between the two tracks, by which course he would have entirely avoided the plaintiff had she not in her confusion ran against and struck the side of his car, from which impact she suffered the injuries complained of.

Upon the presentation of the foregoing facts and the submission of the cause the defendant moved for a directed verdict in his favor, which motion was granted by the trial court, and a verdict rendered accordingly, on which the judgment was entered, from which this appeal is taken.

[1] The sole contention which the appellant makes upon this appeal is that the trial court was in error in taking the question of the defendant's negligence and of the plaintiff's contributory negligence from the jury. We are unable to agree with this contention. The trial court had the parties and their evidence before it. As to the negligence of the

defendant there would seem from the foregoing statement to have been no substantial showing that he was guilty of any sufficient degree of carelessness at the time of or immediately preceding the accident in question to have justified a verdict against him on account of the plaintiff's injuries sustained as above set forth. He had approached the point where the plaintiff and several other persons were standing upon the street awaiting the on-coming street car with every appearance of proper caution; the lights of his car giving ample and sufficient warning of his approach. He was traveling along that portion of the street customarily used by automobiles while the southerly half thereof was in a state of disrepair. When he swerved his car to the southward he was in a position to have safely passed the said assemblage of persons and would have done so without any injury to the plaintiff had she not done the unexpected thing of apparently losing her head and rushing into the open space which he was about to occupy, striking the side of his car and being thus injured.

[2, 3] But, aside from the fact that there was no sufficient evidence of the defendant's negligence before the court, there was affirmative evidence of contributory negligence on the part of the plaintiff, since from the time of her glancing up and down the street, when about two feet from the curb on her way to the center thereof, she neither looked to right or left until she reached her position in the center of said street immediately in front of the defendant's approaching car. In addition to this her act in rushing out between the tracks and to the place where her collision with the defendant's car occurred was an act which the trial court hearing the testimony would be fully justified in concluding to be contributory negligence on her part. At any rate, the trial court so concluded, and we are unable to say from the state of this record that its judgment in so doing constituted such a breach of discretion as would compel a reversal of this case. The rule has been laid down, both in the Supreme Court and in this court, that the ruling of a trial court as to whether a given state of facts presented before it does or does not amount to negligence as a matter of law will not be disturbed on appeal in the absence of a clear showing of an abuse of discretion. Mayne v. San Diego Elec. Ry. Co., 179 Cal. 173, 175 Pac. 690; Diamond v. Weyerhaeuser, 178 Cal. 540, 174 Pac. 38; Charves v. S. F. O. T. Rys., 186 Pac. 154.

We are of the opinion, therefore, that the judgment should be affirmed; and it is so ordered.

We concur: WASTE, P. J.; WELCH, Judge pro tem.

183 Cal. 673

STEPHAN v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

(L. A. 6660.)

(Supreme Court of California. Sept. 13, 1920. On Rehearing, Oct. 13, 1920.)

1. Justices of the peace ⟸45—Without jurisdiction of counterclaim for $500.

A justice's court did not have jurisdiction of defendant's counterclaim for $500; the recovery sought against plaintiff exceeding $300, the jurisdictional amount.

2. Justices of the peace ⟸174(13)—Defendant may amend on appeal to set up new defense.

On appeal from a justice's court to the superior court, the parties may amend their pleadings, and defendant may set up a defense which was not presented at all in the justice's court.

3. Justices of the peace ⟸174(15)—Setting up excessive counterclaim did not forfeit right to set up proper counterclaim on appeal.

Defendant, by setting up in a justice's court a counterclaim for $500, in excess of the $300 jurisdictional limit of the court, did not lose her right on appeal to amend her answer in the superior court, and to set up a counterclaim for $200.

4. Justices of the peace ⟸174(20) — Costs may be imposed on parties seeking to amend on appeal.

In case of amendment in the superior court by defendant to set up a counterclaim for $200, within the jurisdictional limit of a justice's court, the counterclaim as originally filed in the justice's court having been for $500, it is within the discretion of the superior court to exact payment of costs from defendant, to afford plaintiff relief from costs which he might not have incurred, had a proper pleading been presented in the first instance.

On Rehearing.

5. Fraud ⟸31—Action is common-law action for tort.

An action for damages for fraud or deceit is a common-law action for damages for tort.

6. Justices of the peace ⟸43(2)—Have jurisdiction of all actions at common law for tort under $300.

In view of Const. art. 6, § 5, and Code Civ. Proc. § 76, under section 112, subd. 2, of the Code, justice courts have jurisdiction of all actions formerly at common law for tort, where the demand is for less than $300, except for torts to real property in certain instances.

In Bank.

Application for certiorari by Elizabeth Stephan against the Superior Court of the State of California in and for the County of Los Angeles, and Leslie R. Hewitt, Judge thereof. Application denied.

J. W. Hocker and Hocker & Austin, all of Los Angeles, for petitioner.

Charles W. Hoag and Neighbours, Hoag & Burke, all of Los Angeles, for respondents.

PER CURIAM. [1] The facts in this case are that the plaintiff brought an action in the justice's court for recovery of money on a contractual obligation, the recovery sought being for $201, so that the cause came within the jurisdiction of the justice's court, which extends only to actions for less than $300. The defendant filed an answer, the essence of which was a counterclaim against the plaintiff for $500. Of this counterclaim the justice's court did not have jurisdiction, since the recovery sought against the plaintiff upon it exceeded $300. Malson v. Vaughn, 23 Cal. 61; Maxfield v. Johnson, 30 Cal. 545. The justice gave judgment for plaintiff, either ignoring or deciding against the defendant's counterclaim. The defendant then appealed to the superior court on questions both of law and fact, so that that court had jurisdiction to try the case de novo. In the superior court the defendant amended her counterclaim, so that it showed damage to the defendant by reason of the plaintiff's alleged wrongful acts in the amount of $200 only, and sought to recover only this amount by having it set off against the plaintiff's claim. In other words, the counterclaim as so amended was one of which the justice's court would originally have had jurisdiction. On the trial in the superior court, the court, over the objection of the plaintiff that it had no jurisdiction of the counterclaim, proceeded to try the issues presented by it, found in favor of the defendant thereon, and set off the amount thereof against the plaintiff's claim, and gave judgment that the plaintiff take nothing. The plaintiff now asks for a writ of review annulling this judgment, on the ground that the superior court had no jurisdiction of the counterclaim.

[2] Upon appeal from the justice's court, the parties may amend their pleadings, and the defendant may set up a defense which was not presented at all in the justice's court. Ketchum v. Superior Court, 65 Cal. 494, 4 Pac. 492; Baker v. Southern Cal. Ry. Co., 114 Cal. 501, 46 Pac. 604. It follows that in this case, if the defendant had set up no counterclaim in the justice's court, she could, by amendment to her answer, have set up in the superior court for the first time the counterclaim which she did finally set up, one for $200.

[3] The question therefore presented here is: Did the defendant lose the right to amend her answer in the superior court and set up a counterclaim for $200, because of the fact that she had previously set up a counterclaim upon the same facts for $500, or in excess of the jurisdiction of the justice's

court? We see no reason for so holding. The jurisdiction of the superior court to try the issues presented by the pleadings of the defendant in such a case must depend upon the state of the pleadings at the time of the trial. At that time the counterclaim presented by the defendant was one within the jurisdiction of the justice's court, and one which the superior court had therefore the right to hear on appeal in a justice's court action. This was enough.

[4] It should perhaps be said that, in case of such an amendment as that made here being asked for, it is within the discretion of the superior court to exact the payment of costs from the party seeking to amend, so as to afford the other party relief from costs which he might not have incurred, had a proper pleading been presented in the first instance. The matter of permitting amendments and the matter of costs are of course almost entirely within the discretion of the trial court. Certainly no question of jurisdiction is presented by the action of the court upon such matters.

Writ denied.

ANGELLOTTI, C. J., and OLNEY, SHAW, WILBUR, LENNON, SLOANE, and LAWLOR, JJ., concur.

On Rehearing.

PER CURIAM. [5] We would say, however, that in our former consideration of this case we assumed that a justice's court has jurisdiction of actions for damages for fraud or deceit where the amount of the recovery sought is less than $300. In petitioner's brief the view was taken apparently that such an action was one in equity and for that reason not within the jurisdiction of the justice's court. This point we did not deem it necessary to discuss, since such an action is without doubt a common-law action for damages for a tort. The point, however, is now made in effect that even if it be a common-law action for a tort, it does not come within the instances enumerated by the statute as those of which the justice's court may take jurisdiction.

[6] The statute applicable is subdivision 2 of section 112, Code of Civil Procedure, which gives the justices' courts jurisdiction—

"In actions for damages for injury to the person, or for taking, detaining, or injuring personal property, or for injury to real property, where no issue is raised by the verified answer of the defendant involving the title to or possession of the same, if the damages claimed do not amount to three hundred dollars."

Taking this language by itself, there might be some question as to whether an action for damages for fraud or deceit was one "for taking or injuring personal property." But the section must be construed in connection with the other provisions of the Code and of the Constitution governing the matter of the respective jurisdictions of our different courts. Section 5 of article 6 of the Constitution and section 76 of the Code of Civil Procedure provide in effect that the superior courts shall have jurisdiction of common-law actions for damages only when the demand of the plaintiff is equal to $300. The result is that, if a justice's court does not have jurisdiction of an action for damages for fraud or deceit where the amount of the demand is less than $300, no court has jurisdiction of it. The Constitution and the Code undoubtedly intended to provide a consistent and complete scheme for the administration of justice, so that relief might be given in every case where a party was entitled to it. With this in mind, there is but one reasonable construction which it is possible to give to the Code provision as to justices' courts and that is that those courts have jurisdiction of all actions, formerly at common law, for tort, where the demand is for less than $300, except of course for torts to real property in certain instances.

We might add, as worthy of note, that Chitty, in giving the forms of declaration in common-law actions, includes under the head of forms for torts to personal property, forms in actions for deceit. 2 Chitty on Pleading, 679.

(184 Cal. 72)

HARTIGAN v. JORDAN, Secretary of State, et al. (S. F. 9613.)

(Supreme Court of California. Oct. 11, 1920.)

Elections ⟸145—Candidate failing to present nomination papers 40 days before election cannot have his name printed on ballot.

Candidate nominated by petition was not entitled to have name go on ballot on failure to present nomination papers to registrar of the city and county of San Francisco for examination 40 days prior to a general election under Pol. Code, § 1188, and Primary Law, § 5.

In Bank.

Application for writ of mandamus by William Hartigan against Frank C. Jordan, as Secretary of State of California, and another. Application denied.

William Hartigan, in pro. per.

U. S. Webb, Atty. Gen., for respondents.

PER CURIAM. Petitioner's nomination papers under section 1188, Political Code, were not presented to the registrar of the city and county of San Francisco for examination until Semtember 25, 1920. This was not 40 days prior to the general election of November 2, 1920. It results that he is not

entitled to have his name go on the ballot. Section 1188, Pol. Code; section 5, Primary Law (St. 1917, p. 1345).

The application is denied.

All concur.

184 Cal. 73

In re CASAROTTI'S ESTATE.

CASAROTTI v. LYONS.

(S. F. 9329.)

(Supreme Court of California. Oct. 11, 1920.)

1. Witnesses ⊜223—Question whether testimony is privileged preliminary one for the court.

Whether testimony of a physician was inadmissible because acquired in attending the patient is a preliminary one for the court.

2. Wills ⊜52(1)—Party asserting mental incapacity has the burden of proving it.

A party asserting testator's mental incapacity has the burden of proving it.

3. Wills ⊜55(1) — Evidence insufficient to show incapacity.

In a will contest, evidence *held* insufficient to establish the testator's mental incapacity.

4. Jury ⊜37—Wills ⊜55(1)—In determining whether finding is sustained, evidence of opposite party considered; considering evidence of opposite party not invasion of province of jury.

In determining whether the evidence was sufficient to sustain the verdict that testator was mentally incapable, the evidence of the proponent, as well as the contestant, should be considered, but the consideration of the proponents' testimony does not invade the jury's province.

5. Wills ⊜53(2)—Testimony as to mental condition before and after admissible only as bearing on condition at time of execution.

Testimony of an attending physician who saw the testator twice on the day of his death, as to his mental condition on those two visits, is admissible only as bearing on the capacity of the testator during the interval between the visits at which time the will was executed.

6. Wills ⊜45—Weakness and impairment in faculties will not invalidate a will.

Where a testator is of sufficiently sound mind to be capable of understanding the situation of his property and disposing thereof intelligently without any delusions, he has sufficient capacity to make a will, though he is feeble and suffering from disease.

7. Wills ⊜52(6)—Inability to speak articulately raises no presumption against capacity.

The testator's inability to speak articulately raises no presumption against his capacity to make a will.

In Bank.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

In the matter of the estate of Henry Casarotti, deceased. Will contest by Romeo Casarotti against Cornelius P. Lyons. From a judgment for contestant, proponent appeals. Reversed.

G. P. Hall, of Petaluma, and W. F. Cowan, of Santa Rosa, for appellant.

Frank O. Nebeker, of Oakland, and G. W. Hoyle, of Santa Rosa, for respondent.

SLOANE, J. This is an appeal from a verdict and judgment revoking probate of a will. The will was contested on grounds of undue influence and incompetency. On the trial the question of undue influence was by the court taken from the jury for insufficient evidence on motion for a nonsuit. The only question on this appeal is as to the sufficiency of the evidence to support the judgment on the ground of the testator's mental incompetency to make a will. The only evidence offering support to the claim of contestants on this point was the testimony of the physician in attendance upon the testator during his last illness and covering the period when the will was executed.

One of the grounds of error relied on by appellant is the admission of this testimony over appellant's objection that the physician's testimony was inadmissible under subdivision 4 of section 1881, Code of Civil Procedure, for the reason that it was the disclosure by a physician of information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient.

[1] The patient, in this instance, was suffering from pneumonia. Though it was primarily for the trial judge to weigh the facts upon which the admissibility of this testimony depends, it is doubtful if it sufficiently appears to support the court's ruling that the observations made by the doctor as to the patient's mental competency were merely incidental, and were not necessary to his treatment of the disease, or were not of a nature to come within the protection of professional confidence. Estate of Black, 132 Cal. 392–396, 64 Pac. 695; In re Redfield, 116 Cal. 644, 48 Pac. 794.

[2-4] If, however, it does not appear that there was error in admitting this evidence we do not think, in any event, it was sufficient to support the verdict. The burden of proving incompetency rested with the contestants. There was no pretense that the testator was delirious, irrational, or insane or under any delusions, but merely that he was in such a state of bodily weakness and mental stupor as to be incapable of an intelligent disposition of his property or determination of the objects of his bounty. It is also urged that his condition of weakness was such as to render him peculiarly susceptible to suggestion. The issue of undue

influence having been eliminated, there is no evidence of influence or suggestion of any kind tending to direct his testamentary acts. The evidence is wholly to the effect that he personally and voluntarily suggested the parties to be the beneficiaries of his will, and his desire that all his property should go to them, and even enumerated the various possessions that were to be carried by the general terms of the will. Neither was there anything in the disposition of his estate to strangers by blood, to the exclusion of his several brothers or sisters, to render it obnoxiously unnatural.

The testator, Henry Casarotti, was unmarried, and evidently a comparatively young man. His next of kin were his brothers and sisters, some nine in number. He had for some time been living in the family of Cornelius P. Lyons and the latter's wife, who are the beneficiaries of the will, and proponents of the will, and appellants in this action. His relations with his own people, while not unfriendly, seem to have been not overly cordial because of their objections and criticisms of his relations with the Lyons family, and because of some differences arising in the distribution of their father's estate, through which Henry Casarotti derived most of the property transferred by this will. His relations with Mr. and Mrs. Lyons had been friendly and intimate for a considerable period, and he was living at their home at the time of his last illness and death. He was taken down with an attack of influenza six days prior to his death. This had developed into pneumonia. He died on the 19th of September, 1919, at about 3 in the afternoon. Dr. Gossage, the attending physician, and witness here, visited him about 8 o'clock in the forenoon and again at 12 or 1 o'clock, and did not thereafter see him alive. The will was made between 9 and 10 o'clock in the forenoon. The doctor found him very low at his first visit on the morning of the 19th. He was breathing with difficulty, and in a state of stupor bordering on coma. The doctor testifies that death was imminent. He told his patient that if he had any affairs to settle he had better send for his lawyer and on the patient's acquiescence and the subsequent suggestion of Mrs. Lyons, upon leaving the house the doctor telephoned to G. P. Hall, the attorney who prepared the will, that he was to visit Casarotti's sick bed for that purpose. Obviously, the doctor at the time of this suggestion as to settling his affairs and making a will, contemplated sufficient intelligence and competency on the part of the sick man to give some consideration to winding up his earthly business. The will was executed between the doctor's first and second visits, within an interim of two or three hours. On the second visit he found his patient in a similar state of stupor with evidence of the nearer approach of dissolution. His testimony covering physical and mental symptoms observed at both visits is in substance as follows:

"I saw him alive I think about 12 or 1 o'clock on the day he died, I had seen him that morning prior to that [about 8 o'clock]. His mental condition was such that he was very stupid, comatose condition." "I never saw him very delirious to amount to anything. He was sinking at time of first visit. I probably told him if he had any property to dispose of he had better have a will made. I telephoned after I left to the attorney." "I could not say he was irrational, but he was in a stupid condition." "I had to talk to him, rouse him up to get him to say anything." "I did not mean to say he was irrational at all after he woke up." "He was not taking any opiates or medicines to make him stupid." "When he was aroused he seemed to answer all my questions rationally." "He seemed to understand in a way when I told him to make a will. He did not seem to pay much attention to me. I thought in a way he comprehended what I was saying to him." "He was not insane because he was not in full possession of his faculties." "Q. When he was roused he was all right? A. I would not hardly say he was all right. He was not as bright and intelligent by any means as he was when he was well." "The man was in a bad condition in every way, he was very weak, but his reason had not left him. I think his mental condition was such that any person of ordinary intelligence could understand it as well as a physician." "I visited him again between 12 and 1 o'clock. He was then in a rather worse condition." "There was discoloration in his face." "He was not of sound mind on the occasion of my visits that day." "From being in the condition he was at 8 o'clock I don't think he would be thoroughly in possession of his faculties and be able to determine who was about him by 10 o'clock." "He knew me when I was there." "Q. For aught you could tell us Henry Casarotti may have been perfectly clear in his mind had he been thoroughly aroused after you were there on the morning visit? A. He might have been. I presume he was not, but he might have been." "When I suggested he had better fix his affairs up and send for his attorney I don't remember just what words he used, though he gave me to understand that he wanted to do that. I would say he was very weak mentally and physically." "He had no mental disease. He was just suffering from lack of strength." "I think he was in a condition that morning if out from under his stupor to say what he would like to have done with his property, or to know his sister if she came into the room. I think if he was thoroughly aroused he would know these things." "He would remain awake after he was aroused a short time, just a few minutes, I remember it required speaking to him rather loudly, possibly more than once, to arouse him." "I think I was in the room about 10 minutes on that occasion."

This summary fairly states the substance of Dr. Gossage's testimony on this point. Together with the other circumstances herein narrated it constitutes the entire evidence

in support of the allegation of incompetency.

Even in the absence of direct evidence of the conditions attending the execution of the will, it may be doubted if it would support the finding of the jury as to incompetency. The jury would hardly be justified in inferring from this testimony as to the condition of the testator an hour or two before and an hour or two after the will was executed that he would not have been sufficiently aroused by the presence and efforts of his lawyer to intelligently dispose of his property at the intermediate time.

But the issue does not rest upon the contestant's evidence alone. The testimony of proponent's witnesses must be taken into account in weighing the sufficiency of contestant's case. Evidence which standing by itself might be sufficient to sustain a verdict may, in the light of all the facts, be wholly inadequate, and that without invading the province of the jury as the judges of the weight and sufficiency of the evidence. In re Redfield, 116 Cal. 637, 48 Pac. 794, is a case in which the showing of incompetency was stronger than here, where this court held that in the light of all the facts it was entirely inadequate. In the matter before us there is no conflict in the evidence. The conditions stated by the attending physician at the periods to which he testifies are not disputed, but two apparently disinterested witnesses, the lawyer and the nurse, testify that at the time of the actual execution of the will, an hour or more after the doctor's first visit and an hour or more before his second visit, the patient was aroused and awake, his eyes open and showing intelligence; that he recognized his visitors, and, though suffering, weak and short of breath, talked coherently and with comprehension. The nurse testified that when Mr. Hall, the lawyer, called she had just been administering nourishment to the patient. There was no sign of his being irrational. "He seemed to understand everything said to him. His answers were intelligible. I was called in the room after Mr. Hall was there. Mr. Hall read the paper, the will, and asked Mr. Casarotti if that was his will and wishes, and Mr. Casarotti said 'Yes.'" There was no one beside Mr. Hall in the room while Mr. Hall was drawing the will. "Mr. Casarotti first turned on his right side and Mr. Hall asked him if he was left handed and he said, 'No!'" They then turned him on his left side and he signed the will. "He did not ask any one how to spell his name." "When Mr. Hall left he told Mr. Casarotti he hoped he would soon get well, and Mr. Casarotti said, 'I hope so.'" "We aroused him for his treatment from time to time; he was perfectly normal then; that is, he was clear."

Mr. Hall, who drew the will, testified:

"When I went into the room I says to him, 'Hello, Henry. What's the matter?' 'Well,' he says, 'I am pretty sick but I don't think I am going to die.' I said, 'Did you want to see me?' and he said, 'Yes, I want to make my will.'"

The witness then asked him what property he had, and in response the testator enumerated various items of property, which, so far as appears from the record, correctly and fully included all his estate. In answer to the query as to whom he wished to leave his property, he answered that he wanted to leave it to his "friends Mr. and Mrs. Lyons." Asked as to their names, he said his name is "Con" Lyons, but he did not know what the "Con" stood for. The attorney then got the first names from Mr. Lyons, who was ill in another room. This witness further testified:

"He was awake when I went into the room. He recognized me. He answered my questions intelligently. I saw nothing to indicate that he was irrational. My opinion is that he was perfectly sound in mind. I don't imagine I was there over 20 or 25 minutes. He was not in a state of stupor at any time I was there. There was no continued conversation, but his eyes were open and he showed intelligence and talked intelligently. He was breathing heavily, but no difficulty in his speech. No one held his hand while he signed the will."

Here we have the testimony of a lawyer whose professional duty it was to ascertain the condition of his client's mind, as much as it was the duty of the doctor to note his physical condition.

We think this state of the evidence shows competency to execute a will beyond any substantial question arising either from direct evidence of mental irresponsibility, or from any inference that might be found from the facts testified to as existing on the prior or subsequent visits of the doctor.

[5] The physician's testimony as to the testator's mental condition before and after the execution of the will was admissible only as it tended to show that condition at the very time the will was made. Estate of Wilson, 117 Cal. 262, 49 Pac. 172, 711; Estate of Dole, 147 Cal. 188, 81 Pac. 534. But the doctor admitted that any conclusions he reached as to mental incompetency were based on the patient's weakness and stupor at the time of observation, and he admitted that he might have been aroused, and that if aroused his understanding would be unclouded. The witnesses for the proponent of the will testify that he was so aroused at the time the will was executed, and that his mind and understanding were clear.

[6] It must be borne in mind that it is not every weakness and impairment of the faculties of the testator that will invalidate a will. Even where a testator is feeble in health, suffering under disease and aged and infirm, yet if he was of sufficiently

sound mind to be capable of understanding the nature and situation of his property, and of disposing thereof intelligently, without any delusions affecting his action, he had sufficient capacity to make a will. Estate of Motz, 136 Cal. 558, 69 Pac. 294; Estate of Purcell, 164 Cal. 300, 128 Pac. 932; Estate of Huston, 163 Cal. 166, 124 Pac. 852; Estate of Weber, 15 Cal. App. 224, 114 Pac. 597.

[7] It was held that the fact of the testator being unable to speak articulately, and was compelled to communicate by signs, did not raise a legal presumption of incompetency to make a will. Estate of Latour, 140 Cal. 415, 73 Pac. 1070, 74 Pac. 441.

We are satisfied that the evidence was insufficient to support the verdict.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; OLNEY, J; LENNON, J.; LAWLOR, J.

(49 Cal. App. 225)

PEOPLE v. CARNES. (Cr. 915.)*

(District Court of Appeal, First District, Division 1, California. Sept. 8, 1920.)

1. Larceny ⟸68(1)—Sufficiency of evidence to sustain conviction held a jury question.

In a prosecution for larceny of an automobile found in defendant's possession, sufficiency of the evidence to sustain a conviction *held* a question for the jury.

2. Larceny ⟸64(6)—Failure to explain possession of stolen property tends to show guilt.

If the jury in a larceny prosecution believed that the property was stolen and found in defendant's possession shortly thereafter, the fact that defendant failed to account for its possession tended to show defendant's guilt.

3. Larceny ⟸41, 51(2)—Burden rests upon accused to explain possession of stolen property, and such fact may be considered.

In a prosecution for larceny of an automobile found in accused's possession, the burden rested upon the accused to explain his possession, and that was a fact to be considered with other suspicious facts.

4. Criminal law ⟸572—Jurors could disbelieve testimony tending to prove alibi.

Jurors could disbelieve uncontradicted testimony tending to prove an alibi, or could believe, either that defendant's witnesses were mistaken as to the day and hour they saw accused, or that the witnesses for the prosecution were mistaken in the exact time at which the crime occurred.

5. Criminal law ⟸1044, 1054(1), 1129(1)—No complaint of evidence in absence of exception, motion to exclude, and assignment of error.

Where during cross-examination of witness for defendants the prosecuting attorney asked, "Did you know that he was living at the H. with a woman not his wife?" to which the witness answered, "I did not," and an objection by defendant was properly sustained, and no motion was made to strike out the answer, no exception noted and no assignment of misconduct was made, nor a request that the jury be instructed to disregard the incident, it was too late on appeal to complain that the question might have had an improper influence upon the jury.

6. Criminal law ⟸649(2)—Directing defendant to proceed pending arrival of witness not misconduct.

The action of the trial court in directing defendant to proceed with his case pending the arrival of a certain witness did not amount to misconduct, especially where the witness appeared in due time and testified.

7. Criminal law ⟸1172(6)—Immaterial explanation by court held not prejudicial.

In a prosecution for grand larceny, where the prosecution relied only upon the theory that an automobile had been stolen, defendant was not prejudiced by an instruction of the court, drawing the distinction between grand larceny and obtaining property under false pretenses.

8. Criminal law ⟸789(4)—Instruction as to reasonable doubt held sufficient.

An instruction that: "The accused * * * is presumed to be innocent until the contrary is proven, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he (defendant) is entitled to an acquittal. * * * If you are satisfied beyond all reasonable doubt that the defendant here is guilty of the crime charged against him in the information, * * * you will so declare by your verdict, and, on the other hand, if you are not so satisfied, you should return a verdict finding him not guilty"—was the full equivalent of making it incumbent on the prosecution to establish the guilt of defendant beyond a reasonable doubt.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Ernest P. Carnes was convicted of grand larceny, and appeals from the judgment and from denial of motion for new trial. Affirmed.

William Sea, Jr., of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the State.

WASTE, P. J. The defendant was charged by information with the crime of grand larceny, it being alleged that on or about the 25th day of October, 1919, he took and drove away a Buick automobile belonging to Charles E. Johnson. He was tried, convicted, and sentenced to imprisonment in the state prison. This appeal is from the judgment of conviction and the order denying defendant's motion for a new trial.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court, Nov. 4, 1920.

The first contention made by the defendant is that the evidence is insufficient to warrant the conviction. Johnson, the complaining witness, left his automobile on a street in San Francisco and when he returned about 15 minutes later it was gone. It was next located by the police in a private garage in San Bruno, San Mateo county, where it had been stored by the defendant. He had removed the air pump and certain other parts, painted over the number of the motor, and removed the license plates. The parts that had been removed were found concealed under the sidewalk. It was proved also that the defendant attempted to procure old automobile license plates, failing in which, he tried to borrow plates from a dealer. When arrested, he gave contradictory statements as to how he came into possession of the automobile; first claiming that his wife purchased it, thereafter maintaining that he bought it on the installment plan from a man by the name of Miller. He was unable to give the whereabouts of Miller, and the latter was not produced at the trial, although a notary public testified that one Albert E. Miller, whom he personally knew, signed a bill of sale to the defendant and wife, for a Buick automobile in his presence.

[1-3] The question as to the sufficiency of the evidence was one resting entirely with the jury for its determination. If the jury believed that the property was stolen, and, as was proved, it was found in the possession of the defendant shortly thereafter, and the defendant failed to account for its possession or to show that such possession was honestly obtained, to the satisfaction of the jury, that was a circumstance tending to show the defendant's guilt. The burden rested upon the accused to explain his possession of the automobile, and that was a fact to be considered with other suspicious facts in the case. People v. Kelly, 28 Cal. 424, 426; People v. Gill, 45 Cal. 285, 286; People v. Warren, 130 Cal. 683, 685, 63 Pac. 86.

[4] The defendant attempted to establish an alibi as a part of his defense. He contends that the evidence on this point was uncontradicted and not impeached. The jurors may have disbelieved the testimony tending to prove the alibi, or may have believed, either that the defendant's witnesses were mistaken as to the day and hour they attended the theater, or that the witnesses for the prosecution were mistaken in the exact time at which the automobile was stolen. People v. Gill, supra; People v. Sears, 119 Cal. 267, 270, 51 Pac. 325; People v. Shehadey, 12 Cal. App. 648, 657, 108 Pac. 146.

[5] During his cross-examination of a witness for the defense, the prosecuting attorney, after ascertaining how long the witness had known the defendant, asked, "Did you know that he was living at the Hamlin with a woman not his wife?" The witness answered, "I did not." An objection by the defendant was promptly sustained. The subject was not thereafter alluded to. No motion was made to strike out the answer, no exception was noted, and no assignment of misconduct was made by the defendant, nor did he request that the jury be instructed to disregard the incident. It is now too late to complain that the question might have had an improper influence upon the jury. People v. Shears, 133 Cal. 154, 159, 65 Pac. 295; People v. Amer, 8 Cal. App. 137, 143, 96 Pac. 401; In re Estate of Hess, 192 Pac. 35.

[6] The action of the trial court in directing the defendant to proceed with his case, pending the arrival of the witness Sime, did not amount to misconduct. Furthermore, the witness appeared in due time, and testified.

[7, 8] In its charge, the court instructed the jury as follows:

"Larceny, ladies and gentlemen, is the felonious stealing, taking, or carrying away the personal property of another. *And where by means of fraud, conspiracy, or artifice, possession of the property is obtained with felonious intent, and the title still remains in the owner, larceny is established;* while the crime is false pretenses, if the title, as well as the possession, is absolutely parted with, and where the property feloniously taken is of a value exceeding $50, the offense is grand larceny."

Objection is made by the defendant to the portion italicized. It was unnecessary to draw the distinction in the instant case, between grand larceny and obtaining property under false pretenses. As the prosecution did not contend that the automobile had been obtained by means of fraud, conspiracy, or artifice, but relied upon the theory that it had been stolen, and that its value exceeded $50, there was no occasion for including in the instruction the part objected to. But we are unable to perceive in what manner the defendant was prejudicially injured by the giving of the immaterial explanation by the court of certain other circumstances under which the crime of larceny might be established. It was not error for the court to instruct the jury that—

"The accused, under our system, is presumed to be innocent until the contrary is proven, and in case of a reasonable doubt whether his guilt is *satisfactorily* shown, he [defendant] is entitled to an acquittal. * * * If you are *satisfied* beyond all reasonable doubt that the defendant here is guilty of the crime charged against him in the information, that is, grand larceny, you will so declare by your verdict; and, on the other hand, if you are not so *satisfied* you should return a verdict finding him not guilty."

The instruction was the full equivalent of making it incumbent on the prosecution to establish the guilt of the defendant beyond a reasonable doubt. People v. Wells, 145 Cal. 138, 142, 78 Pac. 470; People v. Miller, 171 Cal. 649, 652, 154 Pac. 468. The

term "reasonable doubt" was correctly defined in the charge, and the jury was properly instructed on the doctrine of the presumption of innocence.

The redirect examination of the defendant as to the manner in which he was dressed on the day when it was alleged the bill of sale was executed by Miller was on an immaterial subject.

The order denying defendant's motion for a new trial, and the judgment are, and each is, affirmed.

We concur: BEASLY, Judge pro tem; RICHARDS, J.

49 Cal. App. 219

PEOPLE v. POO ON. (Cr. 523.)

(District Court of Appeal, Third District, California. Sept. 7, 1920.)

1. Physicians and surgeons ⟸6(9)—Information charging practice of medicine without license held sufficient.

Information charging defendant with violation of State Medical Practice Act, § 17, by willfully and unlawfully attempting to practice and advertising and holding himself out as practicing a system or mode of treating the sick and afflicted without having a valid unrevoked certificate from the state board of medical examiners, *held* not to have set forth different offenses not separately stated, and not to have failed substantially to conform to Pen. Code, § 951, in that it did not set forth the act or omission charged as an offense.

2. Physicians and surgeons ⟸6(11)—Verdict convicting of practice of medicine without license as charged in proper form.

In a prosecution for practicing medicine without a license, verdict finding defendant guilty as charged in the information *held* in proper form, despite defendant's claim that the information stated and set forth different charges, so that the verdict should have set forth which one of such charges defendant was guilty of.

3. Criminal law ⟸371(1, 12)—Evidence of other similar acts by defendant admissible as bearing on questions of intent and motive.

In a prosecution for practicing medicine without license, the trial court did not err in receiving evidence of other acts by defendant of similar nature to that charged in the information; such evidence bearing on the questions of intent and motive.

4. Criminal law ⟸543(2), 1153(6)—Showing of absence of witness sufficient to sustain decision admitting deposition.

Where the deputy sheriff testified he was unable to locate a witness in the state, and there was testimony tending to show she was in Mexico, such showing sustained the decision of the trial court that she was absent at the time of trial and could not be produced as a witness to render her deposition taken at the preliminary examination admissible; defendant's objection questioning the sufficiency of showing of absence being addressed to the discretion of the trial court, whose decision will not be disturbed except for abuse of discretion.

5. Criminal law ⟸1186(4)—Instruction partially unsupported by testimony not ground for reversal.

In a prosecution for practicing medicine without a license, though there was no reference in the testimony of a witness to any examination of her pulse, the words "examination of the pulse," in an instruction on what would constitute guilt, *held* not to have caused a miscarriage of justice, so that, under Const. art. 6, § 4½, conviction cannot be reversed.

6. Criminal law ⟸829(1)—Instructions need not be repeated on request.

The trial court did not err in refusing to give instructions proposed by defendant which were fully covered by the instructions given.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Poo On was convicted of practicing medicine without a license, and, from the judgment and order denying his motion for new trial, he appeals. Affirmed.

L. J. Maddux, of Modesto, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

NICOL, Presiding Judge pro tem. The defendant was tried and convicted in the superior court of Stanislaus county of the crime of practicing medicine without a license, and prosecutes this appeal from the judgment and order denying his motion for a new trial.

1. The information charged the defendant with a violation of section 17 of the State Medical Practice Act (St. 1913, p. 734), the said information alleging that—

"The said Poo On on or about the 19th day of September, A. D. 1919, at and in the said county of Stanislaus, state of California, and prior to the filing of this information, did then and there willfully and unlawfully practice, attempt to practice and advertise and hold himself out as practicing a system or mode of treating the sick and afflicted in this state without having at the time of so doing a valid unrevoked certificate from the state board of medical examiners of the state of California."

The appellant attacks the information on the ground that it sets forth many different offenses which have not been separately stated, and also on the ground that the said information does not substantially conform to the requirements of section 951 of the Penal Code, "in this that, it does not set forth the act or omission charged as an offense."

[1] There is no merit in these objections. The charging part of the information is al-

most in the identical language of the information that was before this court in People v. T. Wah, Hing, 190 Pac. 662, and which information was sustained; the court holding that—

"The information in this case is substantially the same as the information that was before the Supreme Court in People v. Ratledge, 172 Cal. 401, 156 Pac. 455, and which the court held sufficiently charged a violation of section 17 of the said Medical Practice Act. The court said: 'The information is attacked upon the ground that it charges "the crime of practicing medicine without a certificate from the medical board," the contention being that no such crime is denounced by the law. It is true that the statute does not contain the quoted words, but clearly they are used merely for purposes of general description of the offense as they are followed by the averment that the crime was "committed as follows: That the said T. F. Ratledge on the 30th day of October, 1914, at, and in the county of Los Angeles, state of California, did willfully and unlawfully practice, attempt to practice, and advertise and hold himself out as practicing a system and mode of treating the sick and afflicted in the state of California, without then and there having a valid, unrevoked certificate authorizing him to practice a system or mode of treating the sick and afflicted in this state from the board of medical examiners of the state of California." This sufficiently charges a violation of section 17 of the Medical Practice Act (Stats. 1913, p. 734), and is not open to the criticism that it seeks to impute many offenses to defendant because any one of the acts or omissions averred and conjunctively pleaded would suffice as the basis of an information. (Citing cases.) This information does not fall within the rule declared in People v. Plath, 166 Cal. 227 (135 Pac. 954).'"

[2] 2. The defendant challenges the verdict, which is in the following form, "We, the jury in the above-entitled cause, find the defendant Poo On guilty as charged in the information," claiming that the information states and sets forth different charges and that the verdict should have set forth which one of said charges the defendant was guilty of.

The verdict, in our opinion, is in the proper form, and this objection of defendant is sufficiently answered by the case of People v. Nitta, 17 Cal. App. 152, 118 Pac. 946. In that case it was charged in the information that the defendant did willfully connive at, consent to, and permit the placing and leaving of his wife in a house of prostitution, and that he did then and there willfully permit and allow her to remain there.

On appeal it was contended that the verdict was not supported by the evidence, because the evidence shows that the defendant placed his wife in the house of prostitution, and the argument was that this state of facts did not support a charge of conniving at, consenting to, or permitting the placing of his wife in such house. The court, in answer to this argument, said:

"Whether or not the evidence may be said to support a charge of conniving at the placing of the wife in a house of prostitution or not, it certainly supports the charge that he permitted her to remain in such house, which is all that is required to support a conviction under the information. People v. Shotwell, 27 Cal. 403; People v. Frank, 28 Cal. 507; People v. Sheldon, 68 Cal. 434."

[3] 3. The court committed no error in receiving evidence of other acts of defendant of a similar nature to that charged in the information. This evidence was proper as bearing upon the question of the intent and motive of the defendant, and as tending to show such intent and motive evidence was admissible of similar acts prior and subsequent to the time charged in the information. The case of People v. Ratledge, 172 Cal. 401, 156 Pac. 455, was a prosecution for the crime of practicing medicine without a certificate from the medical board. Evidence was received over defendant's objection of similar offenses. The Supreme Court, in sustaining the trial court's ruling, said:

"A witness was permitted over defendant's objection to detail the occurrences upon the occasion of a visit by her to his office nearly six months before the time set forth in the information. The objection was upon the usual grounds of incompetency, etc., and that the time was too remote. The evidence was competent as tending to show the intent and motive of the defendant in the commission of the acts charged in the information, and it was not too remote. Courts are allowed a wide discretion with respect to the periods of time covered by such testimony."

[4] 4. The deposition of Constance Parrish, taken at the preliminary examination of the defendant, was offered and received in evidence over the objection of the defendant. The appellant claims that the showing was not sufficient to justify the admission of said testimony. The deputy sheriff testified that he was unable to locate the witness in this state and he gave testimony tending to show that she was in Tia Juana, Mexico. The showing in our opinion was sufficient to sustain the decision of the court that she was absent from the state at the time of the trial and could not be produced as a witness. People v. Grill, 151 Cal. 592, 91 Pac. 515.

The question whether it has been satisfactorily shown that a witness whose deposition was taken at the preliminary examination of the defendant "cannot with due diligence be found within the state is a question of fact that is addressed to the trial court, to be determined by it from evidence

introduced before it (People v. Plyler, 126 Cal. 379), and with the determination of that question of fact by the trial court this court will not interfere, unless the evidence thereon is such as to satisfy the court that the trial court abused the discretion confided to it in holding that due diligence had been used, and that the witness could not be found." People v. Lewandowski, 143 Cal. 574, 576, 77 Pac. 467.

[5] 5. Complaint is made that the court erred in giving the following instruction to the jury:

"You are instructed that it is as much a violation of the Medical Practice Act to diagnose and prescribe herbs or medicine for any disease of a human being as it is to operate or otherwise treat a human being. You are instructed that it is no defense to an action for a violation of section 17 of the Medical Practice Act to say that he, the defendant, merely sold drugs or medicinal preparations in a commercial capacity, or like a storekeeper, if, at the time of so doing, he inquired of the patient or customer, the manifestations of his disease or ills, or made an examination of the pulse or any portion of the person of said patient or customer, and in connection therewith, selected and gave herbs, drugs, or other preparations intended by him to cure said patient or customer of the said disease or ills from which the defendant determined, by his inquiries or examination, the patient or customer to be suffering with."

Appellant contends that this instruction is erroneous because there is no claim made by the prosecution that the defendant examined the pulse of any one at the time charged in the information, and that the witness Constance Parrish did not in her testimony state that defendant had examined her pulse.

Although there is no reference in the testimony of this witness to any examination of her pulse, nevertheless, in view of the whole instruction, we are clearly of the opinion that the words, "examination of the pulse," contained in said instruction, did not in any manner cause a miscarriage of justice in this case, and to reverse the judgment for the giving of this instruction would be to disregard section 4½ of article 6 of the Constitution, which provides that—

"No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

[6] Error is also claimed in the court's refusal to give certain instructions proposed by the defendant, as to the principle of reasonable doubt, etc., but these instructions were fully covered by the instructions given by the court to the jury.

Finding no material error in the case, the judgment and order appealed from are affirmed.

We concur: BURNETT, J.; HART, J.

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Ex parte REINEGER. (Cr. 2263.)

(Supreme Court of California. Oct. 13, 1920.)

1. Criminal law ⟸13—Proviso of statute relating to sale of imitation milk held not to define criminal offense.

The provisos of Imitation Milk Act, Stats., relating to regulations as to the manner of sale, coloring, etc., and the manufacture and sale for cooking purposes, *held* not to define a criminal offense, but merely to state exceptions to a previously stated prohibition against the sale of products of imitation milk.

2. Food ⟸8—Act prohibiting sale of articles made from imitation milk held not to prohibit sale of imitation milk itself.

Imitation Milk Act, providing that no person shall manufacture, sell, etc., any article, product, or compound made wholly or in part out of an imitation milk, *held* not to absolutely prohibit the sale of the imitation milk itself.

3. Evidence ⟸20(1)—Courts will take judicial notice that boxes containing cans of liquid are called "cases."

The courts may take judicial notice that liquid goods, such as imitation milk, are, for purposes of transportation or storage, first inclosed in tightly sealed cans or bottles and then packed in boxes or other containers, which containers are called cases.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Case.]

4. Food ⟸3—Mode of determination as to whether seller of milk in cans is "wholesaler" or "retailer," stated.

Where an act regulating the sale of imitation milk imposes a different license fee upon wholesalers, who are defined as all persons selling cans of milk in quantities of "one full case or more at a time," than upon retailers, who are defined as including all persons selling in quantities of less than one case, in determining whether a business is wholesale or retail, the number of cans in each case is not material.

[Ed. Note.—For other definitions, see Words and Phrases, Retailer; Wholesaler.]

5. Statutes ⟸206—Construction should seek to give effect to each part of statute and carry out its purpose.

A statute should always be so construed, if reasonably possible, as to give each part thereof the meaning and effect which, from the act as a whole, appears to have been intended, and a narrow or restricted meaning should not be given to a word if it would result in an evasion of the evident purpose of the act, when a permissible and broader meaning would prevent the evasion and carry out that purpose.

6. Food ⟸3—Sale of milk by barrel or carboy held sale by "case," and seller is a "wholesaler" within license act.

Under Imitation Milk Act, imposing a different license fee upon retailers selling milk in quantities of less than one case than upon wholesalers selling one case at a time, a seller of milk in a barrel, carboy, or creamery can, containing larger quantities than would be sold to consumers in ordinary retail trade, would be selling by the case, and consequently would be a wholesaler.

7. Constitutional law ⟸48—Statute requiring wholesalers of milk to take out license presumed valid.

On habeas corpus to procure the discharge of one prosecuted for violating the Imitation Milk Act, imposing a license fee on wholesalers, it will be presumed that the Legislature properly omitted to provide for cases wherein a wholesaler sold and delivered milk to retailers in one-pound cans in large lots not incased at all; the statute making persons selling more than one case wholesalers.

8. Habeas corpus ⟸27—Writ lies only where magistrate without jurisdiction to issue warrant of arrest.

Habeas corpus to procure the release of one charged with selling imitation milk without a license lies only when the magistrate is without jurisdiction to issue the warrant of arrest.

9. Habeas corpus ⟸30(2)—That complaint is demurrable as failing to specify offense does not deprive court of jurisdiction.

Where a complaint in a court of inferior jurisdiction states facts showing that a defendant has committed a public offense, but is subject to attack by demurrer on the ground that it is uncertain as to the particular offense committed, the inferior court has jurisdiction, and the defect will not be ground for release on habeas corpus.

10. Food ⟸20(1)—Complaint under imitation milk statute held insufficient to show commission of offense.

A complaint, in a prosecution for violating Imitation Milk Act, *held* not to show that defendant had committed any offense whatever.

Sloane and Wilbur, JJ., dissenting.

In Bank.

Application by E. B. Reineger for a writ of habeas corpus to be directed to the Chief of Police, City and County of San Francisco, to secure release of petitioner from custody on a charge of violating a statute. Writ discharged, and petitioner remanded.

Thomas, Beedy & Lanagan, Theodore A. Bell, and Raymond Benjamin, all of San Francisco, Thomas E. Lannen, of Chicago, Ill. (William Thomas, of San Francisco, of counsel), for petitioner.

U. S. Webb, Atty. Gen., and Robert W. Harrison and John H. Riordan, Deputy Attys. Gen., for respondent.

John C. Macfarland, amicus curiæ, for State Board of Health.

SHAW, J. The petitioner, being imprisoned on the charge of violating the act of 1919 (Stats. 1919, p. 89), regulating the sale of substances designated therein as "imitation milk," seeks his discharge upon a writ of habeas corpus. He was arrested upon a warrant issued upon a complaint filed in the police court of San Francisco.

The complaint alleges that—

"The crime of misdemeanor, to wit, selling and offering for sale imitation milk, without first obtaining a license therefor, was committed by E. B. Reineger, who did then and there willfully and unlawfully engage in the business of selling, dealing in, and furnishing imitation milk, namely, a compound composed of evaporated skim milk and 7.8 per cent. of edible vegetable fat, without any other ingredient or ingredients, without first having applied for and obtained a license so to do, and did unlawfully sell, other than for cooking purposes, at one time, and in the same transaction, 60 cans of such imitation milk, each can containing one pound avoirdupois, which said imitation milk was not of a separate and distinct character not resembling milk or condensed or evaporated milk, nor colored nor containing any color or any ingredient or ingredients that caused it to look unlike pure, whole cows milk, or the condensed or evaporated product made therefrom."

It further alleged that each can was labeled to show that it was a compound of evaporated skim milk and vegetable fat containing 7.8 per cent. vegetable fat and 25.5 per cent. total solids.

It is claimed on behalf of the respondent that the complaint charges two offenses, the first under section 2 of the act and the second under section 6 of the act. Section 2 has no reference to the obtaining of a license, while section 6 forbids the sale of milk by any person who has not obtained a license therefor as therein provided. We are satisfied that no offense is charged under the provisions of section 2, the material parts whereof are as follows:

"Sec. 2. No person by himself, his agents or servants shall render, manufacture, sell, offer for sale, expose for sale, or have in his possession with intent to sell or to use, or to serve to patrons, customers, boarders or inmates of any hotel, dwelling house, restaurant, public conveyance or boarding house, any article, product or compound made wholly or in part, out of an imitation milk; provided, that nothing in this section shall be construed to prohibit the manufacture or sale, under regulations hereinafter provided, of imitation milk, of substances or compounds that may be used as imitation milk, of a separate and distinct character not resembling milk or condensed or evaporated milk, and in such a manner as will advise the purchaser and consumer of its real character, colored or containing ingredients that cause it to look unlike pure whole cow's milk or the condensed or evaporated produce made therefrom; * * * and provided, further, that nothing in this act shall be construed to prevent or prohibit the manufacture, sale, or use, for cooking purposes, of imitation milk as defined by section one of this act."

[1] The first clause of the complaint manifestly was intended to charge the selling of such milk without license, and that offense only. The claim that an offense is charged under section 2 is based on the second clause of the complaint. Upon the general frame of the complaint it would appear that this clause was intended merely as an additional definition of the offense of selling without license. The claim is that it was not so intended, but that it is a charge of an offense under section 2. Its language follows closely the language of the provisions of section 2. If it was intended as a charge of a separate offense, it could have been based only upon the theory that the provisos were affirmative and prohibitory, and were intended to define a criminal offense. The mere reading of them shows clearly that they were not so intended. They merely state exceptions to the previously stated prohibition. They do not forbid any act nor define any offense. In re Day, 181 Ill. 79, 54 N. E. 646, 50 L. R. A. 519; State v. Weeden, 17 Wyo. 418, 100 Pac. 114; Gaither v. Wilson, 164 Ill. 548, 45 N. E. 1019; 36 Cyc. 1162; 2 Suth. Stat. Constr. § 352.

[2] It is argued that the first clause of the section absolutely prohibits the sale of the imitation milk itself. It is obvious that it was not so intended. An article or compound made by evaporating from imitation milk the water therein, or by any other separation of its ingredients without adding others, would be made wholly out of imitation milk, and would come within the prohibition of the clause. But by no ordinary use of language can it be said that an article made wholly out of imitation milk is the same thing as the imitation milk out of which it is made. The complaint does not allege that the defendant sold any article, product, or compound made wholly or in part out of any imitation milk. The latter part of it charges merely that he did sell imitation milk which was not so colored as to be unlike milk. The first clause does not forbid such sale. Since it fails to state an offense under section 2, the complaint can be upheld only upon the theory that it purports to set forth a charge

of selling imitation milk without license. This, we think, was the real purpose of the pleader.

Section 6 declares that no person shall engage in the business of selling imitation milk without first having obtained a license so to do. For such license it provides that wholesale dealers shall pay a fee of $50, and retail dealers a fee of $5. The petitioner concedes that the complaint charges that he did engage in the business without having obtained a license, but he claims that the section is void because of the uncertainty of its definitions of dealers, the uncertainty being of such a character, so it is argued, that no person in the business could determine from such definitions whether he was a wholesaler or a retailer. The two definitions in question are as follows:

"The term 'wholesale dealer' as used in this section includes all persons, firms or corporations who sell any of said substances in quantities of one full case or more at a time or in the same transaction. The term 'retailer dealer' includes all persons who sell in quantities of less than one case."

It is contended that the question whether a person carrying on the business is a "wholesale dealer" or a retail dealer depends entirely on the meaning of the word "case"; that its meaning is altogether uncertain and indefinite; that consequently no one can determine the question, or ascertain from the section what sort of license a particular dealer must have or what amount he must pay as a license fee; and hence that the provisions requiring licenses to such dealers are incapable of enforcement and void.

[3, 4] The word "case," when used in that connection, is defined as "a box, sheath, or covering of any kind; * * * a box and its contents; * * * as a case of goods" (Webster's Dict.), and also as "anything intended to inclose or contain something." (Standard Dict.) It is common knowledge that liquid goods, such as imitation milk, are, for purposes of transportation or storage, first inclosed in tightly sealed cans or bottles, and then packed in boxes or other containers, each containing a number of the cans or bottles. This is done either by the manufacturer or by wholesale dealers who buy from the factory. Of this fact the courts may take judicial notice. Such boxes or containers are called cases. In each kind of goods usually a fixed number of cans or bottles are packed in each case, and such number is well known to all persons engaged in trade in such goods, whether wholesalers or retailers. In any action wherein the number contained in each case was a fact material to the cause of action, or charge, it would be necessary to allege and prove the usage in that particular trade as to the number of cans or bottles packed in each case, or if there were cases of different sizes in use, the number in each size, if that were a material fact. But as the facts that wholesalers sell and ship such goods in cases as above stated, and that retailers do not, are of common knowledge, the word "case" has a definite meaning when used to distinguish a wholesaler from a retailer. It refers to the boxes in which the cans are packed and shipped, and it includes the contents of such cases, whether a small or a large number of cans is incased. In determining whether the business is wholesale or retail, the number in each case is not material. The one selling by cases would be a wholesaler, regardless of the number of cans in a case; the one selling less than a case at a time would be a retailer. A sale, in the sense here used, would include the delivery. A change in the number of cans packed in a case by the usage of the trade, or by a particular wholesaler, would not affect the question.

[5, 6] If, as suggested, imitation milk were sold by wholesalers in bulk, as in barrels or carboys or large creamery cans, without being put in small cans or bottles for the retailer, and the retailer should adopt the custom of selling to consumers in pint or quart vessels, brought in by the consumer or furnished by the retailer and filled from such bulk containers, no difficulty need arise in applying the law. A statute should always be so construed, if reasonably possible, as to give each part thereof the meaning and effect which, from the act as a whole, appears to have been intended. A narrow or restricted meaning should not be given to a word, if it would result in an evasion of the evident purpose of the act, when a permissible, but broader, meaning would prevent the evasion and carry out that purpose. A barrel, carboy, or a creamery can, used to contain larger quantities of the milk than would be sold to consumers in ordinary retail trade, would be a "sheath or covering" for the milk, a thing intended to contain the milk, and therefore it would be included in the general definition of the word "case." One who was engaged in the business of selling the milk in such packages would be selling by the "case," and consequently a wholesale dealer, as defined in the section.

[7] A wholesaler who engaged in the business of selling and delivering to retailers the one-pound cans in large lots not incased at all, but merely piled into box cars or trucks, would be so rare that he would be in a class by himself, and we may safely leave his case to the next Legislature. The possibility does not appear so great as to require us to annul the section for fear that there may be an unjust discrimination in his favor if it is held valid. In view of the presumption in favor of legislative action we must assume that

the Legislature, upon a survey of the field, concluded that there were no dealers carrying on business in that manner, and that it was improbable that there ever would be, and so purposely omitted any provision for such cases. Ex parte Martin, 157 Cal. 57, 106 Pac. 235, 26 L. R. A. (N. S.) 242; Ex parte Miller, 162 Cal. 698, 124 Pac. 427.

The complaint does not purport to charge a violation of sections 4 and 5 of the act, or of either of them. It is therefore unnecessary to consider the objections urged to the validity of those sections.

The proposition that a compound of this kind which is not milk, but which resembles milk, and which for many purposes may be used as a substitute for milk, is subject to reasonable regulations under the police power, designed to prevent it from being sold to consumers as real milk, is settled by the decision of the Supreme Court of the United States in Hebe Co. v. Shaw, 248 U. S. 297, 39 Sup. Ct. 125, 63 L. Ed. 255. Some of the regulations in this act may be unreasonable; but, as they are not so interwoven with the provisions requiring a license and other parts of the act as to be inseparable and thereby invalidate the entire act, we need not consider the question.

[8, 9] It may be that the complaint is uncertain because it does not state whether the petitioner is a wholesale dealer or a retail dealer as defined in the act. It does not allege whether the 60 cans sold amounted to one full case or not. Habeas corpus lies in such cases only when the magistrate is without jurisdiction to issue the warrant of arrest. Where a complaint in a court of inferior jurisdiction states facts showing that the defendant has committed a public offense, but is subject to attack by demurrer on the ground that it is uncertain as to the particular offense committed, the inferior court has jurisdiction, and the defect will not be ground for his release on habeas corpus. Ex parte McNulty, 77 Cal. 166, 19 Pac. 237, 11 Am. St. Rep. 257. There is nothing in Ex parte Kearney, 55 Cal. 212, or Ex parte Greenall, 153 Cal. 767, 96 Pac. 804, that is contrary to this rule.

[10] The complaints there considered failed to show that the defendant had committed any offense whatever.

The writ is discharged, and the petitioner is remanded to the custody of the proper officer.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; LENNON, J.; LAWLOR, J.

SLOANE, J. I dissent from that portion of the main opinion construing section 2 of the act. In my judgment it was clearly the intention of the Legislature to prohibit the sale of imitation milk. I concur in the rest of the opinion.

I concur: WILBUR, J.

184 Cal. 80

ZELLNER v. WASSMAN et al. (L. A. 6052.)

(Supreme Court of California. Oct. 11, 1920. Rehearing Denied Nov. 9, 1920.)

1. Specific performance ⇐86—Remedy inapplicable to agreement to bequeath where legal remedy adequate.

Equitable relief in the nature of specific performance of an agreement to devise and bequeath property by will cannot be allowed where the legal remedy is adequate; so specific performance of an alleged contract to bequeath a specified sum of money will not be granted, the legal action for damages affording adequate relief.

2. Specific performance ⇐39—Relief will not be granted because action at law is barred by statute of frauds.

Specific performance of an oral contract to bequeath money will not be granted because the legal action for damages is barred by the statute of frauds, particularly as the statute is not disregarded by courts of equity.

3. Specific performance ⇐39 — Statute of frauds applicable to suits in equity, but cannot be used as instrument of fraud.

The statute of frauds is applied in equity suits as well as in actions at law, subject to the rule that, since the statute was designed to prevent fraud, equity will not permit it to be used as an instrument for the accomplishment of fraudulent purposes.

4. Specific performance ⇐39 — No resort to equitable relief on theory that law action is barred by statute of frauds.

Where the administration of law and equity has been merged in one court, the doctrine of equitable estoppel applied to prevent reliance on the statute of frauds in case it is sought to be used as instrument to accomplish fraud is not confined to suits in equity, but is equally available in actions at law, and hence in such a court there can be no resort to equitable relief on the theory that legal action is barred by the statute.

5. Frauds, statute of ⇐103(1) — Bequest in lost will held not memorandum of contract to bequeath.

Though testator made a bequest in a will duly executed, it does not amount to a memorandum in writing required by the statute of frauds (Civ. Code, § 1624, as amended in 1905 [St. 1905, p. 611]), requiring agreements to leave property by will to be reduced to writing, where the will was not discovered at the death of the testator.

6. Frauds, statute of ⟸139(1)—Execution of will not performance of agreement to bequeath.

The mere execution of a will containing a bequest where the will was not discovered at the death of testator, and there was no other written memorandum, coupled with the fact that the services for which the bequest was to be made were fully rendered, does not render the contract executed, so as to prevent the personal representatives of the decedent from relying on the statute of frauds.

7. Frauds, statute of ⟸143(4)—Representatives of decedent not estopped from relying on statute of frauds.

Where decedent's mother requested plaintiff to assist her in making investments and in caring for decedent during periods of delirium tremens, and requested decedent to pay plaintiff $5,000 out of her estate, and decedent arranged to bequeath plaintiff that sum if he would forego fees as administrator, etc., *held* that, where there was no written memorandum of the agreement as required by Civ. Code, § 1624, as amended in 1905 (St. 1905, p. 611), the personal representatives of decedent may rely on the statute of frauds, there being no estoppel, as there was no representation by decedent that he would reduce the contract to writing.

8. Judgment ⟸249—Where complaint states cause of action on any theory, it supports recovery.

As there is but one form of civil action, plaintiff may recover if his complaint states any cause of action entitling him to any relief in law or equity, even though he has misconceived the relief to which he is entitled.

9. Frauds, statute of ⟸138(4)—Party may recover for services on quantum meruit where action on contract is barred by statute.

Where a party has conferred on another with the assent of the latter a benefit not intended as a gratuity, and the recipient cannot be held on his original promise to compensate, the law implies a promise to pay the reasonable value; hence, where plaintiff could not recover on an agreement to bequeath money because there was no written memorandum as required by Civ. Code, § 1624, as amended in 1905 (St. 1905, p. 611), *held* that, where the agreement was in consideration of the rendition of services, etc., plaintiff might recover on the quantum meruit.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Richard Zellner, Jr., against E. C. Wassman, Carl Frederick Wassman, and Frank Bryson, administrator of the estate of Hugo C. Wassman, deceased. From a judgment of nonsuit, plaintiff appeals. Reversed.

J. L. Murphey, of Los Angeles, for appellant.

Slosson & Mitchell, of Los Angeles, for respondents.

LENNON, J. Plaintiff appeals from a judgment of nonsuit in an action brought against the administrator and heirs at law of Hugo C. Wassman, deceased, upon an alleged contract of said deceased to leave certain property to plaintiff by will. The claim sued upon emanates from the following circumstances set forth in the complaint: Frequently every year, for a period of seven years, commencing in 1905, the mother of deceased requested plaintiff to come to her home and take charge of deceased during attacks of delirium tremens, to which he was subject. Complying with these requests, plaintiff, on many occasions during the years above mentioned, remained with the deceased a large part of his time, both day and night, and, in order to do so, neglected his business. Plaintiff was also frequently requested to and did attend deceased as a companion, and both deceased and his mother declared to plaintiff that the latter was of great assistance and benefit to the said deceased. In addition to these services, plaintiff aided the mother of deceased in business matters and advised the purchase, for the sum of $3,000, of certain real property which was sold by her a few days prior to her death for $35,000, $5,000 of which was paid in cash and $30,000 by a promissory note secured by a mortgage. In consequence of the foregoing, the mother of deceased declared to plaintiff, in the presence of her son, that she intended to pay plaintiff $5,000, and that she would bequeath him that amount by will, for she did not have the money with which to pay him at the time. She requested her son, the deceased, to pay plaintiff $5,000 from her estate in the event that she died without making a will or paying the said sum, and the son agreed to do so.

The money was never paid by the mother, who died intestate in the month of July, 1912, leaving to her son, as her sole heir at law, an estate consisting of $4,776.80 in cash, real estate valued at $500, and the above-mentioned promissory note for $30,000. At the time of the mother's death, the son was suffering from serious illness, caused by excessive drinking, and plaintiff, upon the son's request, temporarily gave up his business and devoted several weeks to care of said son. As a result of the efforts of plaintiff and one other person, the son had, prior to October, 1912, altogether stopped drinking alcoholic liquors. At that time the son, being himself unable to act as administrator of his mother's estate, asked plaintiff to act in that capacity, and plaintiff did so. During the administration of the estate the son told plaintiff that he desired to compensate plaintiff for his services to him and to carry out the wishes of his mother with respect to the payment of the $5,000, but that there would not be sufficient money for that purpose until the $30,000 note was paid. This was so, he said.

because, although cured of the drinking habit, he was unable to earn a living and was entirely dependent upon the proceeds of his mother's estate for support. He then proposed to plaintiff that, if plaintiff would waive his administrator's fees, amount to approximately $1,100, and would make no claim against his mother's estate, he, in turn, would pay plaintiff $5,000 out of the money collected on the $30,000 note, provided that the amount of said note was collected prior to his death, and that he would make a will and bequeath plaintiff $5,000 so that plaintiff would be secured in event the son died before the note was collected. Plaintiff agreed to accept this proposition and fully performed all of the conditions on his part. The note is still uncollected, save for interest and a small portion of the principal, amounting to less than $3,000, and the son did not during his lifetime pay, or have sufficient money with which to pay, the $5,000 to plaintiff. Although the son made and executed a will wherein he bequeathed $5,000 to plaintiff, no will was found upon his death, which occurred November 26, 1917. Administration of the estate is now pending; the only heirs of the decedent being two uncles, one of whom resides in Hanover, Germany, and the other in the state of Tennessee.

The complaint is drawn upon two theories: (1) That plaintiff is entitled to specific performance of the alleged agreement; (2) that the action is a suit at law upon a claim against the estate of the decedent, duly presented and rejected by the administrator.

[1-4] Under the facts disclosed by the complaint, equitable relief in the nature of specific performance is unavailable. Agreements to leave property by will often consist of promises to devise real property in return for peculiar personal services, or other consideration, which was not intended to be, and in the contemplation of law could not be, compensated by money, and this circumstance has rendered possible the frequent interposition of equity in cases involving violations of such agreement. The fact remains, however, that in actions upon these agreements, as in other actions upon contracts, inadequacy of the legal remedy to compensate for the breach is the keystone of equitable jurisdiction. Since plaintiff relies upon an alleged contract to bequeath a specified sum of money, the case falls within the decision of this court in Morrison v. Land, 169 Cal. 580, 147 Pac. 259, where it was said:

"An ordinary action at law for breach of the contract would bring him the very thing to which he is entitled under the allegations of his complaint—afford him full and adequate relief. In such an action, the measure of damages would have been the value of the property agreed to be bequeathed, for that was the amount in which he was damaged by the breach. See 40 Cyc. 1073. Attorneys for respondents pertinently ask, 'Is a decree in equity ordering payment of a sum of money from the estate to plaintiff any more perfect and complete justice to him than a common law judgment in his favor and against the estate for a like sum?' A clearer case of adequacy of remedy at law could not be made than that presented here. The situation is such as to absolutely preclude resort to equity."

In support of the proposition that the case is amenable to equitable jurisdiction, counsel for plaintiff advances the naive argument that plaintiff's remedy at law is inadequate if a legal action is barred by the statute of frauds. The proposition, if adopted, would lead to the anomalous result that all oral agreements within the statute of frauds which had been performed by one of the parties thereto would be specifically enforceable in equity upon the ground that the statute rendered a recovery at law impossible. Moreover, plaintiff would gain nothing even were he permitted to sue for equitable relief in the nature of specific performance, for the statute of frauds is not disregarded in equity. It is enforced in suits for equitable relief as well as in actions at law, subject to the rule that, since the statute was designed to prevent fraud, equity refuses to permit it to be used as an instrument for the accomplishment of fraudulent purposes. 3 Pomeroy's Equity Jurisprudence, § 1293. Where the administration of law and equity has been merged in one court, this doctrine of equitable estoppel is not confined to suits in equity, but is equally available in an action at law. 5 Browne on Statute of Frauds, p. 575; Seymour v. Oelrichs, 156 Cal. 782, 106 Pac. 88, 134 Am. St. Rep. 154. Therefore a plaintiff's claims to an equitable estoppel will be considered in determining whether or not his cause of action is barred by the statute of frauds whether the action be at law upon the contract or an equitable action seeking specific performance.

[5] This brings us to a consideration of the legal action upon the claim presented against the estate. Agreements to leave property by will must be reduced to writing or evidenced by some written note or memorandum; for, by virtue of the 1905 amendment to section 1624 of the Civil Code, they are within the purview of the statute of frauds. It is admitted that the agreement of the son to leave $5,000 by will herein sued upon was not reduced to writing, and that no written note or memorandum thereof was made unless the will executed by deceased, a copy of which was attached to the complaint, fulfills the requirements of the statute in that respect. The will in question contained a simple bequest of $5,000 to plaintiff, without reference to any agreement in respect thereto. The pre-eminent qualification of a memorandum under the statute of frauds is "that it must contain the essential terms of the contract, expressed with such a degree of cer-

tainty that it may be understood without recourse to parol evidence to show the intention of the parties." 5 Browne on Statute of Frauds, § 371. Accordingly, it has been held in this state that an undelivered deed cannot be regarded as a sufficient memorandum of an oral agreement for the sale of land therein described when the deed is silent as to the terms of the alleged agreement and merely conveys the land from one party to another. Swain v. Burnette, 89 Cal. 564, 570, 26 Pac. 1093. In other jurisdictions the same reasoning has been applied to a will, for some reason ineffective upon the death of the testator, which makes no mention of the terms of the contract in pursuance of which it is alleged to have been executed. Allen v. Bromberg, 163 Ala. 620, 50 South. 884; McClanahan v. McClanahan, 77 Wash. 138, 137 Pac. 479, Ann. Cas. 1915A, 461. A potential factor in furtherance of fraud would be engendered were a will containing a simple bequest permitted to operate as evidence of a binding contract to make such a bequest. It must therefore be held that there is no written memorandum of the agreement here in suit.

[6] Nor does this case fall within the rule that the statute of frauds cannot be invoked in case of a completed oral contract (Schultze v. Noble, 77 Cal. 79, 19 Pac. 182; Colon v. Tosetti, 14 Cal. App. 693, 113 Pac. 365, 366), for the contract now sued upon was not completed. The reason that the contract is now in court is because the decedent did not perform his part of the alleged agreement by causing to be in existence at the time of his death a will bequeathing $5,000 to plaintiff. The mere execution of a will was not a performance of the contract.

[7] It has been stated that the right of courts of equity to hold a person estopped to assert the statute of frauds where such assertion would amount to practicing a fraud applies "in every transaction where the statute is invoked." 2 Pomeroy's Equity Jurisprudence, § 921; Seymour v. Oelrichs, supra. We may assume, for the purposes of this case, without deciding, that this doctrine applies to contracts to leave property by will; for in any event, the circumstances of this case are not such as to estop defendants from invoking the statute of frauds as a defense. As a general rule neither the mere omission to put a contract in writing nor such omission coupled with performance is alone sufficient to create an estoppel. "A plaintiff * * * must be able to show clearly * * * such acts and conduct of the defendant as the court would hold to amount to a representation that he proposed to stand by his agreement, and not avail himself of the statute to escape his performance, and also that the plaintiff, in reliance on this representation, proceeded, either in performance or pursuance of his contract, to so far alter his position as to incur 'an unjust and unconscientious injury and loss, in case the defendant is permitted after all to rely upon the statutory defense.'" 5 Browne on Statute of Frauds, p. 585. Plaintiff's services to decedent's mother were apparently rendered upon the basis of friendship, in the absence of contract and without expectation of charge. The performance relied upon by plaintiff consisted in waiving administrator's fees and refraining from presenting a claim against the mother's estate, in addition to certain personal services, in consideration of an oral promise to leave plaintiff $5,000 by will. There was therefore no such change of conditions and relations in reliance upon the contract that a refusal of the other party to perform would amount to fraud, as was the case in Barry v. Beamer, 8 Cal. App. 200, 96 Pac. 373, cited by counsel for plaintiff. There was no representation on the part of decedent that he would reduce the promise to writing, as was the case in Seymour v. Oelrichs, supra. The words and conduct on the part of decedent in making the oral promise and accepting plaintiff's performance did not amount to an inducement to plaintiff to, in effect, waive a written instrument in reliance upon a representation that decedent would stand by his agreement and not avail himself of the statute of frauds. There is therefore an absence of the element of fraud which is requisite to an estoppel. It is a case in which the consequences of the failure to comply with the statute must be borne by the party who seeks to enforce the agreement, and it follows that plaintiff has no cause of action upon the contract.

[8, 9] While the contract cannot be enforced, either in law or equity, we think that plaintiff is nevertheless entitled to some relief under the pleadings and evidence offered in support thereof, and that, as a consequence, the judgment of nonsuit was erroneous. There being but one form of civil action in this state, a plaintiff may recover if his complaint "states any cause of action entitling the plaintiff to any relief at law or in equity." Hayden v. Collins, 1 Cal. App. 259, 261, 81 Pac. 1120, 1121. It is not essential that a complaint state a cause of action for the relief which plaintiff seeks, provided the facts stated show some right of recovery, and a party cannot be thrown out of court merely because he may have misconceived the form of relief to which he is entitled. Walsh v. McKeen, 75 Cal. 519, 17 Pac. 673; Rogers v. Duhart, 97 Cal. 500, 32 Pac. 570; Brown v. Irrig. Dist., 190 Pac. 797. Where a party has conferred upon another, with the assent of the latter, a benefit which was not intended as a gratuity, and the recipient cannot be held upon his original promise to compensate by virtue of the statute of frauds, the law implies a promise on the part of the party receiving the benefits to pay the reasonable value of whatever has been received under

the contract. Elliott on Contracts, vol. 2, § 1216. In the present case it appears, from a careful examination of the pleadings, that plaintiff has pleaded facts sufficient to entitle him, under the rules just mentioned, to a recovery for the reasonable value of his services. It is true that the cause of action for the reasonable value of the services is inartificially set forth, and that the pleadings ought to be amended for the purpose of clarifying the issues, but the facts pleaded were sufficient to advise defendants of the nature of the basis of plaintiff's claim of recovery, and objection, so far as the sufficiency of the complaint was concerned, was raised only by general demurrer. The claim presented to the administrator by plaintiff and sued upon in the present action sets forth facts sufficient to show the nature of the services performed; a request for the services on the part of decedent; that the services rendered were not gratuitous, but were rendered, to some extent at least, in expectation of and under a definite arrangement for compensation; that plaintiff has received no compensation therefor. Testimony in support of all of these allegations was either given or offered and refused; proof of the value of the services and the failure to pay the same was offered and rejected. The trial court evidently proceeded upon the theory that both of plaintiff's causes of action were predicated solely upon the contractual claim, which, as we have above stated, was unenforceable. However, in view of the presence in the pleadings of facts sufficiently stating the elements of a cause of action for the value of the services rendered, and in view of the fact that sufficient evidence in support of such cause of action was either introduced or offered for introduction, the nonsuit should not have been granted.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOANE, J.; OLNEY, J.; LAWLOR, J; WILBUR, J.

184 Cal. 89

FULLER v. TOWNE. (L. A. 5369.)

(Supreme Court of California. Oct. 11, 1920. Rehearing Denied Nov. 10, 1920.)

1. Schools and school districts ⟸81(2)—Evidence insufficient to show indemnitor of surety on contractor's bond did not agree to make good deficiency to materialmen.

Evidence *held* insufficient to sustain finding that defendant indemnitor of a surety company against loss on bonds given on behalf of a contractor to erect a schoolhouse, after arranging at a creditors' meeting after the disappearance of the contractor to complete the building and pay all claims in full if not harassed or oppressed, did not agree to collect the money due from the school district, apply it to claims, and make good any deficiency, in consideration of release of stop notices by claimant materialmen.

2. Schools and school districts ⟸81(2)—Indemnitor of surety company liable on promise to materialmen, irrespective of his liability for contractor's default.

Where the indemnitor of surety on bonds of a contractor to erect a school building, in consideration of claimants for materials releasing their stop notices so that he could secure payment for the work, which he had completed on disappearance of the contractor, agreed to apply payments to claims and to make good any deficiency, his promise was supported by consideration, and he was liable thereon, whether or not, on account of the contractor's default, he was obligated to pay materialmen.

3. Trial ⟸404(2)—Finding stop notices ineffective merely a conclusion of law.

The trial court's finding that certain stop notices given by materialmen to a school district relative to payments on a school house under construction for it were wholly ineffective was not a finding, but a conclusion of law.

4. Mechanics' liens ⟸113(2)—Stop notice effective as to money subsequently falling due under contract.

Code Civ. Proc. § 1184, makes a stop notice effective as to any money subsequently falling due under the contract without any provision that the money be due at the time of the giving of the notice, or that the notice be effective only as to money falling due next after the use in the building of the materials on account of which the notice is given.

5. Schools and school districts ⟸81(2)—Stop notices effective as to money due under contract whether notice was for labor or materials furnished at instance of contractor or of surety's indemnitor.

Where the indemnitor of surety on the bonds of a contractor to erect a schoolhouse on the contractor's default merely stepped into his shoes and undertook to complete the work, stop notices from materialmen to the school district as to payments on the contract were effective under the statute as to all money due or thereafter becoming due under the contract, whether the notice was for labor or materials furnished at the instance of the original contractor, or at the instance of the indemnitor of the contractor's surety.

6. Contracts ⟸72—Agreement in consideration of release supported whether or not stop notices released were effective.

A contract, in consideration of release by materialmen of stop notices filed in good faith, under which the materialmen were claiming in good faith, is supported by sufficient consideration and is valid, regardless of whether or not the notices were legally effective.

7. Frauds, statute of ⟸33(2) — Oral agreement of indemnitor of surety of contractor for release of stop notices not within statute.

Oral agreement of indemnitor of surety on bonds of contractor to erect school building to

apply all payments to the claims of materialmen and to make good any deficiency in consideration of release of stop notices to the school district filed by such materialmen *held* not within Code Civ. Proc. § 1973, Civ. Code, § 1624, as a promise to answer for the debt of another, in view of the exception of cases provided for in Civ. Code, § 2794.

In Bank.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by J. D. Fuller against Z. A. Towne. From judgment for defendant, plaintiff appeals. Reversed.

Sheldon Borden, Richard J. O. Culver, G. C. De Garmo, and Albert A. Kidder, Jr., all of Los Angeles, for appellant.

Tanner, O'Dell & Taft, of Los Angeles, for respondent.

OLNEY, J. The plaintiff, as the holder by assignment of certain claims against one La Rue, brought the present action against the defendant, Towne, upon the alleged promise of the latter to pay the claims. After trial judgment went for the defendant, and the plaintiff appeals. The facts as stated in the complaint are in brief: La Rue in April, 1915, entered into a contract with the trustees of the school district of Watts, in Los Angeles county, to erect a schoolhouse, and induced a surety company to execute two bonds on his behalf, one for the faithful performance of the contract, and the other for the payment of claims for labor done upon, or materials furnished for, the building. These bonds were furnished by the surety company in reliance upon a written contract previously executed by the defendant, whereby he agreed to indemnify the company against loss upon any bonds they might give on behalf of La Rue. La Rue commenced the erection of the building and had partially completed it when he disappeared. The defendant thereupon, induced by his responsibility on his indemnity contract, undertook to complete it and did so. Prior to his disappearance La Rue had purchased and failed to pay for materials furnished for the building, and it is the claims for the price of materials so furnished which the plaintiff holds by assignment and upon which he sues. After La Rue's disappearance, stop notices on behalf of each of these claims against any money payable by the school district for the building were given the district by the plaintiff's assignors. Upon the completion of the schoolhouse, there was a considerable balance due from the school district under the building contract. In order to obtain this money, the defendant promised the plaintiff's assignors that, if they would withdraw their stop notices, so that he could secure payment from the school district, he would use the money so obtained to pay the claims against the work, including their claims, and would pay any deficiency out of his own pocket. The plaintiff's assignors accordingly released their claims so far as the school district was concerned, and the balance due for the building was paid the defendant. With this balance he paid in full all bills which he had himself incurred in connection with the work, and applied the remainder pro rata to the payment of the claims incurred by La Rue. The remainder was not sufficient to pay these latter claims in full, the defendant refused to make the deficiency good, as it is alleged he promised to do, and the complaint asks for judgment against him for the amount of the deficiency.

It is apparent at once upon the foregoing facts, as stated in the complaint, that the gravamen of the plaintiff's cause of action is the alleged promise of the defendant to make good the deficiency. The other material facts appear practically without dispute, and if the defendant actually made the promise, he is liable upon it, for it was a promise made for and supported by a sufficient consideration. It may be that he would be liable even if this particular promise were not made, for the complaint goes on to allege a number of other promises by the defendant, made subsequently to the one we have mentioned. But these later promises, as alleged, are based upon the prior promise, and we are not certain that they are supported by any consideration other than the obligation of the prior promise, so that, if the prior promise were not made, it may be that the subsequent promises are not contractual in effect for want of a consideration. But it is not necessary to decide the question so presented, and for the purposes of discussion on this appeal we may assume the view most favorable to the defendant, and that is that the later promises would not be effective unless supported by the prior promise mentioned, so that the situation is that, if the defendant made that promise, he is liable, and, if he did not make it, he is not. The trial court found that he did not make it, and the most fundamental question presented by the appeal is as to whether or not this finding is contrary to the evidence.

[1] An examination of the record makes it plain that the finding is contrary to the evidence and wholly without support in it. The evidence for the plaintiff is that upon the disappearance of La Rue the defendant engaged one Pierce, a credit man for one of La Rue's creditors, to advise or assist the defendant in the situation in which he found himself by reason of his agreement to indemnify the surety company which was La Rue's bondsman; that a meeting of creditors was had whereat Pierce, speaking for the defendant, who was present and acquiesced in all that Pierce said, informed the creditors that the defendant would undertake to complete the building and pay all claims in full, provided he was not harassed or pressed; that upon the completion of the building another

meeting of creditors was had, with the defendant and Pierce present, and at this meeting substantially the arrangement alleged in the complaint was made between the creditors and the defendant; that is, the creditors were to withdraw their stop notices, and the defendant was to collect the money due from the school district and apply it to the claims against the work, and was himself to make good the deficiency which was known at the time to exist. There were quite a number of witnesses to the foregoing facts. There was also considerable testimony as to the defendant's subsequent conduct, which strongly corroborates the testimony that the arrangement claimed was made. According to this testimony, the defendant later gave his note and mortgage for the deficiency, but there was some clerical defect in the instrument, and, upon their return to the defendant for correction, he refused to redeliver them. There was also introduced in evidence a verified pleading by the defendant in another action wherein it was stated that he had executed such note and mortgage.

The only evidence for the defendant was his own testimony. He admitted that at the first meeting of the creditors he was present and allowed Pierce to speak for him, and does not controvert the fact that Pierce stated that he would pay the claims against the work in full. As to the meeting after the completion of the building, when the arrangement which is the crux of the case is claimed by the plaintiff to have been made, the defendant does not testify at all. Nor does he in his testimony deny having promised to make good the deficiency. He does deny ever having promised to give a mortgage or ever having executed one, and that is about all of substance that he does deny. Even as to that, he admits signing some papers which may have been the note and mortgage, but says he signed them without reading them and in the belief that they were something else. He likewise explains the verification of the pleading which alleged that he had executed such note and mortgage by saying that he had sworn to the pleading without reading it. It is doubtful if this testimony was sufficient to justify the finding which the court made that he did not execute the note and mortgage. But, whether it was or not, it was wholly insufficient to justify the finding that he did not make the arrangement at the creditors' meeting which is the basis of the action. That arrangement was testified to by several witnesses, there is nothing whatever to cast doubt upon their testimony, on the contrary all the circumstances of the case tend to corroborate it, and the defendant's evidence does not controvert it. There is but one conclusion possible, and that is that the finding is contrary to what is the plain fact in the case.

[2] We have stated that, if this finding were not justified, if the promise substantially as alleged in the complaint were in fact made, the defendant was liable. Prima facie, of course, this statement is true, for the promise was made for a consideration, the withdrawal by the plaintiff's assignors of their stop notices so that the defendant might collect the balance on the building contract from the school district, and, being supported by a consideration, creates a contractual obligation enforceable at law. Counsel for the defendant, however, contend that the statement is not true for several reasons, and the cause should not be decided without a discussion of these reasons. Among those urged are that there was no valid contract between La Rue and the school district, that the bonds which the surety company signed on La Rue's behalf were not valid, that the bonds given by the surety company did not fall within the defendant's indemnity contract, and that the defendant never received any consideration for executing the indemnity contract. Some of these reasons are advanced in more than one form. They all, however, go to the single point that because of them the defendant was not liable on his indemnity contract, and was therefore under no obligation because of La Rue's default, and in particular was under no obligation to pay the bills of plaintiff's assignors for materials furnished for the work. The answer is that it is wholly immaterial whether the defendant was so obligated or not. He is not being sued upon that obligation, but upon a wholly independent one which he later assumed voluntarily, in consideration of the plaintiff's assignors releasing their stop notices. His motive for assuming this later obligation may have been his belief that he was responsible for La Rue's bills, because of the indemnity contract, but his mistaken belief in this respect, if it was a mistake, does not entitle him now to deny or avoid the contractual arrangement which he made. Even if he could have avoided that arrangement in the first instance on the ground of mistake, which is very doubtful at best, he certainly cannot do so now, when it is wholly impossible to restore the creditors to the position they were in when by his promise he induced them to release their stop notices.

[3, 4] Another reason advanced why the defendant should not be responsible upon his promise is that, according to the claim of counsel, the stop notices were wholly ineffective. The trial court, in fact, made an express finding to that effect, but the finding is very evidently but a conclusion of law. It is rather difficult to get clearly the ground upon which it is claimed the notices were ineffective. Apparently it is one or more of the following: (1) The fact that the materials for whose price the notices were given had all been used in the building at the time of La Rue's disappearance, and La Rue had been paid all installments due up to that time; (2) the fact that no money was due on

the building when the notices were given; and (3) the legal proposition that the work done by the defendant was as if done under a separate contract from that done by La Rue. As to the first two grounds, it is sufficient to say that the statute makes a stop notice effective as to any money subsequently falling due under the contract without any provision that the money be due at the time of the giving of the notice, or that the notice be effective only as to money falling due next after the use in the building of the materials on account of which the notice is given. The statute (section 1184, Code Civ. Proc.) reads:

"Upon such notice being given, * * * the owner or person who contracted with the contractor, shall withhold from his contractor sufficient money due or that may become due to such contractor to answer such claim. * * *"

See, also, Diamond Match Co. v. Silberstein, 165 Cal. 282, 131 Pac. 874.

[5, 6] As to the third ground, the answer is that the defendant undertook the completion of the schoolhouse, not under a new or separate contract or as an independent contractor, but under La Rue's contract and as one completing the contract for La Rue upon the latter's default. The defendant simply stepped into La Rue's shoes, and consequently a stop notice was effective under the statute as to all money due or thereafter becoming due under the contract, regardless of whether the notice was for labor or materials furnished for the building at the instance of La Rue or at the instance of the defendant. There is nothing contrary to these views in Hughes Bros. v. Hoover, 3 Cal. App. 150, 84 Pac. 681, and Clark v. Beyrle, 160 Cal. 314, 116 Pac. 739, cited by defendant's counsel. Furthermore, it would make no difference if the notices were legally ineffective, as counsel claims. The plaintiff's assignors filed them in good faith and were claiming under them in good faith. They had a right to insist upon them and were under no obligation to release them. This being the case, a contract in consideration of their release is supported by a sufficient consideration and is valid, regardless of whether or not the notices were in truth legally effective. 13 Corpus Juris, 346.

[7] The final contention on behalf of the defendant which requires discussion is that the promise sued upon was within the statute of frauds as a promise to answer for the debt of another, and was not in writing. The promise was certainly one to answer for the debt of another, and it was not in writing nor was there any written memorandum of it. But section 1624, Civil Code, and section 1973, Code of Civil Procedure, which constitute our statute of frauds as to contracts of this character, both except from their operation the cases provided for in section 2794, Civil Code. This section specifies a number of cases wherein a promise to answer for a debt of another need not be in writing, but of these there is only one within which the defendant's promise here might fall. Omitting the provisions concerning other cases, the section reads as to the one material here:

"A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor and need not be in writing. * * * 3. Where the promise, being for the antecedent obligation of another, is made * * * upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person."

It is clear that the present promise falls within the class so specified. Just two elements are required by the Code provision: (1) That the promise be for an antecedent obligation; and (2) that the consideration be for the benefit of the promisor. Both elements are present here. La Rue's debts were antecedent obligations, and the consideration for the defendant's promise, the release or withdrawal of the creditors' stop notices, was for his benefit. It was for the purpose and had the effect of enabling the defendant to secure from the school district the unpaid balance of the contract price for the schoolhouse. The defendant had himself incurred bills for labor and materials for completing the building for which he was responsible in any case. These bills he was enabled to pay by the money he secured from the school district upon the release by the creditors of La Rue of their stop notices, and one of the purposes of the arrangement was to enable him to do this. The direct benefit to the defendant is plain. It follows that it was not necessary that the defendant's promise be in writing. See, also, Leslie v. Conway, 59 Cal. 442; Sacramento Lumber Co. v. Wagner, 67 Cal. 293, 7 Pac. 705; Doe v. Allen, 1 Cal. App. 560, 82 Pac. 568.

There are a number of other points discussed by counsel, but they are either answered or rendered unimportant by what has already been said.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; SLOANE, J.; WILBUR, J.; LAWLOR, J.

184 Cal. 105

PEOPLE v. NAKIS. (Cr. 2285.)

(Supreme Court of California. Oct. 15, 1920. Rehearing Denied Nov. 11, 1920.)

1. Jury ⟸31(11)—Irregularity of appointment of "elisor" without showing of disqualification of officers may be waived.

Though the court, under Code Civ. Proc. § 226, has no power to appoint an elisor—a person designated and directed by a court to summon a jury when the persons designated by law for that duty are disqualified to act—unless both the sheriff and coroner are disqualified, irregularity of such an appointment, without showing of disqualification of coroner, and the consequent irregularity in summoning of jury, may be waived, even in a felony case; strict compliance with the statutory procedure not being part of the right to trial by jury, guaranteed by the Constitution, which may not be waived in a felony case.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Elisor.]

2. Jury ⟸110(9)—Irregularity of appointment of elisor without showing coroner's disqualification waived.

Irregularity of appointment of an elisor without showing disqualification of coroner, and consequent irregularity in summoning of jury, was waived, there being no objection, but defendant's counsel announcing, "Defendant is perfectly satisfied with the appointment of —— as elisor."

3. Criminal law ⟸868—Irregularity of placing jury in charge of deputy of disqualified sheriff waived.

Irregularity of placing the jury on retiring in charge of a deputy sheriff, notwithstanding disqualification of the sheriff is waived by defendant failing to object.

4. Criminal law ⟸1163(1)—Placing jury in charge of deputy of disqualified sheriff held harmless.

Placing the jury on retiring in charge of a deputy sheriff, though the sheriff is disqualified, will be held harmless, in the absence of an affirmative showing of prejudice therefrom.

5. Criminal law ⟸404(3, 4)—Pistol and clothing found at time and near place of arrest admissible.

The pistol and clothes of defendant, stained with human blood, found at the time and near the place of defendant's arrest, though three weeks after the homicide, are admissible.

6. Criminal law ⟸369(15)—Evidence of other offense, showing defendant's possession of pistol before homicide, admissible.

As tending to show that defendant at the time of the homicide was in possession of the pistol found in his room and capable of discharging bullets of the two calibers found in deceased, testimony that it had before the killing been taken from witness in a robbery by defendant and others is admissible.

7. Criminal law ⟸369(2)—Evidence of other crime admissible to prove material fact.

Proof of one crime, tending to prove any fact material on trial for another crime, is admissible, though it may tend to prejudice the jury.

8. Witnesses ⟸396(1)—Witness may state reason for making statement contrary to his testimony.

For consideration of the jury on the question of credibility of witness whose testimony contradicts his signed statement made before the trial, he may testify that he was bribed by defendant's brother to make the statement.

9. Criminal law ⟸720(6)—Right of district attorney in argument to draw inferences from testimony stated.

A district attorney has the right in his argument to the jury to draw any inferences from the testimony which in his judgment are logical.

10. Criminal law ⟸729—Statement of district attorney as qualified on objection held harmless.

Statement of district attorney in argument that the judge "in his generosity" permitted a certain book of accounts to be introduced as qualified, on objection being made, *held* harmless.

11. Criminal law ⟸721½(1)—District attorney not to call attention to little testimony of defendant.

For district attorney in argument to call attention to how little testimony defendant gave is misconduct.

12. Criminal law ⟸1171(3)—Calling attention to little testimony of defendant held harmless.

For district attorney in argument to call attention to how little testimony defendant gave, he desisting on objection and the evidence against defendant being overwhelming, is not ground for reversal.

13. Criminal law ⟸1037(2)—No complaint on appeal of argument in absence of request for instruction to disregard.

Error in argument of district attorney may not be complained of on appeal, it being such that its effect would be obviated by instruction to disregard it, and no such instruction having been asked.

14. Criminal law ⟸783½—Direction to jury to disregard question held sufficient.

Direction to disregard any question asked and not permitted to be answered, given immediately after sustaining of objection to a question, *held* sufficiently definite that it should be disregarded.

In Bank.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Ernest Nakis was convicted of murder, and appeals. Affirmed.

Carl E. Lindsay and Henry Brickley, both of Fresno, for appellant.

U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., John H. Riordan, Deputy Atty. Gen., and C. E. Beaumont, Dist. Atty., and R. G. Retallick, Deputy Dist. Atty., both of Fresno, for the People.

LENNON, J. The penalty of death was the sentence imposed upon the defendant in this case, in keeping with the verdict of a jury finding him guilty of murder in the first degree. Edwin Taylor, the deceased, was a familiar character about the streets of Fresno, commonly known as "the old broom man," who had accumulated considerable wealth and was reputed to be in the habit of secreting large sums of money about his person. On May 16, 1919, his body was found in a tractor shed on the Gibson ranch, a lonely place about 12 miles north of Fresno. About 8 o'clock, or some time between the hours of 8 and 10, on the morning of May 16, a number of witnesses saw deceased riding in the direction of this ranch, and clearly remembered the incident, for it was unusual to see the old broom man in an automobile. Several of these witnesses identified the defendant as the man who was driving the machine in which deceased was riding, and their descriptions of the automobile corresponded in important particulars with the description of a machine rented by defendant on May 15 and returned by him on the afternoon of the following day. Two men, one of whom was the owner of the orchard and the other his assistant, were working in an orchard at a point slightly over a quarter of a mile from the tractor shed on the Gibson ranch on the morning of May 16, and saw deceased and a companion pass by in a machine and stop at the ranch between 9 and 10 o'clock. These men, believing that deceased and the man with him had been sent out for the purpose of poisoning squirrels, watched them, from time to time, as they walked about the place, and finally observed the deceased starting toward the tractor shed, followed by the other man. Soon afterward they heard two shots and a low groan or howl, and thought a dog had been killed. About five minutes thereafter the companion of the deceased came out of the shed alone, closed the door, and returned in the machine in the direction from which he had come. Upon his return trip, this man passed within 20 feet of the witnesses, who had walked toward the road for the purpose of observing his features more closely; they testified that the man in the machine was the defendant. In the afternoon these witnesses drove over to the Gibson ranch and found the old broom man lying dead on the floor of the tractor shed, his pockets either torn open or turned inside out. They immediately notified the sheriff. No money was found on the body of deceased, but an empty canvas money bag was discovered near the body. Two bullets were taken from the body of deceased, one a .38 and the other a .41 caliber. At the time of defendant's arrest, which occurred about three weeks later, a pistol was found above a window casing in the room occupied by him at that time; it was a .41 Colts, which was, according to expert testimony, capable of discharging both .38 and .41 caliber bullets. In order to arrest defendant, it was necessary to pry open two doors of the cabin where he was living, the doors and windows being nailed shut, and defendant was found, wrapped in a quilt, hiding under the bed. Near the shack where defendant was arrested, there was discovered a bag containing a suit of clothes, identified as those of defendant, upon which were small stains, which were pronounced by an expert to be human blood stains. A witness testified that, on the afternoon of May 19 he met defendant at a water tank about 150 miles south of Fresno, and that at that time defendant stated to him that he had killed the old broom man and had tried to reach Mexico.

Defendant's case consisted primarily of an attempt to establish an alibi by the testimony of two witnesses, corroborated by defendant's own testimony, to the effect that he arrived at the tobacco ranch of a friend a mile or so south of Fresno between 9 and 10 o'clock on the morning of May 16, and remained there until 11:30. Defendant also sought to contradict the testimony as to the incident at the water tank on the afternoon of May 19 by the introduction of a book containing the entries of the dates upon which men had been employed at a tobacco ranch about 75 miles north of Fresno, and from which it appeared that on the afternoon of May 19 defendant had been employed at that ranch.

Upon this appeal from the judgment it is conceded by counsel for the defendant, as indeed it must be, that the evidence adduced in behalf of the people's case sufficiently supports the judgment. It is earnestly urged, however, that certain alleged erroneous rulings of the trial court, coupled with the claimed misconduct of the district attorney and an asserted irregularity in the summoning of the jury, were so grievously prejudicial in their operation and effect as to warrant and compel a reversal of the judgment, despite the sufficiency of the evidence to support the verdict.

Error is assigned in the appointment by the trial court of an elisor to summon two special venires of jurors. In this behalf the record shows positively and unqualifiedly that counsel for the defendant, in response to the suggestion of the trial court, conceded the disqualification of the sheriff of the county to act in the matter of summoning the needed jurors and the consequent necessity for the

appointment of an elisor. The record further shows that counsel for the defendant expressly consented to the appointment of a Mr. Harkness as an elisor in the place and stead of the sheriff for the purpose of summoning the required jurors, and specifically declared:

"The defendant is perfectly satisfied with the appointment of Mr. Harkness as elisor."

This was done, so the record shows, in order to obviate any objection which might be made to the sheriff summoning the jury because of his conceded disqualification to act in the premises. Thereupon an order was made, directing the elisor to summon a special venire of 50 jurors, and, when that venire was exhausted, a second order was made also with the consent of counsel for the defendant, for a second special venire, and the same Mr. Harkness, again with the consent of counsel for the defendant, appointed as elisor to summon the additional jurors who were needed for the trial of the case. Despite the record showing of his consent to the course pursued by the trial court for the summoning of the jury, counsel for the defendant, be it said to his credit, insists that, because a human life is involved he is justified as a matter of professional duty and at the cost of self-stultification, in assailing the order of the trial court excluding the sheriff and appointing an elisor upon the ground that the defendant's right to have a jury summoned in the manner precisely prescribed by law was a right guaranteed by state and federal Constitutions, which could not be ignored by the trial court nor waived by either the defendant or his counsel.

[1, 2] An elisor may be defined to be a person designated and directed by a court to summon a jury when the persons designated by law for that duty are disqualified from acting. Code Civ. Proc. § 226; Bruner v. Superior Court, 92 Cal. 239, 28 Pac. 341. In the absence of the disqualification of both the sheriff and coroner, the court has no power to appoint an elisor. Wilson v. Roach, 4 Cal. 362; People v. Fellows, 122 Cal. 233, 54 Pac. 830; People v. Vasquez, 9 Cal. App. 545, 99 Pac. 982. Ordinarily, before appointing an elisor, the court should require a formal showing that both the sheriff and the coroner are disqualified (Bruner v. Superior Court, supra; People v. Irwin, 77 Cal. 494, 20 Pac. 56; People v. Yeaton, 75 Cal. 415, 17 Pac. 544), nevertheless it is the duty of the court to determine, of its own motion if need be, whether the sheriff and coroner are disqualified, and, if it be conceded that both are disqualified an elisor must be appointed (People v. Le Doux, 155 Cal. 535, 102 Pac. 517). Generally speaking the constitutional right to trial by jury cannot be waived by the defendant, or his counsel, in a felony case, but the manner and method of summoning a jury is the subject-matter of legislative control rather than of constitutional provision. That is to say, it is the province of the Legislature, subject to the proviso that the fundamental requirement of impartiality be not violated, to prescribe the procedure and designate the officer for the summoning of a jury. People v. Harding, 53 Mich. 48, 18 N. W. 555, 51 Am. Rep. 95; Lommen v. Minn., etc., Co., 65 Minn. 196, 68 N. W. 53, 33 L. R. A. 437, 60 Am. St. Rep. 450; Hildreth v. City of Troy, 101 N. Y. 234, 4 N. E. 559, 54 Am. Rep. 686; Mattox v. State, 115 Ga. 212, 41 S. E. 709. While the constitutional guaranty to a defendant in a criminal case of trial by jury of necessity embodies the right to have the jury summoned and selected in substantial compliance with the particular procedure provided by law (People v. Coffman, 24 Cal. 230; People v. Irwin, supra; People v. Compton, 132 Cal. 484, 64 Pac. 849), still such procedure, in its final analysis, confers no more than a statutory right, the benefit of which may be waived by the defendant or his counsel. And this is so because the procedure prescribed is not, in the absence of express constitutional or statutory inhibition, regarded as a jurisdictional restraint upon the power of the court to proceed, with the consent of the defendant, to a trial of the case pursuant to a procedure for the summoning of the jury which may not be in strict accord with the requirements of the statute. Queenan v. Territory, 11 Okl. 261, 71 Pac. 218, 61 L. R. A. 324; State v. Mortenson, 26 Utah, 312, 73 Pac. 562, 633; State v. Albee, 61 N. H. 423, 60 Am. Rep. 325; Perteet v. People, 70 Ill. 171; People v. White, 20 Cal. App. 156, 128 Pac. 417; Flynn v. State, 97 Wis. 44, 72 N. W. 373; Bishop's New Criminal Procedure, § 118. The disqualification of the sheriff in the instant case being conceded, the trial court should, in strictness, have selected the coroner in the place and stead of the sheriff to summon the needed jurors, but the right to insist upon the selection of the coroner rather than the appointment of an elisor was lost to the defendant when he knowingly consented, in the presence of an opportunity to object, to the summoning of the jury by an elisor. Watkins v. Weaver, 10 Johns. (N. Y.) 107; Queenan v. Territory, supra. In other words, it was entirely competent for the defendant, directly or through his counsel, to waive an apparent irregularity in the matter of summoning the needed jurors, and this, we take it, the defendant did when his counsel announced:

"The defendant is perfectly satisfied with the appointment of Mr. Harkness as elisor."

The decision in the case of Bruner v. Superior Court, supra, has no application to the facts of the instant case. While the holding in that case was to the effect that the summoning and impaneling of a jury for

the trial of a defendant were void, and the result of their deliberations of no effect, because the jury was summoned by an elisor who was not selected and appointed by the trial court in substantial conformity with statutory requirements, it will be noted that in that case there was no express waiver, as here, by the defendant of the right of the defendant, in the absence of a formal and sufficient showing of disqualification of the sheriff of the county, to have the jury selected by that officer, or the coroner, rather than by an elisor. Not only was there no express waiver by the defendant in the case last cited, but objection, timely objection, was made to the action of the trial court and steps, timely steps, taken to conserve the rights of the defendant. The case of People v. Enwright, 134 Cal. 527, 66 Pac. 726, also relied upon by the defendant here in support of the contention that the trial court was without jurisdiction to proceed to trial with a jury summoned by an elisor selected and appointed without a formal showing first made of the disqualification of the sheriff and coroner, is not in point, for, in so far as it relates to the question involved here, it does no more than decide that—

"The point that the special venire was placed in the hands of the coroner, rather than in those of the sheriff, without any showing why, cannot be raised on this record. No such fact was stated as the basis of the challenge."

In the case of People v. Schmitz, 7 Cal. App. 330, 94 Pac. 407, 419, 15 L. R. A. (N. S.) 717, the trial court "refused to hear the defendant as to the enmity and disqualification of the elisor Biggy," and in that case counsel for the defendant vigorously and steadfastly objected to the appointment of the elisor, and persistently protested against the refusal of the trial court to permit the defendant to file counter affidavits in opposition to the claimed disqualification of the sheriff and coroner. So, obviously, the situation in these and kindred cases, is clearly distinguishable from the situation revealed by the record in the case at bar.

[3, 4] Nor is the action of the trial court in placing the jury in charge of a deputy sheriff, when it retired to deliberate upon its verdict, a ground for the reversal of the judgment. While the deputy was, perhaps, technically disqualified by reason of the admitted disqualification of the sheriff from official participation in the proceedings (People v. Le Doux, supra), no objection to his appointment was raised at the trial, and, in fact, it was at one time suggested by counsel for defendant that the jury be placed in charge of the sheriff himself. The rule that by failing to call the court's attention thereto by timely objection at the trial, a defendant in a criminal case may waive his right to object to certain irregularities and errors not basal in their nature has frequently been applied to irregularities in matters concerning the custody and control of the jury. People v. White, supra; People v. Tarm Poi, 86 Cal. 225, 24 Pac. 998; Price v. U. S., 14 App. D. C. 391; Dreyer v. People, 188 Ill. 40, 58 N. E. 620, 59 N. E. 424, 58 L. R. A. 869; Id., 187 U. S. 71, 23 Sup. Ct. 28, 47 L. Ed. 79. Where a technical error is committed at the trial to which a defendant gives tacit consent, the right to object cannot be held in abeyance until defendant ascertains the nature of the verdict; but such right is waived upon the failure of the defendant to avail himself of it when the opportunity was fairly presented. People v. Kramer, 117 Cal. 647, 49 Pac. 842; Queenan v. Territory, 190 U. S. 548, 23 Sup. Ct. 762, 47 L. Ed. 1175; Sylvester v. State, 46 Fla. 166, 185, 35 South. 142. Moreover, in the instant case no attempt has been made to demonstrate that any prejudice has resulted from the error. In the absence of an affirmative showing of prejudice to the defendant, a reversal for irregularities in regard to the custody and management of the jury cannot be had. People v. White, supra; Jarnagin v. State, 18 Tenn. (10 Yerg.) 529; Speer v. State, 57 Tex. Cr. R. 297, 123 S. W. 415; Galan v. State, 68 Tex. Cr. R. 200, 150 S. W. 1171; Holmes v. State, 70 Tex. Cr. R. 214, 156 S. W. 1172. The error complained of in the case at bar is no more inherently prejudicial than those committed in the cases cited, and, there being neither an objection at the trial nor an affirmative showing of prejudice, it does not constitute ground for reversal.

[5-8] It was not error to admit in evidence the pistol and bag of clothing found at the time of defendant's arrest near the spot where he was taken into custody. The fact that a period of three weeks had elapsed between the date of the murder and the time of the arrest might affect the weight of this particular evidence, but would not render it incompetent. As was stated in the case of People v. Mar Gin Suie, 11 Cal App. 42, 50, 103 Pac. 951, 955:

"As a part of the original case of the people, we think the testimony with regard to the finding of the pistols was proper as furnishing a circumstance bearing upon the charge, whether directly or remotely, was for the jury to decide in view of all the other facts and circumstances." People v. Fitzgerald, 138 Cal. 39, 70 Pac. 1014; People v. Argentos, 156 Cal. 720, 726, 106 Pac. 65.

A Chinese witness testified to the effect that he had owned the pistol in question for over 30 years, and that it had been taken from him, about a month before the murder, at a time when he and other Chinese were robbed by a number of men, among whom was the defendant. The introduction of this

testimony was objected to on the ground of irrelevancy, and also for the reason that it tended to prejudice the defendant by showing the commission of another crime. It having been proved that .38 and .41 caliber bullets were found in the body of the deceased, and that a pistol capable of discharging bullets of both calibers was found in the cabin where defendant was arrested, it became a relevant subject of inquiry whether defendant possessed that pistol at the time of the murder, and evidence which tended to prove such fact likewise became relevant. People v. Rogers, 71 Cal. 565, 12 Pac. 679. Whenever proof of one crime tends to prove any facts material in the trial of another, such proof is admissible, and the fact that it may tend to prejudice the defendant in the minds of the jurors by inducing the belief that he had been the perpetrator of another crime is no ground for its exclusion. People v. McGilver, 67 Cal. 55, 7 Pac. 49; People v. Rogers, supra; People v. Walters, 98 Cal. 138, 32 Pac. 864; People v. Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269. The jury was carefully instructed as to the purpose for which this evidence was admitted, and directed not to consider it "for any other purpose whatsoever." One of the witnesses to the occurrences at the Gibson ranch signed a written statement prior to the trial, in which he declared that he could not swear that the man he saw leaving the ranch in the automobile was the defendant. At the trial the witness testified that this statement, which was not made under oath, but was signed in the office of one of the attorneys for defendant, was made by him as the result of a bribe received by him from the brother of defendant. These facts, of course, were merely for the consideration of the jury in determining the credibility of the witness. No attempt was made to impeach the companion of this witness, who testified to practically the same facts, in regard to the events at the ranch and the identity of the man in the machine, as those sworn to at the trial by the witness who had previously signed the contradictory statement.

[9-13] Turning to the comments of the district attorney during the course of his argument to the jury, claimed to have been so far afield as to constitute formidable misconduct on his part, the reference to defendant as "the known associate of prisoners in the jail" was not entirely without support in the evidence. The fact was brought out upon the examination and cross-examination of defendant, as well as by other witnesses for the defense, that, on the afternoon of the day of the murder, defendant went to the jail for the purpose of seeing a friend, who was then held as a prisoner, and that another of his associates had been in prison shortly before that time. A district attorney has the right, in his argument to the jury, to draw any inferences from the testimony which, in his judgment, are logical. People v. Vaughn, 25 Cal. App. 736, 147 Pac. 116, 117. The book of entries of employment introduced for the purpose of proving defendant's whereabouts on May 19, 1919, concerning which the district attorney stated that the judge, "in his generosity, permitted this to be introduced here," was a doubtful piece of evidence at best. The owner of the book, being himself incapable of reading or writing, caused the dates of employment to be entered by men in his employment, and he was himself unable to attest the correctness thereof; the man who made the particular entry was neither produced nor accounted for at the trial. The remark was therefore not wholly without justification. Moreover, upon defendant's counsel objecting to the remark, the district attorney immediately added the qualification, "because he [the trial judge] wanted to give every possible opportunity for the defendant to prove anything that might go to show his innocence, and that was correct." In view of this qualification, the statement could not have been prejudicial. People v. Raber, 168 Cal. 316, 143 Pac. 317. The comment of the district attorney during the course of his argument to the jury, by which he called attention to "how little testimony the defendant gave," was misconduct. People v. McGungill, 41 Cal. 429. If a district attorney persists in commenting upon the failure of defendant to testify, or if the evidence against defendant is not sufficiently strong to warrant a conviction notwithstanding remarks of that nature, the judgment may be reversed because of such misconduct (People v. Derwae, 155 Cal. 592, 102 Pac. 266); but, in view of the fact that, in the present case, the district attorney desisted from further comment along that line upon objection thereto, and in view of the additional fact that such a comment could not have operated as an inducement to the verdict in the presence of the overwhelming evidence against defendant, we do not consider it a ground for reversal in this case. Moreover, the record shows that counsel for defendant, after objecting to the remark, said: "Let the objection stand. I assign it as error. That is enough"—and refrained from requesting an instruction that the jury disregard the remark. Where the error is such that its effect would be obviated by an instruction to the jury to disregard it, and no such aid is invoked, the error cannot be complained of on appeal. People v. Shears, 133 Cal. 154, 159, 65 Pac. 295; People v. Babcock, 160 Cal. 537, 117 Pac. 549; People v. Wong Hing, 176 Cal. 699, 169 Pac. 357; People v. Warr, 22 Cal. App. 663, 136 Pac. 304; People v. Vaughn, supra. Inasmuch as the court was not once, during the course of the argument to the jury, requested to

instruct the jury to disregard the improper statements of the district attorney, and such an admonition would doubtless have been sufficient to cure any effect the remarks might have produced, the claimed misconduct in argument cannot be considered on appeal.

[14] On direct examination defendant testified, as previously stated, that he visited a friend in the jail on the afternoon of May 16. Upon cross-examination, the district attorney asked if this friend, and another associate of defendant, "were both charged with the crime of robbery at the time." The court sustained an objection to this question and, in compliance with a request from defendant's counsel that the jury be instructed to disregard the question, directed the jury "not to pay any attention to the questions that are asked—any questions that are asked that are not permitted to be answered." While the ruling was possibly not as emphatic as might be desired under the circumstances, nevertheless, since it was given immediately following the sustaining of an objection, the reasons for which had been fully explained by counsel for defendant, it cannot be said that it was not sufficiently definite for the purpose of advising the jury that the question that had just been asked was to be disregarded by them.

After a careful review of the evidence adduced upon the whole case, we are of the opinion that the verdict found by the jury was not the result of prejudice and was uninfluenced by any of the errors or irregularities complained of. People v. Lawlor, 21 Cal. App. 63, 131 Pac. 63.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; LAWLOR, J.; SHAW, J.; OLNEY, J.; WILBUR, J.

184 Cal. 201

SAN GABRIEL VALLEY COUNTRY CLUB v. CITY OF PASADENA. (L. A. 5485.)

(Supreme Court of California. Oct. 20, 1920.)

Waters and water courses ⟸119(2)—Diversion of drainage through channel on plaintiff's land unlawful.

Diversion of drainage from a natural channel into a channel through plaintiff's land was unlawful.

In Bank.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by the San Gabriel Valley Country Club against the City of Pasadena. From a judgment for defendant, plaintiff appeals. Affirmed.

Hickcox & Crenshaw, of Los Angeles, for appellant.

John Munger, City Atty., and R. S. Parker, both of Pasadena, for respondent.

LAWLOR, J. This case, in all its essential facts, is the same as San Gabriel Valley Country Club v. County of Los Angeles, 188 Pac. 554. It was there held that the plaintiff was entitled to neither injunction nor damages upon the facts presented, and such was the judgment of the trial court here. For a statement of the facts, and a discussion of the law applicable to them, it is necessary only to refer to that decision.

The only difference between that case and the one at bar lies in the fact that here there were either 75 or 107 acres of land, as the case may be, the drainage of which originally was, not into the wash or channel which passes on down to the plaintiff's land, but into another channel to the west or southwest. The diversion of this drainage from its natural channel into the channel through the plaintiff's land was of course unlawful. See Rudel v. County of Los Angeles, 118 Cal. 281, 50 Pac. 400. This fact, however, is wholly immaterial as far as the present case is concerned. The diversion was not one made by the defendant city, but by the inhabitants of the particular territory prior to its incorporation into the city, and more than eight years before the commencement of the present action. More important than this, however, is the fact that such diversion was not made or affected in the slightest degree by the storm drains on account of which exclusively this action is brought. Those drains operate only to carry what waters would, except for them, flow in the wash for which they are a substitute. If the plaintiff has any right to complain of the diversion of the drainage of the lands mentioned, the present action was not brought to enforce it, and the right is not here involved.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; WILBUR, J.; SLOANE, J.; LENNON, J.

184 Cal. 163

WHITMAN v. CITY OF SAN DIEGO et al. (L. A. 5145.)

(Supreme Court of California. Oct. 19, 1920.)

1. **Municipal corporations ⇐648—Intention to dedicate conclusively presumed from adverse user for five years.**

Though there can be no dedication for a street without an intention, such intention is conclusively presumed from an adverse user by the public for 5 years, and a denial by the owner of an intention to dedicate cannot defeat the title acquired by the public by its hostile use.

2. **Municipal corporations ⇐654—Evidence held to sustain finding of user as street for more than five years.**

In an action to quiet title to land claimed by a city as a street, evidence *held* to sustain the trial court's finding that the land had been used by the public for travel for more than 5 years.

3. **Judgment ⇐747(5)—Decree quieting title against claim of dedication does not preclude claim of right necessary to prescription.**

That a decree had been previously entered, holding that there had been no dedication of a street across plaintiff's land and quieting title, does not estop the city, in defending an action to quiet title several years thereafter, from claiming that the user of the strip for street purposes after the decree was under claim of right, so that such user for 5 years would establish the street by prescription.

4. **Municipal corporations ⇐648—Use of street must show owner it was hostile.**

Use by the public may be sufficient to create a highway, but if such use alone is relied on, it must be of such character and under such circumstances as to indicate clearly to the owner of the property that the use was hostile and adverse.

5. **Municipal corporations ⇐654—Evidence held insufficient to sustain finding use of street was hostile.**

Evidence which showed merely the occasional driving of vehicles across an unimproved and uninclosed tract of land *held* insufficient to sustain a finding of the court that such use was hostile to the owner of the land, and not permissive.

In Bank.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by Blance M. Whitman against the City of San Diego and others. Judgment for defendants, and plaintiff appeals. Reversed.

Haines & Haines, of San Diego, for appellant.

Doolittle & Morrison, of San Diego, T. B. Cosgrove, City Atty., of Los Angeles, and M. R. Thorp, Deputy City Atty., of San Diego, for respondents.

WILBUR, J. This is an action to quiet title of plaintiff to certain property against certain liens for the improvement of Ohio street, and also to enjoin the issuance of bonds for such assessments made upon plaintiff's adjoining land for the improvement of said street. Both parties state that the question before this court is whether that portion of Ohio street running through the property of the plaintiff is or is not a public street. In 1888 a map was filed by the contestants of plaintiff's predecessor, whereon Ohio street was shown as now claimed by the city. The plaintiff's predecessor was not a party to the filing of this map, and, claiming that he was not bound thereby, secured a judgment against the city of San Diego and others interested, quieting title to the land included in such street, and canceling the map in question, March 15, 1895. On February 18, 1904, a map, showing plaintiff's land subdivided into lots and blocks and showing Ohio street running through it, was attached to a lis pendens in an action brought by the College Hill Land Association against the city of San Diego, and recorded in the office of the county recorder. From 1907 the city assessor and from 1908 the county assessor assessed the property of plaintiff according to this map by lot and block, and omitting that portion of her land covered by Ohio street. Plaintiff protested against this form of assessment without avail. Her agent, without her knowledge or authority, filed verified tax statements for the years 1910 and 1911, according to such subdivision. If there is any inference of dedication to be drawn from the fact that the land was thus assessed and the by the protest of the owner against such assessment, that inference is entirely overcome by the protest of the owner against such assessment. There is, then, in the record, no evidence of actual intention to dedicate this land, except such as arises as a matter of law from adverse user. The owner lived in the Philippine Islands from 1904 until 1907, and had no direct personal knowledge of the condition of the property, and thereafter only visited San Diego twice, for a few days each time. The trial court found that the public had acquired the street by adverse user for more than 5 years, and the judgment is based upon this finding. Plaintiff appeals and attacks the finding as not supported by the evidence. At all times up to the beginning of the street improvement proceedings the neighborhood was sparsely settled, and up to 4 or 5 years previous to the adoption of the resolution of intention there were only a few scattered houses in the neighborhood. There was, for a period of approximately 5 years before January, 1912, more or less travel upon Ohio street, and the question is whether or not this travel was of such a nature and for such a period as to justify the finding of the

trial court that the public had acquired an easement by adverse possession. Travel along the street increased with the building up of the neighborhood; hence the least amount of travel during the prescriptive period was during 1907 and 1908. We will state those portions of the evidence relied upon by respondents to show such user. George A. d'Hemecourt, a civil engineer, testified that in the year 1899 he had surveyed the entire length of Ohio street and had placed stakes at every block and every intersection of the street; that there was then no travel along the street; that in 1904 he had placed reference points in the center of the street, so that people owning lots could "brush a road" through; that the brush was cut out about 1904 and 1905. Henry Ellers testified as follows:

"I know that there has been a street there ever since I have been there, because we can tell where the line was. We could drive straight north from University north."

He further testified:

That he bought a lot on Ohio street in 1906; that he had driven along Ohio street (across plaintiff's property) to Madison street many times before; that in 1907 he hauled a load of chickens up there for a man named Lilly, who lived at the corner of Adams and Ohio, and that he had driven there a good many times; that there were teams going along there. The street was not graded. There was a wagon road being used, and that road had continued to be used since that time. "In 1907 there was a wagon road, that is all. It was not graded. It was all up and down and over bumps. A few wagons were driven there. We could tell where the streets were. When I first drove it over at the time I got there there was not much teaming there, but the road was there, and it has been there ever since."

On cross-examination he testified:

That at the time he was there there was nothing done to the streets; that they were rough and ungraded. "The way I found the line of this so-called street when I drove up there to get Mr. Lilly's chickens and chicken coop [1907] was that there was Works up there. He lived two blocks north of that, and my house was supposed to front on Ohio street. That is the way we found the line. There was some marks. There was stakes up on Adams. I do not remember that there were any houses between El Cajon avenue and Monroe avenue (plaintiff's property is between these points) as it is now up there along this Ohio street. Works lives on Adams, two blocks, I thing, or three blocks west. As to the amount of travel 9 years ago (1906) there was not much doing there. Once in a while I seen a team pass up there. The teams were not confined to any particular route. You could not travel all over. You did not keep to the road where the street should be. The first improvement I saw made on Ohio street northward from El Cajon avenue was that it was graded in 1912. There were buildings, a lot of buildings built up all through there. When I got there there was hardly a house east of the Normal, but two or three. They commenced building about 1909."

Thomas L. Works lived in the neighborhood for 20 years, and testified:

That he could not definitely fix the beginning of travel there. As near as he could fix it it was 4 or 5 years prior to the grading of the street. That the travel took a zigzag course according to the formation of the ground. "That formation up there is awfully hilly, full of hummocks. I was over the tract oftener than once a month. One could travel over what is now Ohio street before Mr. Hyde graded it. There were hummocks and a few houses; naturally there was a way of getting through to them. You could not call it a defined street. There was not any way of getting through, except following around zigzag through these hills."

He stated that he did some grading on the street about a year and a half before Ohio street was graded, and that at that time his zigzag track would not carry one further afield than the line of an 80-foot street.

C. L. Hyde, a witness for the defendants, testified:

That he had been familiar with the physical condition of Ohio street from University avenue to Adams street from 1910; that the street was in a more or less rough condition, but was traveled right along; that there was a well-defined wagon road, which consisted of wagon tracks, excepting the south end, which is more of a level country; that probably two blocks of the south and north of and intersecting El Cajon avenue had been graded by the property holders; this would cover a part of plaintiff's property; that some hummocks had been cut down in the center of the street on plaintiff's property; that the balance of the road was passable; that he could not say whether there was anybody living on the plaintiff's tract or not; that there were some furrows plowed along the curb line. "In most places there might be more than the width of a wagon track. There were some hummocks or round knolls that would not be worn enough to give room enough to pass. Take it all through, there was plenty of room for two vehicles to pass side by side. The street was roughed out all the way through."

Frank Barber, of the city engineer's office of San Diego, testified that in 1909 he had set stakes at the street corners along Ohio street on both sides of the street; that at that time the brush had been cut off a portion of Ohio street 30 or 40 feet in width between El Cajon and Madison avenues; that there was a passable roadway along there; that a portion of the street had been closed and the hummocks cut off by a road grader, and the earth shoved into the center to make a roadway for travel. This was through plaintiff's property.

E. J. Walker, the superintendent of the respondent contracting company which did

the work of grading and curbing Ohio street, testified that:

He had been familiar with the street about 2 years before the work was done; that at the time the work was done from Madison on down to Monroe, "although a little rougher than the first block south of Adams, still that road ran on down through there. The brush was all taken out of it. It continued on down that way until it got to Meade street. That is as near as I could tell you how I found the road. The brush had all been cleared away. We did not have to cut any brush at all. There was a well-defined roadway when I went there, and the public had been using it."

From this testimony, construed most favorably to the respondents, it appears that plaintiff's land, consisting of a little over six acres, is in the heart of a subdivision originally made in 1888; that all the streets in this subdivision were thus dedicated to public use, and by a formal ordinance, not hereinbefore referred to, accepted by the city; that all the streets in the tract became public streets, save only in that part of the tract which was set apart to the plaintiff's predecessor by a decree of partition; that in connection with the subdivision of this tract the street corners were indicated by surveyor's stakes; that plaintiff's tract of land completely blocked Ohio street and Monroe avenue. In 1906 there was a well-defined wagon road along Ohio street through plaintiff's property, zigzagging to avoid hummocks in the street, but confined to the street. This road was used constantly from that time forward by all who found occasion to do so, and during the entire 5 years previous to the beginning of the proceedings to improve the street this roadway had been clearly marked and constantly used. It is evident that the actual use of the street did not extend its full width through plaintiff's property. The road was "brushed out" the 30 or 40 feet in width in 1909, and to the full width by 1912. The wagon road zigzagged through the plaintiff's property, but was confined to the 80-foot strip claimed by the city as a street. The distance which Ohio street traverses the plaintiff's property was about 430 feet.

[1] The decree of 1895, quieting the title of plaintiff's predecessor to the land in question, is strongly relied upon by the appellant as fixing the rights of the parties and preventing the running of the statute of limitations. Appellant claims that "the record is bare of any testimony whatsoever tending to show that the plaintiff had the slightest knowledge that any one was traveling over her land at all, much less that any one was doing so under the adverse claim of a street, according to that duplicate map or otherwise;" that in default of such notice or of any acquiescence on her part to any claim of the city, no title could be gained by adverse user. Barnes v. Daveck, 7 Cal. App. 487, 94 Pac. 779. It is true that an actual intention to dedicate property is essential to such dedication. Smith v. San Luis Obispo, 95 Cal. 463, 30 Pac. 591. But the theory on which the prescriptive right of the public to the street is based is that from an adverse user of 5 years the intention of the owner to dedicate the property to such use is conclusively presumed, and the mere denial on the part of the owner of any intention to dedicate, or evidence which might otherwise satisfy the court that there was no such actual intention, cannot be considered in opposition to the title acquired by the public by its hostile use. Appellant places great emphasis upon the fact that the map filed with the lis pendens in 1904 in the office of the county recorder was not only unauthorized by her, but was improperly recorded. We attach no significance whatever to this map so far as the rights of the parties are concerned. Plaintiff was not in any manner bound by this map, and its existence on the records tends to explain, though not to justify, the assessment of the plaintiff's land by lot and block.

[2] From the foregoing evidence the court was justified in finding that there had been a public use for 5 years. But the question remains, Was such use adverse; that is, under a claim of right? It is clear from the evidence that the owner was never notified in any way of such a claim, and was relying, not only on her ownership of the land, but upon a decree of court, expressly deciding that the city had no rights therein. After plaintiff paid her taxes in the fall of 1907, she ascertained from her receipt that the land was assessed in accordance with the subdivision theretofore declared by the court to be unauthorized and not bringing in plaintiff. Her demand that the property be assessed as a whole was refused. If, however, we assume that this act of the assessor, who had no authority or control over the public streets, amounted to an adverse claim of right in the street, such claim was brought to her attention less than 5 years before the street improvement was completed, and consequently cannot aid us in considering the character of the use from January to July, 1907.

[3] Appellant claims that the judgment quieting the title of plaintiff or her predecessor against the city estopped the latter from making the claim of right to the street essential to the securing of title by adverse possession, citing Hintrager v. Smith, 89 Iowa, 270, 56 N. W. 456; Larum v. Wilmer, 35 Iowa, 244, 247, and that thereafter, in order to start the statute of limitations running, it was essential that actual notice be given to the owner of the intention to claim the property adversely (citing Root v. Woolworth, 150 U. S. 401, 414, 415, 14 Sup. Ct.

136, 37 L. Ed. 1123), and that prior to the giving of such notice any possession by the city would be held permissive only. The rule stated in Root v. Woolworth, supra, is cited as the law in 2 Corpus Juris, p. 163, § 299. It is also followed in the recent case of Midkiff v. Colton, 252 Fed. 420, 164 C. C. A. 344, and was followed in the earlier case of Dupont v. Charleston Bridge Co., 65 S. C. 537, 44 S. E. 86. The question does not seem to have been directly raised in or decided by this court. But the principle relied upon in Root v. Woolworth, supra, was that in the decree in a suit to remove a cloud from the title by which a conveyance was required to be made by the defendant to the plaintiff, the situation was substantially that between a grantor and grantee, and that the grantor, after the grant, was deemed to hold in subordination to the claim of his grantee. In numerous cases in this state involving the adverse possession by a grantor as against a grantee, it is nowhere held that actual notice of the adverse possession other than that derived from the possession itself was essential to start the statute of limitations running. In all of these cases it was assumed, and in some of them stated, that the rule was no different between a grantor and grantee and the grantor and a stranger. Franklin v. Dorland, 28 Cal. 175, 87 Am. Dec. 111; Dorland v. Magilton, 47 Cal. 485; Lord v. Sawyer, 57 Cal. 65; Garabaldi v. Shattuck, 70 Cal. 511, 11 Pac. 778; Barker v. Clark, 128 Cal. 181, 60 Pac. 677; Allen v. Allen, 159 Cal. 197, 113 Pac. 160; Hodgkins v. People's Water Co., 177 Cal. 730, 171 Pac. 945. For instance, in Allen v. Allen, supra, it is said:

"He [the grantor] stood in relation to his title, asserted by adverse possession, as would any other adverse claimant, and it was necessary for him to make full proof of all the conditions in order to constitute it."

The Supreme Court of Texas in Thomson v. Weisman, 98 Tex. 170, 82 S. W. 503, refused to follow Root v. Woolworth, supra, upon the ground that the matter had been determined to the contrary in Pendleton v. McMains, 32 Tex. Civ. App. 575, 75 S. W. 349. In the latter case it was said:

"There is no peculiar sacredness in a title to land obtained through a judgment that lifts it out of the scope and purview of statutes of limitation, and if the possession be adverse for 10 years, whether it be by the defendant in the judgment or any one else, it will perfect a title."

It is stated in Thomson v. Weisman, supra, that—

"This court has held a vendor, by executed conveyance, who remains in possession of the land, claiming it as his own, without notice other than possession, may acquire against his vendee a title by limitation."

In Hodgkins v. People's Water Co., supra, this court, in holding that the defendant in an ejectment suit could gain title by adverse possession against the plaintiff, although the judgment was in favor of the plaintiff, cited the case of Pendleton v. McMains, supra, as authority for the proposition that—

"Adverse possession of land for 10 years after the rendition of judgment in an ejectment suit where no writ of possession was issued, etablished a title against the plaintiff independent of and subsequent to the right of possession adjudicated in the ejectment suit."

[4] Use by the public alone may be sufficient to create a highway. Schwerdtle v. County of Placer, 108 Cal. 589, 594, 595, 41 Pac. 448. But such use, if use alone is relied upon to establish the right of the public, must be of such a character and under such circumstances as to indicate clearly to the owner, if advised thereof, or, if not, such as might be readily ascertained by the owner, so as to advise the owner, knowing the character of the use, that such use was hostile and adverse.

[5] The point at issue then resolves itself into this question: Was the use by that portion of the public that traveled across plaintiff's land during the first six months of 1907 of such a character as to advise the plaintiff, if she had known thereof, that such use was under a claim of right? We conclude from the evidence in the case that the trial court was not justified in holding that the use by the public was of such a nature as to give notice that the use was under a claim of right. The surrounding country was almost uninhabited. The use of the wagon road across plaintiff's land must necessarily have been very slight, although it was no doubt sufficient to be clearly indicated on the ground. The street was unimproved and almost impassable. The plaintiff's premises were uninclosed and unoccupied. As we said in San Diego v. Hall, 179 Pac. 889:

"* * * Something more than a mere casual user must be shown before any valid dedication will be implied. The rule upon this subject—a rule to the measure of which appellant's testimony fails to reach—was well expressed by Mr. Justice Sloss, speaking for the court in bank, in the case of F. A. Hihn Company v. City of Santa Cruz and Union Traction Company, 170 Cal. 436–447, 150 Pac. 62–68: 'In order to constitute a valid dedication, there must be an intention on the part of the owner to devote his property to the public use. California Navigation Co. v. Union Transportation Co., 126 Cal. 433, 46 L. R. A. 825, 58 Pac. 936; Niles v. Los Angeles, 125 Cal. 572, 58 Pac. 190. It is true that this intent may be inferred from long acquiescence in a use by the public. 13 Cyc. 455. But where land is uninclosed and uncultivated, the fact that the public has been in the habit of going upon the land will ordinarily be attributed to a license on the part of the owner, rather than to his intent to dedicate. 13 Cyc. 484.'"

It is conceded that, if none of that portion of Ohio street extending through plaintiff's premises is a public street, the assessment upon plaintiff's property is invalid, and that the judgment should be reversed.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SHAW, J.; LAWLOR, J.; LENNON, J.

184 Cal. 173

SECURITY TRUST & SAVINGS BANK v. FIDELITY & DEPOSIT CO. OF MARYLAND et al. (L. A. 5002.)

(Supreme Court of California. Oct. 20, 1920.)

1. Pleading ⊂=422 — Objection for want of verification waived by proceeding to trial.

Where parties proceed to trial on an unverified petition or answer without objection thereto, they are held thereby to waive their right to object to the want of verification.

2. Guardian and ward ⊂=17—Failure to verify petition no ground for collateral attack on order of appointment.

Where, after filing of petition for appointment as guardian, notice was given and hearing regularly held, the defect in pleading that the petition for appointment was unverified was waived, and, no want of jurisdiction being disclosed on the face of the record, the order of appointment cannot be collaterally attacked.

3. Guardian and ward ⊂=33—Money paid to guardian on mortgage held payment to ward, satisfying mortgage released.

Where an owner borrowed $11,000 on her property from plaintiff's assignor, which was $8,800 in excess of the amount called for by a mortgage, which she had previously executed to her ward, having released the ward's mortgage in order to obtain the $11,000 loan, a direct connection is traceable between the money secured by plaintiff's loan and the release of the ward's mortgage, and equity regards the money, to the extent of $2,200, as paid to the use and benefit of the ward, and if the money is applied by the guardian for other uses, such misappropriation amounts to embezzlement, for which the person who paid the money to the guardian cannot be held accountable, under Code, § 2244, and the ward must look to the guardianship bond.

4. Mortgages ⊂=121—Mortgagee may not enforce mortgage for more than amount, though liable as surety for mortgagor.

Where a recorded mortgage and loan secured thereby were for the specified sum of $2,200, the owner could not in any event become entitled to enforce the mortgage for a greater sum than the $2,200, with interest, regardless of the amount paid by it under its obligation as surety for the mortgagor.

In Bank.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by the Security Trust & Savings Bank against the Fidelity & Deposit Company of Maryland and others. From a judgment for defendants, plaintiff appeals. Reversed.

E. W. Sargent, W. G. Cooke, and S. W. Odell, all of Los Angeles, for appellant.

S. E. Vermilyea and S. L. Carpenter, both of Los Angeles, for respondents.

LENNON, J. The appeal from the judgment in favor of the defendant in this action to quiet title to real property, situate in the city of Los Angeles, involves a determination of the legal effect of several and various transactions appertaining to the execution, satisfaction, and release of certain mortgages upon the property in suit. The facts of the case are practically undisputed, and, as revealed by the pleadings, proof, and findings, are these:

Johanna Agnes Keffel, the owner of the property in suit, through whom both plaintiff and defendant derive their respective claims of interest in said property, being in ill health and believing her death to be not far off, transferred the said property by deed dated and delivered March 2, 1906, to her son, Max Keffel, without receiving any valuable consideration therefor, and the legal title thereto remained in the latter until December 3, 1909. At the time of this conveyance, Johanna Agnes Keffel was acting as the guardian of an incompetent son, and the defendant, Fidelity & Deposit Company of Maryland, was surety on her guardianship bond in the sum of $6,000. A portion of the funds of the incompetent which came into the possession of the guardian were misappropriated by her and applied to the "purchase or betterment" of the real property conveyed, as above set forth, to the son Max Keffel. At the request of defendant, and for the purpose of securing the restoration to the incompetent of the moneys so misappropriated from his estate, Johanna Agnes Keffel caused her son, Max Keffel, to make a promissory note in the sum of $2,200, and to execute, as security therefor, a mortgage upon the property conveyed to him as aforesaid, both bearing date December 2, 1909. The note was payable to Johanna Agnes Keffel; the mortgage ran to said Johanna Agnes Keffel, as guardian. On December 3, 1909, Max Keffel and his wife reconveyed the property to the grantor, Johanna Agnes Keffel, without consideration. Some time after the reconveyance Johanna Agnes Keffel executed a mortgage, dated April 26, 1911, upon the same property to Mrs. M. J. Turner, to secure the repayment of $11,000, borrowed from Mrs. Turner at that time by Johanna Agnes Keffel. This latter transaction was conducted by means of an escrow, approximately $9,000 of the $11,000

being used to pay off two mortgages which had been executed and recorded prior to the execution of the $2,200 mortgage by Max Keffel. May 10, 1911, after these two prior mortgages, together with certain tax liens, had been satisfied and released, and the expenses incident to the escrow had been paid, the escrow was closed, and the balance of the $11,000, namely $1,046.96, was paid over to Johanna Agnes Keffel. Shortly before the closing of the escrow, to wit, May 6, 1911, Johanna Agnes Keffel, as guardian, released of record the $2,200 mortgage, which had been recorded at the request of an agent of defendant March 13, 1911. Neither the acceptance of this mortgage by the guardian nor its release by her was authorized by order of court, and no part of the sum secured thereby was ever returned to the ward's estate.

Johanna Agnes Keffel died intestate in October, 1911, leaving no estate, other than the aforesaid real property and $15 in money. On February 21, 1914, Frank N. Goodman, who subsequently qualified as guardian of the incompetent son, instituted an action on the guardianship bond against the administrator of the estate of Johanna Agnes Keffel, deceased, and Fidelity & Deposit Company of Maryland, defendant herein, as surety, for the recovery of the money misappropriated from the ward's estate. Judgment was rendered in favor of the ward for the sum of $3,645.40, with interest. It appearing, upon petition of the guardian, that an appeal was about to be prosecuted from that judgment, the court authorized and empowered the guardian to compromise the claim arising from said judgment by accepting from defendant Fidelity & Deposit Company the sum of $2,500 in complete satisfaction of said judgment, and, on receipt of this sum, to make an assignment in writing to defendant, Fidelity & Deposit Company, of all interest of the ward and his guardian in the $2,200 mortgage executed to Johanna Agnes Keffel as guardian. This assignment was duly executed July 16, 1914, and the mortgage constitutes the basis of defendant's claim of an interest in the property in suit. Plaintiff held the $11,000 Turner mortgage by assignment, and, having obtained a decree of foreclosure upon said mortgage December 5, 1914, purchased the property at a sale held in pursuance of the decree. Whether or not the mortgage assigned to defendant can be asserted as a valid, subsisting, and superior lien upon the property in suit is the problem propounded for solution.

The conclusions of law of the trial court were: (1) That the $2,200 mortgage was a valid lien on the premises, created for the protection of the incompetent and to secure the restoration to his estate of the moneys misappropriated by the guardian; (2) the marginal release of this mortgage was inoperative and void; (3) the estate and title of plaintiff in the said premises is inferior and subject to this prior subsisting mortgage; (4) defendant, by right of subrogation and legal assignment, is the owner of the $2,200 mortgage and entitled to enforce the same against the premises to the extent of the amount paid by it in satisfaction of the judgment in favor of the incompetent.

[1, 2] It appears from the record of the guardianship proceedings, which was introduced in evidence, that the petition for appointment, upon which the superior court made the order appointing Johanna Agnes Keffel guardian of her incompetent son, was unverified. The failure to verify the petition of appointment in accordance with the requirements of section 1763 of the Code of Civil Procedure amounted to no more than a defect in pleading and the verification was not a jurisdictional requirement for the making of the appointment. Where parties proceed to trial upon an unverified petition or answer without objection thereto, they are held, by so doing, to waive their right to object to the want of verification. People v. Reis, 76 Cal. 269, 275, 18 Pac. 309; Hill v. Nerle, 29 Cal. App. 473, 156 Pac. 981. It appears that, after the filing of the petition for appointment as guardian, notice was duly given and a hearing was regularly held, and the defect in pleading was therefore waived, and, no want of jurisdiction being disclosed on the face of the record, the order of appointment cannot be collaterally attacked. Isaacs v. Jones, 121 Cal. 257, 261, 53 Pac. 793, 1101; In re Lundberg, 143 Cal. 402, 77 Pac. 156. For the purposes of this case, Johanna Agnes Keffel must be considered the duly appointed guardian of her incompetent son and subject to the rules governing such a guardian.

The facts of the case are substantially the same as those in the case of Cummings v. Strobridge Land Syndicate, 150 Cal. 209, 88 Pac. 901, 119 Am. St. Rep. 189. There the guardian had embezzled $2,000 of the ward's money and executed a mortgage upon his own land in favor of the ward, by way of securing the deficit. Subsequently the guardian borrowed $2,000 from a third person, and, without authority from the court, released of record the mortgage previously executed by him to his ward. There was no agreement that the guardian was to apply the money received from the new mortgagee to the extinguishment of the ward's mortgage; he stated, however, that he would see that the ward's mortgage did not affect the lien of the new mortgage, and it was the understanding between the parties that the lien of the new mortgage should be a first lien upon the property. It was held that, inasmuch as the money was paid by the subsequent mortgagee to the guardian upon the release of the mortgage, such payment would be deemed a complete satisfaction of the

mortgage, although the money was never, in fact, received by the ward. In that case the court said:

"But, aside from this and other like questions with which the case abounds, one proposition is determinative of the matter, and upon it this decision may rest. Assuming or conceding that the note and mortgage as given to the ward were valid, so as to incumber the land; assuming, also, and conceding that the release of this mortgage was without authority of the court; conceding, also, that the witness Sayle [the guardian] does endeavor * * * to have it appear that he did not pay over to his ward the money which he received from the Baird mortgage—the fact remains that equity itself, under such circumstances as those here disclosed, makes such payment in pursuance of its maxim that it will regard as done that which ought to have been done. When the money for the release of this mortgage came into Sayle's hands, it was, in equity, the ward's money, and any improper use which Sayle thereafter made of it was but a second embezzlement of the ward's funds."

[3] The facts of the present case bring it within the rule of equity thus enunciated. The owner of the property borrowed $11,000 upon her property from plaintiff's assignor, which was $8,800 in excess of the amount called for by a mortgage which she had previously executed to her ward. In order to obtain this $11,000 she released the ward's mortgage, and therefore there is traceable a direct connection between the payment of the money secured by plaintiff's mortgage and the release of the ward's mortgage. As a result equity regards the money, to the extent of $2,200, as paid to the use and for the benefit of the ward. If the money is applied by the guardian to other uses, such misappropriation amounts to an embezzlement on the part of the guardian, for which the person who pays the money to the guardian cannot be held accountable (Civ. Code, § 2244), and in such a case the ward must look to the guardianship bond for reimbursement.

It is true that there were mortgages upon the property prior in time of execution to the ward's mortgage, which, together with the taxes and other items, amounted to nearly $10,000, and that therefore the $11,000 advanced by plaintiff's assignor was insufficient to pay both the ward's mortgage and these additional charges. But there is no proof that the release of the ward's mortgage was executed after the payment of the other liens. The escrow was begun April 24, the ward's mortgage was released May 6, and an escrow statement was rendered May 10, from which it appeared that the liens prior to the ward's mortgage and certain expenses had been paid by that date, leaving a balance of $1,046. From all that appears, the ward's mortgage was released prior to the other payments, and the money which was the consideration for that release was later misappropriated to the payment of the other charges. But, however that may be, there was no contract or agreement which prohibited the guardian from putting in escrow money in addition to that derived from the new mortgagee, so as to render the sum sufficient for the extinguishment of all existing liens and charges. In fact, it was the duty of the guardian to do this, in view of the understanding between the parties that plaintiff's assignor was to be given a new first mortgage upon the property in consideration of the $11,000 loan, and the lender had the right to assume that this was done. The lender was not required to go back of the record of the release and see that the money called for by the mortgage was actually applied to the deed of the ward; all that she was obliged to do under the circumstances was to see that there was placed in the hands of or to the credit of the guardian the amount of the ward's mortgage and, having done so, the receipt of the guardian, as such, was a sufficient acknowledgment of the appropriation of that amount to the use of the ward's estate, and thereupon the satisfaction of the mortgage became operative.

The cases relied upon by respondent in support of the point that the release of the mortgage to the ward was void differ from the present case in important particulars. In Aldrich v. Willis, 55 Cal. 81, the party executing the release was not the guardian, and consequently was wholly unauthorized to represent the minor. In Jennings v. Jennings, 104 Cal. 150, 37 Pac. 794, inasmuch as the ward's mortgage was released several months prior to the execution of the new mortgage, and the loan by the subsequent mortgagee was made to the mortgagor and a third party upon their joint promissory note, there is no indication of any relation between such payment and the release of the mortgage to the ward. The mortgage, as appears from the syllabus of that case, was released without any payment whatever. In Martin v. De Ornelas, 139 Cal. 41, 72 Pac. 440, it was, in effect, agreed between the person advancing the money and the guardian that the debt to the ward was not to be paid, but was to be secured by a new mortgage on different property, which was to be substituted for the released mortgage, and, of course, the ward was not bound by this unauthorized change of security, but could elect between the two mortgages.

The view we take of the validity of the release of the $2,200 mortgage renders unnecessary any consideration of plaintiff's various contentions with regard to its right to subrogation and the legal effectiveness of the ward's mortgage and the assignment thereof to defendant. Likewise it is unnecessary to discuss plaintiff's assignments of error in the admission of evidence.

[4] The judgment of the trial court decreed:

"That defendant Fidelity & Deposit Company of Maryland is the owner of said mortgage and entitled to enforce the same against said premises for the sum of $2,500 and interest thereon from the 16th day of July, 1914; and * * * that the estate and title of the plaintiff in and to the said premises is subject to the lien of said mortgage to the amount of said sum of $2,500 and interest."

The recorded mortgage and the note secured thereby were for the specific sum of $2,200, and defendant could not, in any event, become entitled to enforce the mortgage for a greater sum than $2,200, with interest, regardless of the amount paid by it under its obligation as surety, and the judgment was therefore erroneous in this additional particular.

Since defendant's mortgage does not constitute a valid and subsisting lien upon the premises, the judgment in favor of defendant must be reversed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; OLNEY, J.; SHAW, J.; LAWLOR, J.

184 Cal. 180

E. CLEMENS HORST CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (S. F. 9319.)

(Supreme Court of California. Oct. 20, 1920. Rehearing Denied Nov. 18, 1920.)

1. Master and servant ⊂=352 — Employer's "serious misconduct" within Compensation Act defined.

"Serious misconduct" of an employer within Workmen's Compensation Act, § 6b, authorizing increased compensation, means conduct which the employer either knew or should have known to be conduct likely to jeopardize the safety of his employés.

2. Master and servant ⊂=352 — Employer's "willful misconduct" within Compensation Act defined.

An employer's serious misconduct, causing injury to his employé and justifying the award of increased compensation under Workmen's Compensation Act, § 6b, is "willful," particularly with reference to the requirement of knowledge to the employer, though the evidence does not show positively that the employer was notified of the unsafe condition, if it appears from the circumstances that the acts of omission or commission evinced a disregard for the safety of others and willingness to inflict the injury complained of, as a failure to guard shafting, in directing violation of a general safety order of the Industrial Accident Commission.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Willful.]

3. Master and servant ⊂=352—Employer's "officer" chargeable with misconduct within Compensation Act defined.

Workmen's Compensation Act, § 6b, authorizing increased compensation where the employé is injured by reason of serious and willful misconduct on the part of an executive or managing "officer" of a corporation, by "officer" means a person in the corporation's employ, either elected or appointed, invested with the general conduct and control in a particular place of the business, the word not being used in its technical, legal sense as one elected or whose office is provided for by articles of incorporation or by-laws.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Officer.]

4. Master and servant ⊂=405(1) — Evidence held to show accidental injury by "serious and willful misconduct of executive or managing officer," within Compensation Act.

Evidence *held* to sustain the Industrial Commission's finding that the accidental injury to an employé caught in a revolving shaft was the result of the "serious and willful misconduct of an executive or managing officer" of the corporate employer, justifying increased compensation under Workmen's Compensation Act, § 6b.

5. Constitutional law ⊂=48—Presumptions to be indulged in favor of validity of act.

All presumptions are to be indulged in favor of the validity of an act of the Legislature.

6. Master and servant ⊂=347 — Workmen's Compensation Act provision for additional allowance for willful misconduct of employer held constitutional.

Const. art. 20, § 21, empowering the Legislature to create a liability on the part of employers to compensate employés for injuries received irrespective of the fault of either party, authorized the enactment of Workmen's Compensation Act, § 6b, providing for compensation, increased by one-half in case the injuries were caused by willful and serious misconduct of the employer.

In Bank.

Application for certiorari by the E. Clemens Horst Company, a corporation, the employer, to review an order of the Industrial Accident Commission of the State of California, awarding compensation for injuries to Mrs. La Verne Hamilton, the employé. Award affirmed.

Rehearing denied in bank; ANGELLOTTI, C. J., dissenting.

Edward C. Harrison and Maurice E. Harrison, both of San Francisco (Arthur W. Bolton, of San Francisco, of counsel), for petitioner.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

LAWLOR, J. This cause is before us on a writ of certiorari issued upon the application of petitioner, E. Clemens Horst Company, a corporation, to review an award made on October 24, 1919, by the respondent Industrial Accident Commission in favor of

respondent Mrs. La Verne Hamilton as compensation for injuries sustained by her on June 7, 1919, while in petitioner's employ. The sum of $8.89, payable weekly in advance, was awarded to her against the Ocean Accident & Guarantee Corporation, petitioner's insurance carrier, as "a temporary total disability indemnity," and one-half of that sum, $4.45, also payable weekly in advance, was awarded her against petitioner as additional compensation by reason of the fact, as found by the commission, that her injuries were occasioned by petitioner's "serious and willful misconduct."

The said insurance carrier is not a party to this proceeding, and the only question presented is as to the validity of the award of additional compensation against the petitioner. The latter's contentions are: (1) That section 6(b) of the Workmen's Compensation Act (St. 1917, p. 834) is unconstitutional; and (2) "that even if this section were valid, there is no evidence of 'serious and willful misconduct * * * on the part of an executive or managing officer' of the petitioner corporation, and that therefore the commission was without jurisdiction to make the award."

At the date of the accident Mrs. Hamilton was employed in petitioner's vegetable drying plant near Wheatland, Yuba county, which had been built about three months before. E. Clemens Horst was petitioner's president and general manager. George E. Miller was general superintendent of petitioner's ranches. It appears that he was not a director or stockholder of petitioner. T. L. Conrad was superintendent of the plant at Wheatland, and was neither a director nor a stockholder of petitioner. When Mrs. Hamilton was injured she was working on a small platform raised about two feet from the floor of the plant. It was her duty to watch a conveyor belt which passed in front of her, and upon which potatoes were being carried from a peeling machine to a "slicer" about two feet to her left, and to pick out and pare those potatoes which had not been properly treated by the peeling machine. Directly over, and parallel to the conveyor belt, and about 5½ feet above the platform on which she was standing, was a rapidly revolving shaft which operated the various machines in the plant. This shaft was protected by a board on the side nearest the employé, but was unprotected below. The accident occurred under these circumstances: About 8 p. m. the mouth of the "slicer" at Mrs. Hamilton's left became clogged. Leaning over the belt and under the shaft, she reached out to clear the potatoes away from the "slicer." In this position her hair was caught by the shaft and pulled from her head, so that she was completely scalped. It is admitted by petitioner that "the accident happened in the course of her employment, and no question is made of her right to recover compensation."

1. We shall first consider petitioner's claim that the finding that the injury was caused by the employer's serious and willful misconduct is not supported by the evidence. Section 6(b) of the Workmen's Compensation Act (Stats. 1917, p. 834; Deering's General Laws, Consol. Supp. 1917–1919, Act 2143c, p. 1392), as it stood at the time of the accident, read in part:

"Where the employé is injured by reason of * * * serious and willful misconduct * * * on the part of an executive or managing officer [of a corporation], the amount of compensation otherwise recoverable for injury or death, as hereinafter provided, shall be increased one-half: * * * Provided, however, that said increase of award shall in no event exceed twenty-five hundred dollars."

The commission has found on this point:

"(8) That at the time of said injury, the employer was a corporation. That the employer by its executive and managing officers constructed said plant and placed therein the transmission shafting upon which applicant was injured, parallel to and directly over the belt upon which applicant worked, at a height on a level with her eyes and without any guard or protection on the under side thereof. That applicant's work required her to bend forward with her head beneath said shafting, and it was necessary for her to stoop to do so. That her hair was thereby brought into close proximity to the unguarded portion of said shafting, which was at all times revolving rapidly. That said shafting was at all times herein mentioned maintained in said condition by said employer through its executive and managing officers and by said Miller and Conrad. That said construction and maintenance were, and each of them was, a direct and open violation of the provisions of sections 33, 34, 35, and 36 of the Workmen's Compensation, Insurance, and Safety Act of 1917. That the duty owed by said employer and its executive and managing officers to employés, under the said provisions, cannot be delegated by them, or any of them so as to free them, or any of them, from responsibility for the violation of said duty, and under the ruling in the case of Fidelity & Deposit Co. of Maryland v. Industrial Accident Commission, 171 Cal. 728, 154 Pac. 834, L. R. A. 1916D, 903, constituted serious and willful misconduct on the part of said employer. That said serious and willful misconduct was the proximate cause of said injury.

"That said construction and maintenance were further in violation of General Safety Order No. 6(a) of the Industrial Accident Commission, then in full force and effect, which provides that: '* * * All transmission shafting, either horizontal or vertical, in workrooms * * * and located within seven feet of the floor or platform, must be guarded.'

"That said violation of said safety order constituted serious and willful misconduct on the part of the executive and managing officers of said corporation, and of said corporation, and was the proximate cause of said injury.

"That therefore applicant is entitled to have her compensation for said injury increased one-half under section 6(b) of said act, said in-

crease to be paid by said employer, and not by said insurance carrier."

The question, then, is: Does the evidence sustain this finding?

Mrs. Hamilton testified that she had been engaged in this particular work for ten days prior to the accident; that on the day in question two foremen had told her "to watch to see that it [the belt] didn't stop up at the end," where it dumped the potatoes into the "slicer"; that she could not reach that end of the belt without stooping under the shaft; that when she commenced to work at this plant she had been told "the general nature of the work, but not just what I was to do"; that she had not seen any signs on the premises warning employés against approaching the machinery; and that she had not "tried to take potatoes out of the slicer" except on the occasion when she was injured.

Mrs. Daisy Cope testified that she had been working on the same belt as Mrs. Hamilton; that the revolving shaft which caused the latter's injuries was "right over the belt" on a level with her eyes; that no one had called her attention to any danger signs in the plant, and that she had seen none; that prior to the accident she herself had felt the suction from the revolving shaft tugging at her hair, but had not spoken about it to her fellow employés; that she had not been warned "to look out for the shaft"; that "the shaft is right over the belt, and if you are not careful you would raise up under it"; that the board protecting the shaft on the side nearest her was "right even" with her head; that there was sufficient distance between the shaft and the belt at the point where the witness worked so that her hair would not become entangled in the shaft unless she leaned over the belt, but that the belt ran "upward" as it approached Mrs. Hamilton's position, "and it was closer to the shaft there than it was where I was."

Mrs. A. M. Parker stated that at the time the applicant was injured she was "forelady, overseeing the work"; that she had not instructed Mrs. Hamilton "to be careful or about the machinery in any way"; that she did not remember seeing any warning signs in the plant; that the "slicer" frequently became clogged; that she did not know whose duty it was to clear the machine in such cases, but that the "day boss" had told Mrs. Hamilton to do so; that in order to do so she would have to lean over the belt so that her head "came right under the shaft"; that within a few days after this accident the shaft was boxed in; that she (the witness) had a pole which she often used to clear potatoes from the "slicer," but that this was not generally known among the employés, and that "the most of the time I used it was after she got hurt"; and that the pole was not located so that Mrs. Hamilton could use it. When recalled by petitioner, she admitted that no instructions had been given to any one except to the applicant to clear the "slicer," and stated that she herself had not been told to do it until after Mrs. Hamilton was injured, but that during the 10 days prior to the accident she frequently used the pole to keep the mouth of the machine clear.

Mrs. Marion Sherman, who was working about 5 feet from Mrs. Hamilton when the latter was hurt, testified that she had not been instructed as to whose duty it was to keep the "slicer" clear, but that "any one who was working on that end of the belt, right there, they was to keep the potatoes moving"; that she, too, had noticed the effect of the shaft on her hair when she stood erect; that the shaft was about 2½ feet above the belt; and that any one working in front of the belt would naturally stoop under the shaft in order to reach the mouth of the "slicer."

T. L. Conrad testifying for petitioner, stated that he was "fairly familiar" with conditions at the plant; that the distance between the shaft and the platform on which Mrs. Hamilton was working was about 5½ feet; that after the accident the shafting was boxed in at his direction; that one Boyd was the night foreman at the plant under him; that the "slicer" occasionally became clogged; that it was Mrs. Parker's duty to keep it clear, and not the duty of an employé stationed where Mrs. Hamilton was; that he did not know whether or not his foremen, who were "supposed to instruct these employés when they went to work about their duties," had given these or other instructions; that "we had signs up in regard to the safety of the machinery"; that, so far as he knew, Horst himself had no knowledge of the dangerous position of the shaft; that surface of the shafting was smooth; that he had never seen "any woman working in the same position Mrs. Hamilton was cleaning the slicer"; that "she had no business there," clearing the mouth of the machine; and that a woman working "below" Mrs. Hamilton on another belt had been instructed by him and by the foreman to keep the "slicer" from becoming clogged. On cross-examination he stated that prior to the accident he had frequently noticed the position of the shaft; that he had been on the platform where Mrs. Hamilton worked, and had seen that the shaft was "open underneath and on the back," although there were two boards "in front"; that he had never called the attention of Horst or Miller to the position of the shaft; that he had never told any other foreman "to cover it up or box it in"; that he thought Horst was in the East, and had not been in the plant before the accident; and that he himself had considered the plant "as ready to run and absolutely safe."

George E. Miller, also a witness for petitioner, testified that he had inspected the Wheatland plant "simply in a general way by going through it and seeing it in operation. The instruction to the builders at the time it was built was to house in everything they considered dangerous. * * * I know that we didn't consider it was necessary to inclose shafts where the shaft was over the belt, so that one would have no business to be in there. Of course, there are dangerous places in any plant or any machine when you get in that dangerous position, but we didn't consider it was necessary to put boards underneath the shaft where the shaft was back of or over the conveyor." He further testified that the plant had not been built from plans or specifications, but from general instructions; that he had never made a special survey of the plant; that he frequently visited the various ranches under his supervision, and "had them make changes wherever I thought they were necessary"; that he had seen the revolving shaft, but had not noticed there was no guard underneath it; and that "the handling of the plant and operation of it" was left to Conrad.

Horst testified that he had given Miller instructions "to look out for the safety" of the employés; that no report had been made to him as to any dangerous conditions in this plant; that he knew practically nothing of the exact condition of the works other than as he was advised by Miller and Conrad; that prior to the injury his attention had not been called to this shafting, although on many occasions he had been through the plant "in a casual way"; and that his custom was to give Miller "general instructions," and "leave it up to his judgment to see that the work is carried out." As to Miller's powers as superintendent he stated "he has got no authority except what authority I gave him."

Miss Viva Jessup, who worked next to Mrs. Hamilton, stated that she had not known of any instructions being given to any one as to the cleaning of the "slicer"; that she did not remember seeing any "safety signs" in the building; and that she had never heard any one say that the shaft was in a dangerous position.

Subdivision (2) (a) of section 1 of the English Workmen's Compensation Act of 1906 (St. 6 Edw. VII, c. 58) provided that if the injury to an employé "is attributable to the serious and willful misconduct of that workman, any compensation * * * shall, unless the injury results in death or serious and permanent disablement, be disallowed." In discussing what is meant by "serious and willful misconduct," Beven, in his Workmen's Compensation, page 394, considers separately the terms "serious" and "willful," and we think our consideration of the evidence may properly be thus divided.

[1] The first question presented is, then, Was the commission justified in finding that the petitioner was guilty of "serious misconduct"? There is no statutory definition of this term. In this connection we may again quote from Beven, page 401:

"To constitute 'serious misconduct,' it is probable that the Legislature intended to signify conduct that an average workman in being guilty of either would know, or ought to know, if he turned his mind to consider the matter, to be conduct likely to jeopardize his own and his fellow workman's safety."

In our opinion the serious misconduct of an employer under our statute may be similarly defined. There should be no difference in principle between the degree of care required of an employer and that exacted from an employé. "Serious misconduct" of an employer must therefore be taken to mean conduct which the employer either knew, or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employés. It seems clear that, according to this test, the commission was amply warranted in finding that the maintenance of the improperly protected shafting, immediately over, and in close proximity to, the conveyor belt, was such serious misconduct. Mrs. Hamilton's testimony that she had been instructed to keep the belt and the "slicer" clear is uncontroverted, and it plainly appears from the testimony of the other employés that in order to do so it was natural that she should lean over the belt, thereby bringing her head in dangerous proximity to the revolving shaft. Mrs. Sherman testified that it was the custom in the plant for the employé who worked in Mrs. Hamilton's position to "keep the potatoes moving," and she and Mrs. Cope stated that they had frequently felt the suction of the revolving shaft tugging at their hair. From the evidence which we have summarized we cannot hold that the commission was not justified in finding that the place at which the employé was required to work was unsafe. Under the evidence the finding of serious misconduct implies that the conditions of the employment were patently unsafe. If this be true, we know of no rule under which petitioner may claim that, passing for the time being the question of the penalty, it is not primarily liable for resulting injuries. It is so well settled as to require no citation of authority that petitioner was charged with the duty of maintaining a safe place for its employés to work, and we do not think it can be said the evidence is insufficient to establish serious misconduct, in that petitioner's officers knew, or ought to have known, if they had turned their minds to consider the matter, of the conditions under which Mrs. Hamilton was required to work.

[2] Next, as to whether such serious mis-

conduct was "willful." It has frequently been said that willful misconduct involves the knowledge of the person that the thing which he is doing is wrong. Lewis v. G. W. Ry. Co., L. R. 3 Q. B. D. 195; In re Burns, 218 Mass. 8, 105 N. E. 601, Ann. Cas. 1916A, 787; Riley v. Stand. Acc. Ins. Co., 227 Mass. 55, 116 N. E. 259; Beckles' Case, 230 Mass. 272, 119 N. E. 653. Conceding that knowledge is required, it seems to us that in order to prove the requisite knowledge, it is not necessary for the evidence to show positively that the person was notified of the unsafe condition of his premises, but that it is sufficient if it appears that the circumstances surrounding the act of commission or omission are such as "evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of." Railway Co. v. Bryan, 107 Ind. 51, 7 N. E. 807. See. also, Pittsburgh, C., C. & St. L. Ry. Co. v. Judd, 10 Ind. App. 213, 36 N. E. 775. According to the findings, the failure to guard the shafting was in direct violation of a general safety order of the commission. It is not contended that the making of this regulation was not within the power of the commission, and, by sections 48 and 49 of the Workmen's Compensation Act, such orders "are conclusively presumed to be reasonable and lawful." In the face of the evidence it cannot be held that the finding that petitioner was guilty of serious and willful misconduct in maintaining the unguarded shafting is without support.

[3] It only remains to consider in this connection whether such misconduct was that "of an executive or managing officer" of petitioner. It is to be noted that section 12, subdivision (b), of the act of 1913 (Stats. 1913, p 283), specified that the willful misconduct of a corporate employer which should entitle an injured employé at his option either to claim compensation under the act or to sue at law for damages, must be that of an elective officer. This provision was repealed by the act of 1917, supra, and under the corresponding section of that statute—the section here under consideration—the willful misconduct which entitles the injured employé to additional compensation is that of an executive or managing officer of a corporation. It is significant that in this section it is not prescribed that such misconduct be that of an elective officer, and it is to be deemed that in enacting the act of 1917 the Legislature was fully advised of the changes being made in the language of the corresponding provisions of the act of 1913. Under the prior statute an injured employé, in order to recover for the willful misconduct of his corporate employer, was required to bring home such misconduct to an elective officer. Under the 1917 statute, however, the Legislature has seen fit to require that a corporation shall be liable for the willful misconduct of an executive or managing officer, and has not specified that the officer shall be an elective one. It seems clear, therefore, that the Legislature by this section did not use "officer" in its technical, legal sense as one who has been elected, or whose office is provided for by the articles of incorporation, or the by-laws, but that by an "executive or managing officer" was meant a person in the corporation's employ, either elected or appointed, who is invested with the general conduct and control at a particular place of the business of a corporation.

[4] Applying this reasoning to the facts herein, it is plain that Conrad was a managing officer of the petitioner, for whose willful misconduct the company is responsible. The by-laws were not introduced in evidence, and it cannot be determined from the record whether Conrad was elected or appointed as manager of the Wheatland plant. But, as has been shown, Miller testified that the operation of the Wheatland plant was entirely intrusted to Conrad. According to the testimony of Conrad himself, he knew of the position of the shafting, and had been on the platform where the injury was received; that he observed it was "open underneath and on the back"; that he neither remedied the conditions nor reported them to his superiors; that immediately after the accident the shafting was boxed in at his direction; and that as superintendent he was fairly familiar with conditions in the plant. It is not necessary, in order to support the finding, that there be direct evidence that Conrad knew of the dangerous condition of the premises and intentionally failed to remedy it; it is sufficient if the existence of either his knowledge, or intention, or both, may be inferred. The commission may have decided that Conrad could not have failed to observe that an operator tending the belt was in perilous proximity to the unguarded shafting. From all the evidence we cannot say the commission may not have inferred that he must have known of the dangerous conditions of the employment. If he did, as matter of law he would be guilty of willful misconduct if he failed to take proper precautions to remove the danger. It may be observed that if Conrad's testimony as to whether he knew of the situation is to be accepted, the conclusion is inevitable that petitioner in the operation of the plant failed to place responsibility for the working conditions upon any one. In any event, we are not prepared to hold that the superintendent of the plant is not to be charged with knowledge of conditions which are in gross violation of prescribed safety regulations, or that under the evidence he is not "an executive or managing officer" within the meaning of the statute.

And it is only necessary to refer to the testimony of the various employés that the unguarded shafting was on a level with Mrs. Hamilton's eyes, that several of the employés themselves had felt the suction from the shaft, that Mrs. Hamilton had been instructed

to clean the "slicer," and that in so doing it was to be expected she would lean over the belt and under the shaft, in order to justify the conclusion of the commission that her injuries were due to the dangerous conditions under which she was required to work. It must be held, therefore, that the evidence is sufficient to sustain the finding that the accident was the result of the "serious and willful misconduct of an executive or managing officer" of petitioner.

[5, 6] 2. We now turn to consider petitioner's claim that section 6(b) is unconstitutional. The Constitution, as it stood at the time the legislation in force on June 7, 1919, was enacted, empowered the Legislature to create a liability on the part of employers "to compensate their employés" for any injury received in the course of their employment, "irrespective of the fault of either party." Article 20, § 21. This language does not authorize the creation of a liability for anything more than compensation. If the 50 per cent. to be added in cases where the injury is caused by the willful misconduct of the employer is given as a penalty on the employer for such misconduct, and not as compensation to the employé for his injury, the provision is not within the power given to the Legislature by said section, and if it has no other sanction, it is beyond the legislative power and void.

It would be within the general power of the Legislature, under section 1, article 4, to provide that in any case of injury to an employé from willful misconduct of the employer, the amount found as the actual damage sustained by the employé should be increased by adding 50 per cent. thereto as a penalty for the misconduct and by way of exemplary damages. But that part of the award would not be given as compensation, and the jurisdiction to enforce the liability for the exemplary damages would be in the ordinary courts established by section 1, article 6 of the Constitution. That section vests the whole judicial power of the state in the courts there mentioned, except such as may be placed in other tribunals by the subsequent constitutional amendments providing for the giving of special powers of a judicial nature to the railroad commission and to the Industrial Accident Commission. Article 12, §§ 22, 23; article 20, § 21. Section 21, article 20 does not authorize the Legislature to commit to the Accident Commission the enforcement of any liabilities except those created by it against employers to the employés for compensation for injuries. Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 153 Pac. 24; Western Metal Supply Co. v. Pillsbury, 172 Cal. 413, 156 Pac. 491, Ann. Cas. 1917E, 390; Carstens v. Pillsbury, 172 Cal. 572, 158 Pac. 218. Hence it does not authorize the giving of jurisdiction to enforce a liability for punitive damages, not given as compensation, but as something over and above compensation for the injury.

But the provision in question is founded upon a different theory. It is obvious from the language of sections 6 and 9 of the act of 1917, supra, and from the act as a whole, that the ordinary schedule of compensation there established was not considered to be full and complete compensation for the injuries received. The purpose was to take a part of the burden imposed by the injury from the injured employé, and transfer that part to the employer to be ultimately borne by the community in general as an addition to the cost of production. In Western Indemnity Co. v. Pillsbury, 170 Cal. 693, 151 Pac. 398, three of the justices of the court, in upholding the constitutionality of the act, said, with regard to the compensation allowed to employés in addition to medical and surgical expenses, that the indemnity based upon the loss of earnings "covers not the whole, but only a part or a percentage of such loss. The risk of actual injuries is thus shared by employer and employé." The opinion of the other three justices, upholding the act for somewhat different reasons, confirms the foregoing statement. All presumptions are to be indulged in favor of the validity of an act of the Legislature. It is therefore to be assumed the Legislature found that the actual injury by loss of earnings and other elements of damage, not including expenses for costs of treatment and the like, would be at least 50 per cent. more than the fixed schedule would come to, and that it was deemed just, if the injury was caused by willful misconduct of the employer, he should be made to pay a greater proportion of the burden, and the allowance in such a case should be increased by adding 50 per cent, thereto. Thus considered, the additional allowance is really for additional compensation in the strict sense, and not for exemplary damages. This being the case, the power to enforce it was properly given to the commission under the provisions of section 21, article 20, of the Constitution.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; WILBUR, J.; LENNON, J.; SLOANE, J.

(184 Cal. 117)

CROWE et al. v. BOYLE, Auditor of City and County of San Francisco, et al.
(S. F. 9545.)

(Supreme Court of California. Oct. 16, 1920. Rehearing Denied in Bank Nov. 15, 1920.)

1. Municipal corporations ⊂=994 — Taxpayers can enjoin expenditures under illegal contract despite consequent losses.

If a contract between the city and county of San Francisco and a construction company for the construction of an aqueduct was illegal, taxpayers have a right to prevent such illegal expenditure under the contract, legally constituting a loss to the city, though injunction may result in the abandonment of the whole project and consequent business losses.

2. Constitutional law ⊂=15—Municipal corporations ⊂=8 — Statutes ⊂=206 — Effect should be given all language of charter, Constitution or statute.

It is a fundamental rule of construction that effect should be given to all the language of a city charter, Constitution, or statute.

3. Municipal corporations ⊂=328—Supervisors held authorized to regulate method of contracting for public utilities.

Under Charter of City and County of San Francisco, art. 6, c. 1, §§ 9, 14, the supervisors are authorized by ordinance to regulate the method of entering into contracts for the work described in section 9, subd. 8—that is, the construction of public utilities—notwithstanding the general scheme for entering into contracts for public work contained in section 14.

4. Municipal corporations ⊂=340—Bidding and letting of contract on "cost-plus" basis held to have complied with ordinance.

Bidding and letting of contract for construction of aqueduct in furtherance of the Hetch Hetchy project by the board of public works of the city and county of San Francisco, the contract being on a cost plus basis, *held* in compliance with the ordinance of the board of supervisors of March 22, 1920, No. 5007, authorizing such contract, a "cost-plus" form of contract being characterized by payment by the city of the cost of the work.

5. Municipal corporations ⊂=346—Bond held one for faithful performance of construction contract as required by city's ordinance.

Where a contract by the city and county of San Francisco for the construction of an aqueduct in furtherance of the Hetch Hetchy project merely required that the guaranty of the bond should be the amount of the unpaid cost-plus fee to the contractor in the hands of the city, a bond expressly providing that it was not intended as a guaranty of the estimated maximum cost substantially complied with the ordinance requirement.

6. Municipal corporations ⊂=346—Supervisors had power to provide by ordinance for single surety to contract.

If provisions with reference to method of procedure in letting a contract contained in the ordinance enacted by the board of supervisors of the city and county of San Francisco required that bond for the performance of the contract be signed by two sureties instead of one, the supervisors had power to provide in the ordinance for only one surety, as is provided by Pol. Code, § 955, in case of corporate sureties, and had power, after execution of the contract, to waive requirement of more than one surety.

7. Municipal corporations ⊂=346—What supervisors could provide for they could authorize by ratification.

What supervisors of the city and county of San Francisco had a right to provide for in the first instance by ordinance, as that a single surety to the city's construction contract should be sufficient they could authorize by way of ratification.

8. Municipal corporations ⊂=85—In absence of provision to contrary, legislative act of supervisors may be by resolution or ordinance.

In the absence of statutory or charter provision to the contrary, a legislative act by the supervisors of a city may be either in the form of a resolution or of an ordinance, resolutions and ordinances being equivalent terms for many purposes.

9. Municipal corporations ⊂=342—Proceedings of board in letting contract and taking surety bond ratified by appropriate resolutions.

Proceedings of board of public works of city and county of San Francisco in letting contract for construction of aqueduct in furtherance of Hetch Hetchy project, and taking of bond from contractor, *held* ratified by subsequent resolutions of board of supervisors of the city in the appropriate manner for such ratification—that is, by the appropriation of the money for the purpose of carrying out the contract—the resolutions in question being adopted in accordance with the charter and approved by the mayor, and equivalent to ordinances for the same purpose, if they did not in fact become ordinances by reason of such approval and in accordance with the charter of the city, art. 2, c. 1, § 16.

10. Municipal corporations ⊂=347(1)—Single surety on contract for construction work for city bound though two required.

A single surety on contract for construction work for a city is bound by its bond though two sureties are required.

11. Municipal corporations ⊂=995(1)—Taxpayer cannot sue to enjoin payments under contract on account of informality of bond as to number of sureties.

A taxpayer of a city cannot maintain action to enjoin payments under a contract for construction work based on the mere informality of the bond in that there is only one surety where two are required by the charter, in the absence of showing made as suggested of injury either to the public or the taxpayer.

12. Municipal corporations ⊂=338, 921(1)—Supervisors held to have followed authority as to sale of water project bonds; auditor held to have complied with requirements relative to indorsement on aqueduct contract.

Board of supervisors of city and county of San Francisco *held* to have legally followed

the authority vested in them with reference to the sale of bonds to pay for construction of an aqueduct in furtherance of the Hetch Hetchy project, and the auditor, in respect of his indorsement on the contract, to have complied with the requirements of the Charter, art. 3, c. 1, § 10, essential to the validity of the contract.

13. Evidence ⊂=83(2)—Presumptions favor good faith of public officials.

All presumptions of law are in favor of the good faith of public officials, as those of a city in issuing bonds for the cost of a water project without subterfuge by way of an arrangement for an advance fee to take care of discount and market the bonds.

14. Municipal corporations ⊂=921(1)—Purchase by contractor of bonds to raise funds for work not illegal.

It is not illegal for a contractor with a city on a cost-plus basis to use part of his fee in the purchase of bonds sold to raise funds for the work.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by James W. Crowe and James E. Lennon against Thomas F. Boyle, as auditor of the City and County of San Francisco, and the Construction Company of North America. From judgment for defendants, plaintiffs appeal. Affirmed.

Rehearing denied in bank; Angellotti, C. J., and Shaw and Olney, JJ., dissent.

Jared How and Richard C. Harrison, both of San Francisco, for appellants.

George Lull, Robert M. Searls and Lent & Humphrey, all of San Francisco (Edward I. Wolfe, of San Francisco, of counsel), for respondents.

WILBUR, J. [1] This is an action brought by taxpayers to enjoin the defendant auditor from paying $276,000, due under a contract between the city and county of San Francisco, which will hereafter be referred to as "the city," and the Construction Company of North America, for the construction of about 16 miles of aqueduct on what is known as the mountain division of the Hetch Hetchy project. The plaintiffs allege that the contract is void. The trial court, upon stipulated facts, denied the injunction, and plaintiffs appeal. It is conceded by appellants that the contract was let in accordance with the ordinance of the board of supervisors, enacted for the purpose of regulating that matter, except in certain particulars, which will be hereafter noted. Appellants contend that the procedure prescribed by such ordinance is in violation of the charter. It is admitted by the respondents that if the charter provisions regulating the letting of contracts for public work by the board of public works (article 6, § 14 et seq.) apply to the contract in question, the contract is unauthorized and void. The contract is of the type known as "cost-plus-a-fee contract"; that is, a contract by which the city pays for all labor and material used in the prosecution of the work, and, in addition, pays the contractor a fee for its services in superintending and managing the same. The contract was let after advertisement for bids. The fee of the Construction Company of North America under the contract is $1,190,329.20, and the aggregate cost of the work to the city, including the contractor's fee, is estimated and guaranteed at $7,802,952.80. Respondents contend that the method selected by the city authorities is the only possible one for getting the work done at a reasonable cost because of the uncertain and fluctuating cost of labor and material. In support of this contention they point out that the lowest flat contract bid made in response to the call for bids on that basis contained in the same notice calling for bids on the cost-plus-a-fee basis was $9,674,208, and the only other bid on that basis was $16,250,263. It is also stated that the issuance of an injunction against the respondents in this case would necessarily result in the stopping of the work now in progress, and that the delay in the Hetch Hetchy project incident to the disbandment of forces, which will be necessary in the event this case is decided in favor of the plaintiffs, will mean a loss to the city of at least $2,000,000. But, if we assume that the contract is illegal, calling, as it does, for an expenditure of nearly $8,000,000, the taxpayers have a right to prevent such illegal expenditure, which, in the legal sense, constitutes a loss to the city, although the injunction might result in the abandonment of the whole Hetch Hetchy project and the consequent business losses involved. The business exigencies which confront the city cannot justify the illegal expenditure of public money, even though such expenditure might result in a great profit to the city. We must, therefore, confine our investigation to the question of the legality of the contract.

The contract departs from the charter plan. It provides for the payment at the beginning of each year of a large installment of the fee, the first payment of which is the amount involved in this case. The charter provision in regard to installment payments during the progress of the work requires that no more than 75 per cent. of the value of the labor done and materials furnished and used shall be paid for as the work progresses. Article 6, c. 1, § 21. It follows that if these charter provisions apply to this contract it is illegal and void. That question will now be considered.

Does the charter authorize the supervisors to adopt the cost-plus-fee plan?

A bond issue of $45,000,000 was voted by the people of San Francisco in January, 1910,

for the construction of the Hetch Hetchy project for the bringing of water from the Tuolumne river to the city. At the time the bonds were voted the charter authorized the city to acquire, construct, or complete public utilities from funds derived from the sale of bonds issued for that purpose. Article 12, §§ 1, 10, 14, 15. These powers were to be exercised by the board of supervisors; but by an amendment to the charter, adopted by the people of San Francisco, November 5, 1918 (article 6, c. 1, § 9, subd. 8), approved by the Legislature January 17, 1919 (Stats. 1919, p. 1390), it was provided that the construction of all public utilities should be in charge of the board of public works of the city. Respondents claim that the full authority of the board of public works to contract for the construction of public utilities is controlled only by the ordinance of the supervisors enacted for that purpose. On the other hand, the appellants claim that section 14 of the same chapter (1 of article 6) with reference to the performance of all public work must control the action of both the supervisors and the board of public works, and that the provisions of section 14 and succeeding sections concerning the method of contracting are the measure of the power of both; that, such charter provisions having been disregarded, the contract is void, as is expressly provided in section 17:

"Any contract made in violation of any of the foregoing provisions, and in the case of improvement of streets any assessment for the work done under such contract, shall be absolutely void."

[2, 3] We will now consider the provisions of the charter involved in the determination of the question in issue, contained in sections 9 and 14 et seq. of article 6, c. 1, so far as material to the inquiry. Section 9, supra, provides:

"The board of public works shall have charge, superintendence and control, under such ordinances as may from time to time be adopted by the board of supervisors * * * 8. Of the construction, maintenance and operation of any and all public utilities, owned, controlled or operated by the city and county, or which may hereafter be so constructed, owned, controlled or operated. Full authority is vested in the board of public works to carry out the powers granted in this paragraph, *and it may, in accordance with such ordinances as the supervisors may enact, contract for work to be performed*, or materials or equipment to be furnished, or for expert, technical or professional services to be rendered, wherever such work, services, materials or equipment are certified by the city engineer to be necessary in connection with the construction, maintenance or operation of such utilities." (Italics ours.)

Section 14 provides:

"All public work authorized by the supervisors to be done under the supervision of the board of public works shall, unless otherwise determined by the board of public works, be done under written contract, except in case of urgent necessity hereinafter provided; *and except as otherwise specifically provided in this charter, the following proceedings shall be taken in all cases* in the matter of letting of contracts by said board. Before the award of any contract for doing any work authorized by this article, the board shall cause notice to be posted conspicuously in its office for not less than five days, and published for the same time, inviting sealed proposals for the work contemplated; except, however, that when any repairs or improvement, not exceeding an estimate cost of five hundred dollars, shall be deemed of urgent necessity by the board, such repairs or improvement may be made by the board under written contract or otherwise, without advertising for sealed proposals." (Italics ours.)

Section 14 was in the charter when originally adopted. At that time the charter did not authorize the construction of public utilities by the city. That authority has subsequently been conferred by amendment. The respondents contend that, although the phrase "public work" as used in section 14 is broad enough to cover all work controlled by the board of public works, whether done by the city in its proprietary or in its governmental capacity, the words should, in the light of the legislative history, be held to apply only to work done by the city in its governmental capacity.

It is true that in Vale v. Boyle, 179 Cal. 180, 175 Pac. 787, attention was called to the difference between the governmental and proprietary powers of the city in determining whether or not certain sections of the charter regulating the purchase of supplies (section 1, art. 2) applied to supplies purchased for public utilities. What was said on that subject was only to reinforce the construction of the language of the charter fully determined by other rules of construction and was wholly incidental to the question. This is made clear by the following language of the opinion, to wit:

"While it is true that this general consideration alone should not control the express language of section 1, chapter 3, article 2 of the charter, if applicable thereto, it aids us in construing such general provisions of the charter concerning the purchase of supplies, etc., to consider that they were adopted for the purpose of regulating the conduct of the board of supervisors, acting in their governmental capacity."

The point at issue must be determined by the language of the charter, and not by the fact that in its ownership and control of public utilities the city acts in a proprietary capacity. Returning, then, to a consideration of the language of the charter, we find that section 14, supra, first deals with "public work authorized by the supervisors to be done under the supervision of the board of public works," and provides that such work, "unless otherwise determined by the board of public

works," must "be done under written contract, except in the case of urgent necessity." The board of public works thus have a right to determine whether such work shall be done under written contract. The first exception is in the case of "urgent necessity." The next clause, "and except as otherwise specifically provided in this charter, the following proceedings shall be taken *in all cases* in the matter of the letting of contracts by said board" (italics ours), would seem to include not only the matter of letting the contracts authorized by the supervisors, but also the letting of contracts directly authorized by the charter; in other words, "all cases." The next sentence confirms this view: "Before the award of any contract for doing any work authorized by this article, the board shall cause to be posted," etc. While the clause, "and except as otherwise specifically provided in this charter the following proceedings shall be taken *in all cases* in the matter of the letting of contracts by said board," is in a sentence dealing with only these clauses of contracts "authorized by the board of supervisors to be done under the supervision of the board of public works," it is evidently intended to have a broader application, namely, to apply to "all cases" where contracts are let by the board. The clause represents a break in the line of thought equivalent to the beginning of a new sentence, introducing the method of procedure to be followed as outlined in the next and succeeding sentences, which provide for "* * * the award of *any contract* for doing *any work* authorized *by this article*, * * *" etc., so that all work contracted for by the board of public works, whether authorized by the board of supervisors or by article 6 of the charter, is to be contracted for in accordance with section 14, "unless otherwise specifically provided in the charter." The contention of the respondents is thus narrowed down to this proposition, namely, that the matter of contracting for the construction of public utilities is expressly regulated by subdivision 8 of section 9, and therefore comes within the above exception contained in section 14, to wit: "And except as otherwise specifically provided in this charter." The argument, then, is that the matter of letting of contracts for public utilities is controlled not by section 14 of the charter, but by the ordinances of the supervisors upon that subject, enacted by authority of the charter (section 9, subd. 8, supra), which provide that the board of public works "* * * may in accordance with such ordinances * * * contract for work to be performed. * * *" It seems fairly apparent that the effect of this section, construed in connection with section 9, subd. 8, supra, is to require all contracts let by the board of public works to be let in accordance with the procedure prescribed by sections 14 et seq., except in case of those contracts concerning public utilities where the procedure to be followed is regulated by ordinances enacted by the board of supervisors.

It will be helpful, in determining the intent of the people in adopting these charter provisions, to consider the history of the adoption of section 9, subd. 8, supra. Such history is uniformly considered in dealing with kindred subjects, such as the interpretation of the Constitutions.

At the time of the formulation of the amendment to section 9, subd. 8, of chapter 1 of article 6, the action of Vale v. Boyle, supra, was pending. The limitations upon the power of the board of public works to deal with public utilities was raised by the plaintiff in that case, which was begun January 15, 1918. On May 27, 1918, the superior court of San Francisco granted a temporary injunction, holding that the board of public works was required to invite bids for supplies in accordance with section 1, c. 3, art. 2, of the charter. The charter amendment to section 9, subd. 8, supra, was formulated and by ordinance submitted to the people of San Francisco October 21, 1918, to be voted for at the next general election (November 5, 1918). Four days later this court reversed the decision of the trial court in Vale v. Boyle, supra, and held that section 1, c. 3, art. 2, did not apply to such purchase of supplies. At the election the proposed amendment was carried, and was approved by the Legislature January 17, 1919 (Stats. 1919, p. 1376). The controversy in that case was as to whether or not the board of public works was required to follow the charter provisions for the purchase of supplies, or to follow the ordinance of the supervisors regulating the purchase of the automobile busses for the purpose of conducting a public utility. The existence of this controversy over the power of the board of public works to purchase supplies, in any other manner than in accordance with the charter provisions regulating the purchase of supplies, so seriously affecting, as it was claimed in that case, the power of the board to effectively operate the public utilities then owned, and to contract for supplies for the Hetch Hetchy project then under construction, shows that the purpose of the amendment was to exempt the board of public works when purchasing supplies for such utilities from following the routine method provided by the charter and held by the trial court to apply to purchases for the municipal street railroad. This purpose is readily deducible from the language used in the amendment, to wit:

"Full authority is vested in the board of public works to carry out the powers granted in this paragraph, *and it may in accordance with such ordinances as the supervisors may enact contract for* work to be performed or *materials or equipment to be furnished*," etc. (Italics ours.)

It is to be observed that the same provision is made concerning "materials or equipment" and concerning contracts "for work to

be performed." Both are to be done in accordance with the ordinances of the board of supervisors. If it was the intent to relieve the board of public works from the charter provisions applying generally to the purchase of "all supplies," it would seem equally clear that the purpose was to also relieve them from similar restrictions concerning the making of contracts for public work. That this court, after the language of the charter amendment was formulated and submitted, held such charter provisions concerning the purchase of supplies not to be applicable, does not change the intent of the framers of the charter amendment. An examination of the language of the amendment, as well as a consideration of the circumstances under which it was formulated, tends to confirm this conclusion. The clause "full authority is vested in the board of public works to carry out the powers granted in this paragraph" has no force unless it relieves the board of public works of restrictions upon their authority contained in other portions of the charter. The expression "full authority" indicates a purpose to remove limitations upon authority and an intention to remove such general restrictions as might otherwise be deemed applicable. It focuses the attention upon the particular paragraph in which the powers are granted and to the limitations upon that power contained in that paragraph as alone applicable. This paragraph, in effect, reads thus: "Full authority is hereby vested in the board of public works over the construction, maintenance, and operation of all public utilities, and it may in accordance with such ordinances as the supervisors may enact, contract for work to be done," etc. The subdivision clearly deals with the method of contracting for public utility construction, and authorizes contracts therefor "in accordance with such ordinances as the supervisors may enact."

Under sections 14 and 22, c. 1, art. 6, the method of contracting for public work is rigidly prescribed. Those provisions may be summarized as follows: Notice inviting proposals for the work shall be posted and published for not less than five days. The notice must fix the day and hour when the bids are to be received. They must be sealed. The notice must contain the general description of the work, the time within which it shall be commenced and when completed, the amount of bonds to be required, and refer to plans and specifications on file in the office of the board for full detail and description of the work. They must be upon printed forms, accompanied by an affidavit of noncollusion. The bids must be clearly and distinctly written, without any erasure or interlineation. They must be accompanied by a certified check; only one bid to be presented by each bidder. The method of opening and considering the bids; the method of signing the contracts; the execution of the bond; the provision in regard to the method of payment of the contractor—are all regulated in great detail. The award must be to the lowest bidder. It is apparent that, if these charter provisions concerning the letting of contracts for public work by the board of public works control the letting of contracts for constructing public utilities, the whole field of regulation is quite fully covered, and there is nothing of importance left for the supervisors to provide for by any ordinance regulating the method of contracting. It is true that the phrase in subdivision 8 of section 9, "in accordance with such ordinances as the supervisors may enact," might be given some effect by construing it as authorizing the board of supervisors to determine what portions of the work are to be let by contract, leaving the method of advertising for and entering into contracts to be regulated by the charter. But this result is already fully accomplished by the opening clause of section 9: "The board of public works shall have charge, superintendence and control, *under such ordinances as may from time to time be adopted by the supervisors;* * * * 8. Of the *construction*," etc. This general introductory phrase in section 9 in regard to the ordinances of the board of supervisors relates to and affects every portion of subdivision 8 of section 9, and the above phrase in subdivision 8 of section 9, to wit, "in accordance with such ordinances as the board of supervisors may enact," is wholly unnecessary and redundant, unless we construe it to apply to the method of entering into contracts for work to be performed and to direct that such ordinance is to control upon that subject. If the phrase under consideration is eliminated from section 9, subd. 8, and it is thus made to read, "and it may * * * contract for work to be performed or materials or equipment to be furnished," such contracting would still be under the general power and supervision of the board of supervisors by virtue of the opening clause of section 9, giving the board of public works control, etc., "under such ordinances as may from time to time be adopted by the supervisors." The authority to let contracts in accordance with the method prescribed in the charter would be in the board of public works, and would be subject to the general regulatory power of the supervisors. In order to change the method of letting contracts it was essential that other and additional language should be employed in subdivision 8, supra, and this we think was done in a very direct and effective manner by the declaration that the board of public works might contract for work "in accordance with such ordinances as the supervisors may enact" for that purpose. It is a fundamental rule of construction that effect should be given to all the language of a charter, constitution, or

statute, and unless this last-mentioned phrase accomplishes this much it accomplishes nothing, and the charter is to be construed exactly as it would be without such phrase. The use of this phrase in connection with the emphatic provision that "full authority is vested in the board of public works to carry out the powers granted in this paragraph" makes it plain that the supervisors are authorized by ordinance to regulate the method of entering into contracts for the work described in subdivision 8 of section 9, namely, the construction of public utilities, notwithstanding the general scheme for entering into contracts for public work contained in section 14 of that article (6).

Another consideration tends to the same conclusion. Previous to the amendment of the charter of 1919, supra, the power to acquire or construct public utilities was vested in the city. Article 12, § 14. No express provision being contained therein with reference to the construction of such utilities, the power to make provision for such construction would be vested in the legislative body of the city. The provisions requiring contracts for public work to be let by the board of public works, contained in the charter at that time in sections 14 et seq., supra, related solely to contracts executed by them, and had no application to contracts let by the supervisors, and therefore had no application to contracts for the construction of public utilities. Prior to the amendment of 1919, therefore, the supervisors by ordinance could provide the method of entering into contracts for the construction of public utilities, and when this power was taken from them, and vested by the charter amendment in the board of public works, it was not unreasonable to provide for the retention by the supervisors of the power of regulating the method of entering into contracts for such construction, and that is, in effect, what was done by the charter, which authorized contracts to be let under ordinances adopted by the board of supervisors regulating that subject. As has been pointed out, section 14 expressly excepted from its operation contracts otherwise specifically provided for in the charter. The provision for the letting of contracts in accordance with the ordinances of the supervisors in subdivision 8 of section 9, c. 1, art. 6, was no doubt intended to be such a specific provision therefor as was excepted from the operation of section 14.

What did the supervisors mean by the cost-plus-fee plan with a guaranty?

[4] Appellants contend that the board of public works failed to conform to this ordinance in advertising for bids and in letting the contract. We will next examine such contention. The ordinance of the board of supervisors, No. 5007, passed March 22, 1920, authorized the board of public works "to call for and receive sealed proposals and to enter into contracts on the basis of such proposals for the construction of one or more or all portions of said water supply and works, said proposals and contracts to be based on the so-called cost-plus-a-fee-plan with a guaranty by the contractor that the total cost to the city shall not exceed a specified maximum price per unit." With reference to the letting of such a contract it is provided, in section 2, "that after comparing proposals received for doing the work the board of public works may in its discretion award the contract either to the bidder submitting the lowest maximum cost guaranty, or to the bidder proposing to do the work for the lowest contractor's fee." The ordinance also contained the following provision:

"Sec. 3. All such contracts shall provide that inasmuch as the city and county is to pay the actual cost of doing the work, within the guaranteed limit, no expenditures chargeable to the city and county shall be incurred for labor, material, supplies or equipment required for such work, except upon the prior written authorization of the city engineer and board of public works, and only to the extent of such authorization. Said contracts may also provide for progressive payments of the contractor's fee. * * *

"Sec. 4. The provisions of the charter requiring the retention by the city and county of 25 per cent. of the amount of contractor's payments until completion of the work shall not be held applicable to such annual advance payments allowed contractors, but shall apply to all other payments on account of the contractor's fee. The provisions of the charter applicable to general contracts by the city requiring a bond for the protection of laborers and material men shall not be considered as applicable to cost plus a fee contracts where all labor and material bills are paid directly by the city and county, and no such bond shall be required."

Purporting to act under the authority of this ordinance, the board of public works, on April 6, 1920, advertised for bids "for the construction of aqueduct tunnels in the mountain division of the Hetch Hetchy project, on a cost-plus-fee basis. Contract No. 77C, Hetch Hetchy water supply." It was provided in this notice that "the amount of bond for faithful performance of contract has been fixed at $100,000." In pursuance of this proposal the Construction Company of North America made its bid, wherein it proposed and agreed, if its proposal was accepted,

"to take charge of and superintend the work mentioned in said advertisement and described in the specifications referred to in said advertisement, and to furnish the necessary organization for carrying out said work in accordance with the specifications, * * * and subject to all conditions contained in said specifications, for the total sum of $1,190,329.20. * * * The undersigned, in further consideration of the acceptance of this proposal, hereby guarantees that the unit costs to the city of said work, determined in the manner provided

for in the specifications, including the total sum above mentioned, but excluding the general overhead costs of the city's engineering and administrative offices in San Francisco and at Groveland, will not exceed the sum named in the schedule of guaranteed maximum unit costs attached to and forming part of this proposal, and agrees that if the actual unit costs to the city of San Francisco, so determined, exceed such guaranteed costs, the total amount of such excess on all work to which the same applies may be deducted from any payments due to, or withheld from, the undersigned under the contract."

The award of contract followed the language of the proposal, awarding the contract No. 77C to the respondent Construction Company of North America—

"to take charge of and superintend the work mentioned in the advertisement for the above-mentioned contract, and described in the specifications referred to in said advertisement, and to furnish the necessary organization for carrying out said work in accordance with the specifications therefor, * * * for the total sum of $1,190,329.20."

It contains the same provisions with reference to guaranty of unit cost contained in the bid. Apparently the bids were made on blanks furnished by the board of public works. Contract No. 77C, executed in accordance with these proceedings, provided that the respondent contractor—

"promises and agrees * * * that it will do and perform all of the following work * * * for the construction of aqueduct tunnels in the mountain division of the Hetch Hetchy project on a cost-plus-fee basis, with guaranteed maximum units costs, and awarded to the contractor above named by the board of public works. * * *"

It also contained the same guaranty with reference to unit cost contained in its proposal and in the award of the contract hereinabove quoted. The board of public works on behalf of San Francisco, subject to the provisions of the specifications, agreed to pay a fee of $1,190,329.20. The specifications provide for payment of the contractor's fee as follows:

"First. In the event that the contractor has submitted a bid requiring annual advance payments, as soon as the contract has been signed and the contractor has undertaken the work, in order to cover the initial cost and expense to which the contractor estimates he will be put in undertaking his work for the first year, the city will pay to him the amount specified in his bid as his advance payment for the first year.

"Second. At the expiration of each successive period of three months succeeding the date on which the contract is signed, and during which the contract is in force, or until ten such payments have been made, the city will pay to the contractor one-eleventh of the entire amount of his bid fee (excluding the contractor's estimated annual advance payments, if they are required by his bid), less twenty-five per cent. of said one-eleventh, and also less the amount of any excess of actual unit costs over guaranteed unit costs, determined as hereinabove set forth.

"Third. At the commencement of the second and third years, respectively, succeeding the date of signing the contract, the city will pay to the contractor the entire amount of the advance payment estimated by the contractor for that particular year, if such an estimate is included in his bid, plus such addition or minus such deduction as the board of public works may find proper, to make such advance payment equal to the contractor's actual advance costs for that year. The finding of the board of public works as to the extent to which these annual advance payments shall be modified, if at all, shall be binding and conclusive; and if said finding is not acceptable to the contractor, or if he does not express his acceptance or rejection of said finding within ten days from the date at which he is notified of the same, the contract shall be declared terminated by the board of public works and shall be of no further force or effect.

"Fourth. When the contract shall have been completed to the satisfaction of the board of public works, or at the termination of the same if due to the failure of the contractor to accept the board's modification of his second or third annual advance payment, as above provided, the city will pay to the contractor the total sums withheld under the twenty-five per cent. retention clause in paragraph second of this section, plus the unpaid one-eleventh of the bid fee, less any deductions which the city engineer may find necessary or proper under the terms of this contract, either on account of the maximum guaranty clause or otherwise. The decision of the city engineer as to the items, amounts, and propriety of any such deductions shall be binding and conclusive upon both parties hereto. Acceptance of such final payment by the contractor shall constitute a complete settlement of all obligations of the city under this contract and a release of the city from the obligation to pay any further sums whatever.

"The contractor, in fixing the amount of the annual advance payment in his proposal, shall include in the amount of such payment only the initial cost and expense to which he considers he will be put in undertaking his work for each year, and not any current expenses or profit, which should be distributed through the year."

In considering the contention of the appellants that this contract and award does not comply with the ordinance, it will be necessary to further consider the terms of the ordinance. The fundamental inquiry is, what is meant by the "so-called cost-plus-a-fee" plan and guaranty, etc. The phrase "cost-plus-a-fee," disassociated from the other parts of the ordinance and construed solely with reference to its language, and not with reference to any technical significance attached to the term, would seem clearly to indicate that the city was to pay the cost of doing the work—that is, for labor and material and other expenses of the contractor—and to pay the con-

tractor a fee for his services. The term is used to distinguish the plan of contracting by which the services of the contractor are secured for the management and oversight of the work in accordance with the usual custom of contractors, but without obligation on the part of the contractor to insure that the building will cost no more than the contract price, or, on the other hand, without an opportunity for him to make more than his previously agreed percentage or fee. This type of contract, we understand, is largely an outgrowth of war conditions. In a paper presented before the American Society of Engineers, printed in the proceedings, vol. 45, No. 46, pp. 443–449, and also printed in the Canadian Engineer, vol. 38, p. 183, Ernest W. Clarke discusses the distinction between ordinary contracts for the construction of buildings and improvements, which he refers to as "lump-sum contracts," and the "cost-plus" type of contract. He makes the following statement:

"The usual methods of paying for work are by lump sum, by item charges, and by cost plus a percentage. Under the first two methods the contractor takes the engineers' or architects' specifications and estimates of the quantities, possibly checks the latter by his own computation, guesses at the interpretation which will be placed by the owner's representatives on the terms of the specifications, and from his knowledge of cost of materials and cost of labor makes up a bid. In a lump sum contract the preliminary estimate of quantities is final, as are also the original plans of foundations, details, etc. Any changes must be a matter of settlement between the owner and the contractor. The latter takes all the gamble, and if conditions or quantities turn out more favorably than was anticipated he wins; otherwise he loses, or is tempted to decrease the cost to himself by some method which generally means a poorer grade of work than that contemplated in the specifications. If conditions turn out much worse than anticipated by the contractor, he may forfeit whatever bond he put up and leave the owner and bondsmen to settle." The tendency of such contracts, Mr. Clarke points out, "is to remove responsibility from the owner and his representatives and place it on the contractor; also, all the gamble on the weather, foundations, changes in labor and material market, and every other unknown or unknowable factor is carefully unloaded on him. The contractor accepts all this, but the owner pays. * * * In 'cost-plus' contracts, the owner accepts all risks, all costs, and receives the benefit of all favorable conditions; each job carries its own load only, without the addition of losses on other jobs, and without the percentage added by the contractor to offset possibly unfavorable conditions, ambiguous specifications, or captious owners. * * * The contractor furnishes the plant, organization, and expert knowledge of construction and buying; the owner supervises the work and pays the bills. * * * The sliding percentage with maximum fee, as used on government work, could be applied to any contract, large or small. Contracts could be let on the basis of fee demanded, both percentage and maximum, on the size, adaptability, and condition of the plant controlled by the bidder, and on his experience, reputation, and the size and character of his organization. It is true that the interest of the owner to keep down the cost, and that of the contractor to receive a large fee, would clash; but that is controlled by the sliding percentage, which can be arranged to give an actually larger fee for smaller total cost, and by the maximum fee, which is based on the owner's estimate of total cost."

Mr. A. E. Wells, president of a Chicago construction company, in The Heating and Ventilating Magazine for October, 1919, vol. 16, p. 27, under the title "Building Construction under the Cost-Plus-Fixed-Fee Contract," calls attention to the distinction between the lump-sum contract and the cost-plus-a-fee contract.

"The question being asked to-day is 'Should the contractor insure the owner that his structure will not exceed a definite contract price?' In competitive bidding the cost of this insurance is paid generally by the low bidder out of profits, or, as frequently happens, out of his capital, for the reason that he is more likely to get the contract as he scales down his allowances for contingencies. In fact, the man whose bid includes a safe allowance for insurance against higher costs cannot expect to obtain work under the competitive bidding system. The inevitable result is the bankruptcy of many contractors and an additional cost to the owner or the surety company to complete the unfinished contract. This situation has come to such a point that surety companies are refusing to write surety bonds on fixed price contracts except under especially favorable conditions and they frequently recommend to owners the cost-plus-a-fixed-fee contract. But from the owner's standpoint is it not preferable to know in advance what a certain project will cost? It is true that a careful estimate is due him. It should be made by a reliable contractor and checked by owner's architect and engineer. Such a figure should be more satisfactory than a competitive bid, which does not necessarily show the cost of the building, but only what some contractor is willing to gamble is the cost of the job." Mr. Wells concludes as follows: "Unquestionably the contractor is called in because he is an expert in building and not to absorb the risk entailed in the lump sum contract. If it is not the purpose of the owner to buy price insurance along with his building, then cost-plus-fixed-fee is a better basis."

In support of this conclusion, an address of Brigadier-General R. C. Marshall, Jr., chief of the construction division of the U. S. War Department, given before the Associated General Contractors of America, November 21, 1918, at Chicago, is quoted from. General Marshall said that as a result of war conditions "there was developed a form of contract known as the cost-plus-sliding-scale-fee contract." He had secured the opinion of a committee of eminent business men unqualifiedly indorsing this form of contract. General Marshall made the following statement:

"No contractor should be called upon nor permitted to undertake the performance of any contract that within the four corners of the paper upon which it appears is or may be written the financial bankruptcy of the contractor. It is unjust, it is inequitable, it is uneconomic. The great lesson of this war on the subject of the relationship between the contractor and the owner is the 'cost-plus' contract. This represents the only equitable basis under which a contractor may perform constructive and economic services for the owner. It is the only form of contract which affords protection to both parties. To me all the energies, the thought, and experience of this country within its own continental lines during the past year and one-half of this world struggle shall have been in vain unless out of it shall grow, as a permanent institution, solidifying the economic relationship between the contractor and owner, the 'cost-plus' contract." Mr. Wells further stated in his article: "Our standard contract calls for a return to the owner of 90 per cent. of such savings, all of which would have accrued wholly to the contractor under the lump-sum plan. We believe 10 per cent. of the savings to be an adequate incentive for the contractor."

George W. Fuller, consulting engineer, New York City, in Municipal and County Engineering for July, 1920, discusses the "cost-plus-a-fee" contract, and states:

"Prior to the great war, the 'cost-plus' form of payment on contracts in the waterworks held was limited to a relatively few large projects built as a whole under this type of contract for private corporations, and to numerous small, unexpected features of enterprises executed under municipal contracts where 'extra-work' clauses were attached to either lump-sum (bulk) or unit-price contracts. During the war a large amount of emergency government work which had to be performed in the shortest possible time gave great impetus to the 'cost-plus' form of contract. The unstable condition of the market for labor and materials now found in many places causes this form of handling construction work to come up repeatedly for discussion. Such discussion results from the necessity for finding expedients to meet present emergencies which, while not comparable with those of the war period, are nevertheless present during this reconstruction period to an extent which is perhaps not generally recognized. At this time when contractors are sorely puzzled to know how to bid on construction materials on which quotations are made by dealers only on the basis or changes in price contingent on the actual date of future deliveries, and when labor is uncertain in quantity and of reduced and somewhat uncertain efficiency as to output of work per hour, it is obviously necessary to look conditions squarely in the face. Add to this the difficulties in transportation of construction materials and the loss incident to the contractor having a substantial payroll for labor when materials to work with are lacking, and it is readily seen that this is a time for considering fundamental principles in handling construction work to an extent that would not be of interest under normal conditions. * * * Some waterworks construction must go forward. With conditions as they are at present the contractor, if he bids on a lump-sum or unit-price basis, he is bound to name a price which in his opinion will protect him from loss, and if possible assure a reasonable return on his capital investment and for the work of himself and his organization. Under these circumstances it is important to discuss briefly the cost-plus form of contract with a view to seeing if the burden of uncertainty in some respects cannot be shifted from the contractor to the owner to the advantage of all concerned. In fact, if construction work is to go forward there are some projects where such steps seem imperative. * * * It is claimed that under the cost-plus method a contractor has little inventive to keep down the cost of the work. This is frequently true of the cost-plus-percentage but need not be true of the cost-plus-lump-sum type. In any case it must be remembered that a contractor who will deliberately be inefficient on a cost-plus project is equally sure to attempt improper or inadequate construction on lump-sum or unit-price agreements. There have been a great many variations of the cost-plus contract applied to construction work, but the more important are:

"(1) Actual proved cost with labor and material furnished without restriction by the contractor, plus a fixed percentage or lump sum, to represent profit, supervision, financing, use of tools, and plant, or any or all of these.

"(2) Actual proved cost of labor furnished by the contractor and with materials furnished by the owner, with a fixed percentage or lump sum, as above.

"(3) Actual proved total cost for specified work, plus a percentage for specified or unexpected extra or unforeseen work in connection with lump-sum or unit-price contracts.

"(4) Actual proved total cost to the contractor, plus a sliding scale fee and upset maximum fee.

"(5) Actual proved cost to the contractor, plus a fixed charge and fixed construction fee."

Under the head of "Advantages Claimed for Cost-Plus Contracts," 10 specifications are given by Mr. Fuller. The eighth one is as follows:

"(8) Cost-plus contracts do away with the substantial sums usually added in lump-sum or unit-price contracts to cover the following uncertainties: (a) Weather; (b) foundations; (c) changes and shortages in labor market; (d) changes and shortages in material market; (e) delayed deliveries of materials."

Under the head of "Disadvantages" he gives 11 specifications, the first of which is as follows:

"(1) There is no way of determining the approximate cost in advance, and this upsets budgets where definite appropriations have been made or are required."

Mr. Fuller's paper, from which the above quotations are taken, was presented before the annual convention of the American Waterworks Association on June 24, 1920, at Montreal, Quebec. See, also, Engineering News Record, vol. 85, p. 78, July, 1920. In

Engineering and Contracting, vol. 52, p. 728, a form of cost-plus contract used by Bent Bros. in Los Angeles is published. It appears from this contract that the constructor agrees to a definite estimated cost which it is stipulated is based upon certain unit prices, some of which are specified in the contract. It is agreed that the estimated cost may be increased or reduced by reason of the increase or decrease in price of the items. The constructor's fee is a percentage of the estimated cost and is known as the estimated fee. If the actual cost of the work is less than the estimated cost, the constructor, in addition to his estimated fee, is paid one-half of the amount saved over the estimated cost. If the cost of the work is more, the constructor pays half of the loss, "except that in no event shall the constructor be paid less than one-third of the constructor's estimated fee."

These quotations clearly indicate the distinction between the flat contract basis and the cost-plus-a-fee basis of construction contracts. It is apparent from the whole scheme that the purpose of the supervisors in authorizing this form of contract was to make a contract less hazardous to the contractor than the flat-price contract. If we accept the appellants' contention, that the guaranty of maximum unit cost places all the cost over that amount upon the contractor, it is difficult to conceive of a contract less favorable than this to the contractor. Without any hope of profit, he agrees to assume all possible loss. If the work costs less than the maximum guaranty he does not profit by that fact, but if it costs more he pays such additional cost. Not only that, if there is an advance in any one item of cost over the estimate the contractor suffers the loss, while if there is a lowering of cost on any other item the city gets the benefit of it. For instance, if the cement costs $1,000,000 more than the estimate, the contractor pays it. If there is a saving of $1,000,000 on labor and other items of cost, the city gets the advantage of this saving. The estimated or guaranteed cost would be the actual cost, but the contractor would suffer a loss of $1,000,000. Such a construction of the ordinance absolutely ignores the fact that the whole purpose of the cost-plus-a-fee contract is to shift the burden of market fluctuations upon the owner instead of on the contractor. Whatever name may be appropriate to the form of contract said to be devised by the board of supervisors of San Francisco, it certainly is not a "so-called cost-plus-a-fee contract"; that is, a contract "generally styled" a "cost-plus-a-fee contract" (Webster). The form of contract which shifted the hazard of increased cost upon the owner resulted from the fact that millions of young men were being withdrawn from industrial pursuits, that the government was calling millions of men to service and planning to call all the available men to service needed to overcome an enemy whose victories had already cost the world millions of lives. Our attention has been called to no contract approximating in character to that contended for by the appellants. The report of the United States Shipping Board of December 1, 1918, shows the letting of contracts aggregating over $2,000,000,000 for ships. The nearest approach to the contract here involved, as construed by appellants, is, to quote from the report, that on "a fee basis by which the bidder submitted a proposal to build for a sum not to exceed a certain figure, and to take a certain fee in return for his services, with provision for bonus shared between builder and corporation in case cost fell below the estimated cost." A consideration of this form of contract at once discloses that it does not purport to be on a "cost-plus-a-fee basis," and that the contractor has a chance of an additional profit over his fee. And it further appears from the report that the government pays any additional cost due to increased cost of labor or material. It should be noted, too, that the employés in such work were in the preferred service list, and thus the industry was relieved from the hazard of having its men called to service, and that every shipyard was given all the contracts it could possibly carry out, and that the government taxed excess profits. Such a contract could not be appropriately styled a cost-plus-a-fee contract, but rather "estimated cost plus a fee plus increased cost," or "estimated cost plus estimated profit plus a fee plus increased cost."

The interpretation of the ordinance contended for by appellants ostensibly throws the hazard of all loss on the contractor, but in fact it throws it on the materialmen and laborers. The laborers are employed and paid only with the consent of the city. The material is purchased and paid for only by such consent. The contractor is, in effect, the agent of the city up to the guaranteed maximum price unit. If this is the limit of the power of the board of public works and the contractor to bind the city, thereafter the contractor must pay all labor and material. The work then has arrived at a point where all future cost is a loss to the contractor and to be paid from his fee or from his private resources. There is no bond to protect the laborers or materialmen. Such a bond is expressly waived by the supervisors (Ordinance, § 4, supra), although ordinarily they would require a bond of over $4,000,000 on a contract of this amount. There is no retention of 25 per cent. (over $2,000,000) for the benefit of laborers or materialmen. In short, the facts that the supervisors waived this bond, that they provided for advance payments of actual cost, that they fixed no amount of bond for the faithful performance

of the contract, that they made no provision for the payment of labor and material after the maximum guaranteed cost had been exceeded, except for payment direct by the city, and waived the usual bond to secure them, lead to the conclusion that it was their intention that in any event the city should pay the actual cost, and that the contract price should be such "cost plus a fee." The contract and specifications involved here seem to combine several features of the cost-plus-a-fee contract described by George W. Fuller, supra. The fourth form of such a contract provides for "an upset maximum fee."

Unless the innovations provided on the cost-plus-a-fee plan by the supervisors in their ordinance absolutely destroy the fundamental basis of such a plan, and substitute in lieu thereof a peculiar plan of their own, the guaranty of the contractor referred to in the ordinance must relate to and bear upon the amount of his fee. It must have been intended that the contractor was to agree that the maximum cost should be a certain amount, and that his fee was to be affected and limited by that agreement. The provision of section 3 that the contract shall recite "that inasmuch as the city is to pay the actual cost of the work, within the guaranteed limit, no expenditures" shall be incurred except upon the prior written authorization of the city engineer and board of public works might indicate otherwise. But the statement of the guaranteed limit contained in this provision is a mere recital as a basis for the agreement that the city engineer is to have supervisory power over the incurring of expenses. This recital ought not to control the fundamental basis of the whole scheme contemplated by the adoption of the cost-plus-a-fee plan. If the contractor instead of bidding a lump sum had specified a percentage of the cost as a basis of his compensation—and he might have bid on that basis—and if we substitute for the word "guarantee" the word "agreement"—for that is what is intended—we have an agreement that the contractor shall receive a certain percentage of the cost of the work coupled with an agreement that the work shall not exceed a certain maximum, and an implication that if it does exceed that maximum his percentage of profit shall be limited to the agreed maximum. If we assume there is any basis for the appellants' contention, we have to consider the additional fact that the board of public works received proposals upon the same basis from all contractors bidding on the cost-plus-a-fee basis; that these bids were a great deal less than the flat contract basis, that the contract was let in accordance with the proposal in the bids; and that afterwards the board of supervisors passed a resolution setting aside bonds for the payment of this contract, and, in effect, ratifying and confirming it.

With reference to the subsequent action of the board of supervisors, the rule is thus stated in Black on Interpretation of Laws, § 95:

"A construction put upon a statute by the Legislature itself, by a subsequent act or resolution, cannot control the judgment of the courts; but it is entitled to weight and consideration in case of doubt or obscurity. * * * Thus, while the Legislature cannot, by resolution, change the obligation of a contract made under a previous act, yet, if they instruct a public officer as to his duties under the contract, such legislative expression of opinion as to what has been done, and the resulting duties of the officer, may be resorted to in determining the intention of the Legislature in passing the act," citing Georgia Penitentiary Co. v. Nelms, 65 Ga. 67.

See, also, State ex rel. Lamkin v. Hackmann, 275 Mo. 47, 204 S. W. 513; Board of Commissioners v. Alexander, 58 Okl. 128, 159 Pac. 311, 316.

The fact that the board of supervisors, within a few weeks after the adoption of this ordinance authorizing the board of public works to solicit proposals for the performance of this work, in effect ratified and approved the contracts entered into by the board of public works under the authority of that ordinance, points significantly to the fact that in using the comparatively recent phrase "cost-plus-a-fee" they did not intend to throw upon the contractor all the hazards due to an increased cost of the work, and that the guaranty therein referred to had relation to the amount of the contractor's fee, and that the guaranty with reference to such maximum unit cost contained in the contract actually entered into was the kind of a guaranty they intended to secure in enacting the ordinance. In the resolution set up as Exhibit J to the complaint, adopted by the supervisors and approved by the mayor, appropriating $2,719,000 to be expended out of the proceeds of water bonds, it is stated:

"Which proceeds are to be placed in the water construction fund for the purpose of paying the estimated expenses of executing contract No. 77C, board of public works, for the construction of mountain division aqueduct tunnels on the Hetch Hetchy project, on a cost-plus-a-fee basis, with guaranteed maximum unit prices during the year commencing with and following the date of said contract."

This is an express declaration by the board of supervisors and the mayor that the contract in question was one "on a cost-plus-a-fee basis, with guaranteed maximum unit prices." If in the ordinance the supervisors had used terms of fixed legal significance, their subsequent interpretation would not be binding on the courts. But they have used a phrase in the formative stage, and we think accurately. But if these phrases lack pre-

cision, the subsequent conduct of the supervisors is sufficient, under the circumstances, to justify the interpretation which we place on the ordinance, namely, that it authorizes the contract entered into by the board of public works.

To recapitulate the argument bearing upon the proper construction of the ordinance of the board of supervisors authorizing the board of public works to advertise for bids on the basis of the so-called cost-plus-a-fee contract:

(1) The sine qua non of the cost-plus form of contract is the payment by the city of the cost of the work.

(2) Section 4 of the ordinance declares that in the cost-plus form of contract the city is to pay for all labor and material.

(3) There is no express provision in the ordinance that the contractor is to reimburse the city for the cost of labor and material paid to laborers and materialmen.

(4) No bond is required to secure laborers and materialmen, such a bond being expressly waived.

(5) The usual 25 per cent. of money due under the contract retained to secure laborers and materialmen and to secure the city in the faithful performance of the contract, is waived.

(6) No provision is made for an adequate bond to secure the city for the repayment to it of money paid to laborers and materialmen. While the usual bond for the performance of the contract would cover this agreement, the amount of such bond is not fixed by the supervisors, but is left to the discretion of the board of public works.

(7) The purpose of the guaranty of maximum unit cost by the contractor is to form a basis of his fee if the bid is on a percentage basis, or, if not, in such manner as the board of public works may determine by its form of proposals and contract.

(8) The board of supervisors have themselves interpreted the ordinance to mean exactly what the board of public works construed it to mean, and in case of doubt we should follow this interpretation.

As an answer to the foregoing considerations it is suggested that the guaranty contemplated that the contractor was to pay all cost over and above the agreed maximum; in other words, that the sine qua non of the guaranty is that the contractor pays the cost of the work. We would thus have the supervisors in one sentence using two irreconcilable terms, one phrase requiring the city at all hazards and in all events to pay the cost of the work, and the other requiring the contractor at all hazards and in all events to pay the cost of the work. On the one hand, we have a construction of the ordinance which resolves the ambiguities thereof in favor of the cost-plus basis, and, on the other, a construction which resolves the ambiguities in favor of the payment of the cost by the contractor.

In response to the considerations which point to the conclusion that the supervisors were seeking a practical solution of a practical problem, and were endeavoring to secure bids from contractors upon a basis more favorable to the city than the lump-sum contract, and that the contract which throws all the hazard upon the contractor and removes from him all hope of profit resulting from decreased cost is less favorable to him than a lump-sum contract, it is answered that the contractor will protect himself by making an outside estimate which will make it practically certain that he will not suffer loss. To this argument we reply that the imputation of such an intent to the board of supervisors is to assume that the provision in the ordinance in regard to a guaranty was considered by them to be absolutely valueless, because to secure a guaranty of a certainty would be of no value to the city; that is to say, if it was assumed that a contractor would bid two or three times the estimated cost of the work as his maximum guaranty, so as to be certain that he would suffer no loss, the guaranty becomes valueless. The guaranty is only valuable on any theory when it is assumed that it is possible, and even probable, that the actual cost will exceed the guaranteed maximum. If we assume that each bidder will fix an exorbitant maximum—say forty or fifty million dollars—then it is obvious that the only real competition in bidding would be as to the amount of the fee, for the maximum guaranty would be of no value to the city. We are thus brought by this process of reasoning to the very conclusion that we reached by the opposite course of reasoning, namely, that the intent of the board of supervisors was to secure competition in the amount of the fee bid. The difference in the two courses of reasoning is that by the former we uphold the validity of the contract here involved and permit the construction of the Hetch Hetchy project, as was clearly contemplated by the supervisors, and by the latter we hold the contract invalid and temporarily retard or permanently destroy the Hetch Hetchy project.

We have assumed in the foregoing discussion that the city attorney has correctly interpreted the contract entered into for the performance of this work, and that the provision in such contract for a guaranty that the maximum unit price should not exceed the amount therein specified was so far modified by the contract, with reference to the retention of parts of the fee due the contractor, that the maximum security of the city is $112,000. Mr. Justice SLOANE has taken a different view of the contract, and we do not enter into that discussion for the reason that we prefer to base our decision upon

the interpretation adopted by the parties in the case. Upon this basis, if we assume that the aggregate of the maximum unit cost cannot exceed the amount of the respondent contractor's bid, to wit, $7,802,952.80, the contract should have been awarded to R. C. Storrie & Co., whose bid fee was $1,074,285.60, because in each case the city pays the cost of the work and the fee of the contractor, and the difference between the two fees is $116,044 in favor of R. C. Storrie & Co. It is only when we assume that the actual cost of the work would be $112,000 more than $7,802,952.80 that the basis of the two bids becomes at all equal, for the bid of the respondent contractor abates as the cost exceeds its guaranty, and it is for the reason that it was contemplated that the maximum unit cost would affect the compensation of the contractor, that the supervisors, in section 2 of the ordinance, provided that the contract might be awarded "either to the bidder submitting the lowest maximum cost guaranty, or to the bidder proposing to do the work for the lowest contractor's fee"; for, as has been said, if the maximum bid is so great that it bears no real relation to the cost, the bid should be let on the basis of the lowest contractor's fee.

Ratification.

The question as to whether or not the resolutions adopted by the board of supervisors subsequent to the execution of the contract, in furtherance thereof, constituted a ratification of the contract so as to bind the city is not discussed in the briefs. It is clear that the board of supervisors, having power to prescribe the method of entering into the contract, would have power to ratify a contract executed without the formalities prescribed by them, as distinguished from such formalities as might be required by the charter. The resolutions adopted by the supervisors are not only significant as pointing to the proper interpretation of the ordinance prescribing the method of the letting of the contract, but are also significant as legislative action ratifying the contract. There can be no question that if the resolutions passed by the board of supervisors subsequent to the letting of the contract are proper expressions of the legislative will, equal in effect to an ordinance, that the subsequent ratification makes immaterial the original intention of the board of supervisors as expressed in the ordinance authorizing the letting of the contract, and we see no escape from the proposition that under the charter of San Francisco the ordinance in question, having been enacted with the formality prescribed by the charter for both ordinances and resolutions, is equivalent to an ordinance in its effect. This matter will be more fully discussed in the consideration of the next point.

Does the Contractor's Bond Comply with the Ordinance?

[5-8] Appellants contend that the bond given by the contractor does not comply with the charter provisions regulating that subject (section 21, c. 1, art. VI), for the reason that it is not a bond for the faithful performance of the contract, and that, although signed by a surety company, there is only one surety instead of two. In this connection it is pointed out that although the Political Code authorizes the acceptance of one corporate surety company instead of two individual sureties, such section does not apply to the letting of contracts by a city, which is a municipal affair. Section 21, supra, provides as follows:

"At the same time with the execution of the contract, the contractor shall execute to the city and county and deliver to the secretary of the board a bond in the sum named in the notice for proposals, with two or more sufficient sureties to be approved by the board, or shall deposit with the secretary a certified check upon some solvent bank for that amount, for the faithful performance of the contract. No surety upon any bond other than the lawfully authorized surety companies shall be taken unless," etc.

The claim that the bond is not one for the faithful performance of the contract results from the fact that in the bond it is expressly provided that it is not intended as a guaranty of the estimated maximum cost. Inasmuch as the contract itself on that subject merely requires that the guaranty shall be the amount of the unpaid fee in the hands of the owner, the bond substantially complies with the requirements of a bond for the faithful performance of the contract. The respondents' only answer to the claim that the bond should have been signed by two sureties is that the universal practice of the city has been to require only one surety company, and that the point was not raised in the court below, but is raised for the first time on appeal. With reference to the latter point it is sufficient to raise the question in this court that the pleadings and stipulation of the parties and findings of the trial court show that the contract was signed by only one surety company. Nor would the proof of a contrary custom, directly in the face of the charter requirements, be of any value. If, as we have held, the board of supervisors have control over the subject of letting of contracts for public utilities, they also have control of the corollary matter of the execution of a bond for the faithful performance of the contract. In the ordinance providing for the letting of this contract by the board of public works no specific provision was made with reference to the giving of the bond for the performance of the contract. It was merely provided in the ordi-

nance that the procedure outlined in sections 14 et seq. of article 6, c. 1, should control. The language of the ordinance is as follows: "Sec. 2. The procedure to be followed in soliciting proposals for and letting such contracts shall be, so far as applicable, that prescribed in article 6, chapter 1, of the charter for general contracts let by the city," with certain exceptions which need not now be considered. Assuming that the provision with reference to the method of procedure in letting a contract, contained in the ordinance enacted by the board of supervisors, required that the bond for the performance of the contract be signed by two sureties instead of one, the supervisors had the power to provide in the ordinance for only one surety, as is provided by general law in case of corporate sureties. Pol. Code, § 955. They also had power after the execution of the contract to waive the requirement of more than one surety. What they had a right to provide for in the first instance they could authorize by way of ratification. Chase v. Trout, 146 Cal. 350, 80 Pac. 81. The resolution of the board of supervisors of May 3, 1920 (No. 17872), approved by the mayor on that date, reciting the execution of the contract in question, setting aside $8,000,000 in bonds to carry it out, appropriating $2,719,000 for the first year, accepting the bid of the Construction Company of North America, was a formal ratification of the contract. This ratification was repeated on the same date by a resolution setting aside and appropriating $2,719,000 from the proceeds of the sale of said bonds authorized by the foregoing resolution, and directing that the "proceeds are to be placed in the water construction fund, for the purpose of paying the estimated expenses of executing contract No. 77C of the board of public works and for the construction of mountain division aqueduct tunnels on the Hetch Hetchy project on a cost-plus-a-fee basis, with guaranteed maximum unit prices during the year commencing with and following the date of said contract"; and on the same date, by another resolution, appropriating $276,776.40, "in payment to the Construction Company of North America as the first annual advance payment contract 77C Hetch Hetchy water works supply construction (claim dated May 3, 1920)." It is suggested that these resolutions were not effective to ratify the letting of the contract, for the reason that the charter required the supervisors to act by ordinance in providing a method of letting of contracts (section 8, c. 1, art. 6, supra), and that a ratification by resolution would therefore not be effective. McCracken v. San Francisco, 16 Cal. 591; Grogan v. San Francisco, 18 Cal. 608, 610, 614; Pimental v. San Francisco, 21 Cal. 362, 363. But in the absence of statutory or charter provision to the contrary, a legislative act may be either in the form of a resolution or of an ordinance. San Francisco Gas Co. v. San Francisco, 6 Cal. 190; note, 34 Am. Dec. 631; Ann. Cas. 1913C, 1321; Ruling Case Law, 19, § 194. For many purposes resolutions and ordinances are equivalent terms. Los Angeles v. Waldron, 65 Cal. 283, 3 Pac. 890; Pollok v. City of San Diego, 118 Cal. 593, 50 Pac. 769; Hellman v. Shoulters, 114 Cal. 136, 157, 44 Pac. 915, 45 Pac. 1057; Jacobs v. Board of Supervisors, 100 Cal. 121, 34 Pac. 630; Hopping v. City of Richmond, 170 Cal. 605, 150 Pac. 977. "And it has been held that even where the statute or municipal charter requires the municipality to act by ordinance, if the resolution is passed in the manner and with the statutory formality required in the enactment of an ordinance, it will be binding and effective as an ordinance." 19 Ruling Case Law, § 194, p. 895; Gleason v. Barnett, 115 Ky. 890, 61 S. W. 20; Barre v. Perry, 82 Vt. 301, 73 Atl. 574; McGilvery v. Lewiston, 13 Idaho, 338, 356, 90 Pac. 348; Steenerson v. Fontaine, 106 Minn. 225, 119 N. W. 400. The charter of San Francisco, although providing that all legislative action shall be by ordinance (article 2, c. 1, § 8), expressly authorizes in section 13 the passage of resolutions providing for the appropriation or disposition of public property or the expenditure of public money. It is thus provided that this particular form of legislative action may be had by either ordinance or resolution. After providing the identical procedure for the passage of ordinances and resolutions, it is provided that bills and resolutions of the type specifically described in section 13, which includes resolutions for the "appropriation or disposition of public property or the expenditure of public moneys," etc., shall after passage be presented to the mayor for approval. It is then provided: "The mayor shall return such bill or resolution to the board within ten days after receiving it. If he approve it he shall sign it and it shall then become an ordinance." With reference to the passing of such ordinance or resolution over the veto of the mayor, it is provided that after such passage "the presiding officer shall certify that fact on the bill or resolution, and when so certified the bill shall become an ordinance with like effect as if it had been approved by the mayor. If the bill or resolution shall fail to receive the vote of fourteen members of the board, it shall be deemed finally lost." The only difference that we have noted concerning the passage and authentication of ordinances and resolutions is that relating to the enacting clause of an ordinance. It is provided in the charter (section 8, c. 1, art. 2) as follows: "Every legislative act of the city and county shall be by ordinance. The enacting clause of

every ordinance shall be in these words: 'Be it ordained by the people of the city and county of San Francisco as follows:' No ordinance shall be passed except by bill, and no bill shall be so amended as to change its original purpose." But the provision in regard to the enacting clause has been held to be directory. City of Napa v. Easterby, 76 Cal. 222, 18 Pac. 253.

[9] We see no escape from the proposition that the proceedings of the board of public works in the letting of the contract and the taking of the bond were ratified by the subsequent resolutions of the board of supervisors in the appropriate manner for such ratification; that is, by the appropriation of the money for the purpose of carrying out of the contract. Such appropriations were made in accordance with the provisions of the charter. The resolutions in question were adopted in accordance with the charter and approved by the mayor, and were equivalent to ordinances for the same purpose, if they did not in fact become ordinances by reason of such approval and in accordance with the above-quoted provision of section 16, c. 1, art. 2.

Taxpayer Cannot Complain of Informality in Bond.

There is another reason why the judgment cannot be reversed, because there was only one surety on the bond.

[10, 11] This action being by a taxpayer, the question is whether he is in a position to raise the point as to the insufficiency of the bond where it is executed by a surety company, and where the general law specifically provides that only one surety company is essential upon a bond in any case provided by law. Section 955, Pol. Code; section 1056, Code Civ. Proc. The appellants are no doubt correct in the contention that the giving of such bond was a municipal affair, and therefore controlled by the city charter, but no allegation is made and no contention raised that the surety is not amply sufficient. The bond has been approved both by the board of public works, as required by section 21 of the charter, and inferentially by the board of supervisors. The bond would be binding upon the surety company, notwithstanding there was only one surety. Kurtz v. Forquer, 94 Cal. 91, 29 Pac. 413; Weir v. Mead, 101 Cal. 125, 35 Pac. 567, 40 Am. St. Rep. 46; Stimson Mill Co. v. Riley, 42 Pac. 1072.[1] No case has been called to our attention in which it has been held that a contract such as this is invalid by reason of the failure to give a proper bond, and in a number of cases it has been assumed that the giving of a bond expressly required by statute is not essential to the validity of the contract. Plummer v. Kennedy, 72 Mich. 295, 40 N. W. 433; Wells v. Board of Education, 78 Mich. 260, 44 N. W. 267; Huebner v. Nims, 132 Mich. 657, 94 N. W. 180; Smith v. Hubbell, 142 Mich. 637, 106 N. W. 547. In this state we have been very liberal in the application of the rule permitting taxpayers to bring a suit to prevent the illegal conduct of city officials, and no showing of special damage to the particular taxpayer has been held necessary. Gibson v. Trinity County Supervisors, 80 Cal. 359, 22 Pac. 225; Winn v. Shaw, 87 Cal. 631, 25 Pac. 968; Barry v. Goad, 89 Cal. 215, 26 Pac. 785; Santa Rosa Lighting Co. v. Woodward, 119 Cal. 30, 50 Pac. 1025; Clouse v. City of San Diego, 159 Cal. 434, 114 Pac. 573; Osburn v. Stone, 170 Cal. 480, 150 Pac. 307. The rule has now been crystallized into a statute (section 526a, Code Civ. Proc.). We think that our decisions point to the conclusion that the taxpayer should not be permitted to maintain an action based upon the mere informality of a bond, where no showing is made or suggested of injury either to the public or to the taxpayer. In Ransome-Crummey Co. v. Bennett, 177 Cal. 560, 171 Pac. 304, plaintiff sued upon a street assessment. The proceedings were in invitum. The charter provided that where a bond for the faithful performance of a contract for street work was executed by a surety company such company must be organized under the laws of the state of California. The bond given was not executed by a company so organized. The court said:

"The question is whether under these circumstances the fact that the surety on these bonds, otherwise good and sufficient, was not of the class designated by the charter, is available as a defense in an action to foreclose the lien of the assessment. We think this question is correctly answered in the negative by what was said and held in Miller v. Mayo, 88 Cal. 568, 26 Pac. 364, and Greenwood v. Morrison, 128 Cal. 350, 60 Pac. 971, and on further consideration we are satisfied that Manning v. Den, 90 Cal. 610, 27 Pac. 435, decided nothing to the contrary. It follows that the facts embraced in this finding constitute no defense to plaintiff's action."

If in proceedings in invitum the failure to give the kind of bond required by the charter is insufficient to avoid the contract made in the exercise of the taxing power of the city, it follows irresistibly that a taxpayer ought not to be allowed the extraordinary remedy of injunction to prevent the carrying out of a valid contract because of such informality, where no showing whatever is made of actual injury to the taxpayer. It has been said that injury will be presumed from a failure to comply with the law (Santa Rosa Lighting Co. v. Woodward, supra) but such presumption cannot be applied under the circumstances here shown.

[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 110 Cal. xviii.

The Auditor's Certificate Concerning Availability of Proceeds of Municipal Bonds.

[12] Appellants contend that the indorsement by the auditor upon the contract in question was insufficient to comply with the requirements of article 3, c. 1, § 10, of the charter, and that the proceedings for the setting aside of the sale of the water bonds for the payment of the expenses of the contract does not conform to the charter provisions in that regard. The charter provision in regard to the indorsement upon the contract is as follows:

"Provided, that where the expense of executing such contract is to be paid entirely from the proceeds of bond issues, the requirements of this section may be satisfied through an indorsement by the auditor that a sufficient number of bonds have been set aside to be sold as payments under the contract fall due, and from the proceeds of which sale the estimated expense of executing such contract may be paid, as certified by the board or officer making the same."

The certificate of the auditor upon the contract is in the following language:

"In accordance with the provision of article III, chapter 1, section 10 of the charter of the city and county of San Francisco, I hereby indorse upon the within contract my certificate that by Resolution No. 17872, New Series, of the board of supervisors of the city and county of San Francisco Water Bonds of the issue of 1910, in the amount of eight million ($8,000,000) dollars, have been set aside, to be sold as payments under the contract to which this indorsement is attached fall due, from the proceeds of which sale the estimated expense of executing such contract may be paid; that said amount of bonds is sufficient for such purpose, according to the certificate of the board making such contract; that prior to this indorsement the contractor has agreed in writing to purchase such bonds, in such amount and at such periods of time, for par and accrued interest, as will enable the treasurer to make payments in cash under such contract as such payments fall due and are approved."

The agreement of the contractor was to purchase on or before the day when each advance annual installment of the fee became due an amount of bonds sufficient to take care of the total amount of expenditures required under the contract for the next ensuing year, and the amount agreed to be purchased for the first year was $3,052,000, the bonds to be purchased at par and accrued interest. The contention of the appellants is that this arrangement for the sale of bonds did not conform to the charter provisions, and that therefore the certificate was in effect untrue. The contention is as follows:

"The contract in question assumes to be one not for the present sale, but for the future sale in installments, upon the happening of future events, one of which may not happen within one year, and one of which may not happen within two years, from the date of the contract. The sales assumed to have been consummated by this contract were not sales to the highest bidder, nor are the sales over the treasurer's counter to any applicant at a price not less than par and accrued interest fixed by the supervisors, which are the only methods of sale prescribed by the charter."

We think this position is not well taken. The purpose of requiring the auditor's certificate was to submit to him the question of whether or not he would have in the treasury at the time payments were due under the contract sufficient funds to meet these payments. Under the agreement entered into between the contractor and the city he would have such funds on hand for the payment of the amounts due under the contract. The charter (section 10, supra) specifically provides:

"If bonds are withheld, arrangements shall be made prior to the auditor's indorsement for the sale of such bonds in such amounts and at such periods of time as will enable the treasurer to make payments in cash under such contract as such payments fall due and are approved."

This provision of the charter specifically requires that the arrangement for the sale must be made before the auditor's indorsement. It contemplates the future delivery of the bonds "in such amounts and at such periods of time as will enable the treasurer to make payments in cash under such contract as the payments fall due." The charter contemplates two things: First, an indorsement upon the contract of the fact that there is a balance in the treasury available for the payment of the moneys to fall due under the contract. It matters not that this money may have been derived from the sale of bonds. If the bonds have been sold and the money is in the treasury, the certificate of the auditor is in accordance with the fact. Second, if, on the other hand, the bonds have not been sold and have been set apart by the supervisors to meet the obligation under the contract, it is essential that such arrangement be made for the sale of the bonds at future times and in such amounts as will make it certain that the city will have cash on hand to fulfill its obligation to pay cash. The mere setting aside of bonds would not take care of the obligation of the city, and there could be no assurance of the ability so to do in the absence of an actual arrangement or contract for the sale of the bonds at such times and in such amounts as is needed to meet its obligation under the contract. If the arrangements for the sale of bonds were violative of such fundamental provisions of the charter as that the bonds should be sold for not less than par and accrued interest, we should go behind the certificate of the auditor to inquire into the ac-

tual facts in the suit of a taxpayer alleging those facts. So far as we can see no direct requirement of the charter is violated, and the very provision of the charter which requires the certificate of the auditor to be attached to the contract certifying that bonds have been set aside to be sold, and that "from the proceeds of which sale the estimated expense of executing such contract may be paid," implies a sale in advance of delivery. We think that the supervisors have regularly followed the authority vested in them with reference to the sale of bonds, and that the auditor has complied with the requirements of the charter essential to the validity of the contract.

Fraud in Sale of Bonds not Charged.

[13, 14] In the oral argument it was claimed that the arrangement for the advance fee each year was a subterfuge, to take care of the discount necessary to market the bonds. The argument is substantially as follows: That the court will take judicial notice of the fact that government bonds and other similar bonds bearing 4½ or 5 per cent. interest cannot be sold on the market for par; that therefore the agreement of the contractor to purchase the bonds at par is not in good faith for the reason that he could not afford to purchase the bonds at a loss, and hence it must be assumed that the advance payment to be made before or at the time of the purchase of the bonds was intended as a discount on the bonds. The question of whether or not the form of the contract entered into by the city with the contractor was a subterfuge to avoid the provision of the charter requiring the bonds to be sold at par and accrued interest was not raised in the trial court. It is suggested, however, that the facts speak for themselves, and from the admitted facts it must be held that this was the purpose of the city and of the contractor. If there is any fraud or collusion in the matter it was not alleged and cannot be considered by us. All presumptions of law are in favor of the good faith of public officials, and there is nothing in the case other than the facts as stated which give color to any complaint of collusion. Assuming that it is true that the contractor will use a part of his fee in the purchase of bonds, it is no more illegal than it is for him to use any other money belonging to him for the purchase of the bonds. It is his money, and, in the absence of fraud or collusion, he can do with it as he pleases.

We conclude that the contract was valid and that the injunction against the payment of the contract price should be denied.

The judgment is affirmed.

We concur: LAWLOR, J.; LENNON, J.

SLOANE, J. (concurring). I concur in the conclusion reached by Mr. Justice WILBUR, but I do not agree with his opinion construing the contract of guaranty as specified in the ordinance. I cannot accept the construction placed upon ordinance 5107 that the requirement for a contractor's guaranty that the "cost to the city shall not exceed a specified maximum cost per unit" applies alone to the contractor's fee. There are four references to this guaranty in the ordinance. First, the board of public works is authorized to invite proposals and let contracts "on the basis of cost-plus-fee with guaranteed maximum cost to the city and county." Second, the board is authorized to enter into contracts for the construction of "said water supply and works, said proposals and contracts to be based on the so-called cost-plus-fee plan, with a guaranty by the contractor that the total cost to the city shall not exceed a specified maximum price per unit." Third, there is the provision that the board of public works may in its discretion award the contract to the bidder submitting the "lowest maximum cost guaranty, or to the bidder proposing to do the work for the lowest contractor's fee." Whatever this last paragraph may mean, it seems clear that the maximum cost guaranty referred to in the first clause is not the contractor's fee indicated in the second clause. The fourth reference is to the fact that "the city and county is to pay the actual cost of doing the work within the guaranteed limit," and providing that no expenditure chargeable to the city and county shall be incurred for labor and material, supplies, or equipment, required for such work, except on written authorization, etc. The cost and work here referred to as being within the guaranty are clearly the cost and work of the whole contract. It furthermore is an incontrovertible fact that all the parties to the proceedings under this ordinance, in the proposals, specifications, acceptances, and contract, have treated this required guaranty as applying to the total maximum cost of the entire work, including the contractor's fee.

These considerations are conclusive to my mind that the guaranty named in the ordinance was intended as a security against any excess unit cost of the entire construction work.

But, with this interpretation of the ordinance, I concur in the conclusion of Justice WILBUR that the contract cannot be held invalid for failure of compliance with either the charter or the ordinance—First, because, as pointed out in Justice WILBUR'S opinion, the resolutions adopted by the board of supervisors were in legal effect a ratification of the contract; and, second, because, if there was not a valid ratification, the acceptance of the contract rests upon a reasonable interpretation by all the parties of the guaranty requirement.

This court is agreed upon the vital point of the opinion that the supervisors had the power under the amended charter to authorize

by ordinance a departure from the procedure therein prescribed for negotiating public contracts. They did by ordinance change the procedure not only in adopting the cost-plus-fee plan, but by demanding a guaranty from the contractor where the charter required a surety bond. It is fair to presume that the contract of guaranty as executed and accepted was the security contemplated by the ordinance.

The ordinance authorizes the board of public works to enter into a contract on the so-called cost-plus-a-fee plan, "with a guaranty by the contractor that the total cost to the city shall not exceed a specified maximum price limit."

Pursuant to this requirement the contractor, in the contract as executed with the board of public works, agrees as follows:

"The contractor hereby guarantees that the unit costs to the city of such work determined in the manner provided in the specifications, including the contractor's fee hereinafter mentioned, but excluding the general overhead costs of the city's engineering and administrative offices in San Francisco and Groveland, will not exceed the sum named in the schedule of guaranteed maximum unit costs; and agrees that if the actual unit costs to the city of San Francisco, so determined, exceed such guaranteed costs, the total amount of such excess on all work to which the same applies may be deducted from any payments due or withheld from the contractor under the contract."

Stopping with the words "unit costs" preceding the semicolon, we have, so far as is necessary to bind the contractor, an express guaranty as required by the ordinance.

I doubt if there is anything in the subsequent language which modifies the liability of the contractor. The added terms are not a limitation upon the guaranty, but a supplementary provision for securing the liability assumed to the extent of any unpaid moneys due the contractor.

It is claimed that the bond which was given to secure performance of the contract expressly construes the above agreement, and exempts both the surety and the principal from any liability "on this bond" for the guaranty, and limits the liability of the principal to "a charge against said principal as provided in such specifications."

The provisions of the specifications referred to do not contain any limitation upon the liability of the contractor under the guaranty, but it is the manner of ascertaining the amounts to be deducted from the contractor's fee that is referred to as being "provided in the specifications."

This proviso in the bond, of course, destroys any recourse on the bond for such maximum excess costs, but it cannot, and does not purport to, construe the extent of the principal's liability on the guaranty, but, on the contrary, refers to the contract for the measure of his liability; and, in my opinion, after having made an express guaranty covering any extent of excess maximum cost, it cannot be held to have been limited by a supplemental agreement in the nature of an assignment of moneys remaining in the hands of the debtor, as partial security for the promise.

But even conceding, as seems to be the construction of the parties themselves, that the contract of guaranty limits the contractor's liability thereon to such deductions as may be made from his stipulated fees, is there such a failure to comply with the requirement of the ordinance in this regard as to nullify the contract? There is at least a partial guaranty, and who shall say that it is not a full and complete protection to the city against its liability for any excess maximum unit costs that may happen or that were within the contemplation of the board of supervisors?

In this consideration of the sufficiency of the guaranty most of the reasoning in the opinion of Mr. Justice WILBUR in his analysis of the nature and purposes of a cost-plus-a-fee contract applies. In determining the character and extent of the guaranty required, we may properly consider the nature and limitations of the relation of the parties under the contract. All of the purchases and expenditures were to be made by the city and were under its immediate control. No greater liability need be assumed than the city approves. The specifications provided for frequent estimates of the progress of the work and the maximum unit costs indicated. The city reserved the right to curtail expenditures and suspend operations at any time it saw fit, and was empowered to hold out from the contractor's fees 25 per cent. of all amounts other than the advance payments, and after the first year such portion of the yearly advance payments as the board of public works from its investigations finds necessary to cover any excess over the maximum unit costs.

Before this contract was finally entered into it had been certified by the city engineer as his opinion that the work could be completed within the agreed maximum limits. The contract and guaranty was accepted and ratified by the city with knowledge of the form of the guaranty. No question is raised in the pleadings as to there not having been a sufficient compliance with the terms of the ordinance in this respect. Indeed, the plaintiffs recite in their complaint that the board of public works, "acting under authority of ordinance No. 5107 and not otherwise," awarded this contract on the contractor's bid, and that thereafter "a contract in writing in accordance with such proposal made by Construction Company of North America, and such acceptance thereof by the Board of Public Works, * * * was executed." This proposal referred to contained the same provision of guaranty as is incorporated in the contract. The answer of the city and county

of San Francisco avers that under the authority of ordinance No. 5107 the successful bidder was to assume charge and superintendence of the construction of said waterworks under the direction and control of the city engineer. All labor and material bills were to be paid directly by the city and county of San Francisco, "but no such expenditures were to be incurred except upon the previous written approval of the board of public works." Materials, supplies, and expenditures were to be purchased directly by the city in accordance with the usual procedure. The contractor, however, was to guarantee that the unit costs of the various classes of work involved would not exceed the sums specified in the bids. It is further alleged in the answer that a bid was received from the defendant Construction Company of North America; that the guaranteed maximum price of the bid was approximately two million dollars less than any competing bid; that its acceptance was recommended by the city engineer; that it was accepted by the board of public works, and the contract "was finally awarded, under specification No. 76C, to the Construction Company of North America."

It is stipulated in the record that all the allegations of the answer are to be taken as true. These recitals constitute an admission that the contract contained a guaranty as required under the ordinance.

Even on this appeal no serious question is raised by appellants as to a sufficient compliance with the ordinance in the matter of this guaranty.

Certainly, in the light of all these facts, there cannot be said to have been such a failure to comply with the requirements of the ordinance as will render the contract void and inoperative at the petition of a taxpayer.

The point is urged that the contractor's guaranty should have been secured by the statutory bond required by section 21 of article 6, ch. 1, of the charter. It is there provided:

"Every contract entered into by the board of public works shall be signed," etc.; "and at the same time with the execution of the contract the contractor shall execute to the city and county, a bond named in the notice for proposals, for the faithful performance of the contract."

Ordinance No. 5107 directs that in soliciting proposals and letting such contract the provisions of the charter shall be followed so far as applicable.

But the performance of the guaranty is not an obligation that comes within the terms of the charter provision quoted. The primary contract here was the agreement on the part of the contractor to organize, superintend, and carry on the work of construction, which was to be financed by the city itself. As security for the faithful performance of this service, he furnished a bond in the penal sum of $100,000 fixed by the board of public works. It was the city's part of the obligation to authorize the expenditures, purchase the materials, employ the labor, and pay the bills. It was further required of the contractor in consideration of his employment that he secure the city against loss by a guaranty that the work would be completed for a specified maximum unit cost. This might have been accomplished by requiring the execution of a surety bond. Instead, the supervisors by ordinance elected to take as their security the personal guaranty of the contractor. They might have stipulated that he furnish the guaranty of John D. Rockefeller, or John Smith, in which event it would not be claimed that by virtue of the charter requirements he must supplement such guaranty by a bond for its faithful performance. His performance of the guaranty was no part of the original obligation of employment. It was a secondary obligation of indemnity against possible excess in cost in the city's part of the contract. In the absence of this agreement, the burden of any excess cost would fall on the city.

Let us suppose, again, that the ordinance had required the contractor to execute a mortgage, or place in escrow a sum of money, to secure against this excess cost, would it be contended that he must secure the performance of this condition by a bond? On the contrary, the execution of the mortgage or escrow would be performance, just as here the contract of guaranty, with the creation of a lien on the contractor's fee, was performance. Not performance of the secondary obligation to pay in the event of an excess cost, but performance of the agreement to pledge his credit as security against such excess, the agreement to guarantee.

When the supervisors elected to take the contractor's personal obligation for security rather than to exact a bond, they exercised the power possessed under subdivision 8 of section 9 of article 6, ch. 1, of the charter, empowering them to vary by ordinance the method of procedure in the matter of public utilities.

The provision of the ordinance for the contractor's guaranty was a modification in this respect of the charter procedure, and it may be fairly inferred was intended to supply such indemnity as would otherwise be required under the charter by a bond. It may be conceded that just what form of guaranty was contemplated does not appear from the ordinance. The board of public works, interpreting and acting upon this authorization, entered into this agreement with the contractor fixing the maximum unit costs and accepting in lieu of the charter bond this form of guaranty or indemnity against an excess cost. It certainly is some form of a guaranty. Both the board of public works and

the board of supervisors have recognized and ratified it as a compliance with the charter and the ordinance.

It is a recognized rule of construction of a statute or ordinance that its contemporaneous interpretation by those charged with its execution is entitled to consideration. 25 R. C. L. 1043; Edwards v. Darby, 25 U. S. (12 Wheat.) 206, 209, 6 L. Ed. 603; U. S. v. Ala. G. S. R. R. Co., 142 U. S. 615, 12 Sup. Ct. 306, 35 L. Ed. 1134; Arnett v. State, 168 Ind. 180, 80 N. E. 153, 156, 8 L. R. A. (N. S.) 1192.

Another salutary rule is that where a statute is uncertain as to its interpretation, or fairly susceptible of more than one construction, a construction to which it is fairly susceptible may be followed, which will avoid unreasonableness, hardship, or even inconvenience (25 R. C. L. 1018).

"If * * * the language is not clear, and it is obvious that, by a particular construction in a doubtful case, great public interests would be endangered or sacrificed, the court ought not to presume that such construction was intended by the makers of the law." Pickering v. Day, 3 Houst. [Del.] 474, 95 Am. Dec. 291; People v. Lambier, 5 Denio (N. Y.) 9, 45 Am. Dec. 273.

I think in this case it sufficiently appears that the requirement of the guaranty was intended by the ordinance as a substitution for the bond, and that the guaranty executed was in substantial compliance with the ordinance.

184 Cal. 202

WASSERMAN v. LOS ANGELES RY. CORPORATION. (L. A. 5170.)

(Supreme Court of California. Oct. 20, 1920.)

1. Carriers ⟸356(7)—In case of mistake in ticket, passenger could not refuse to pay fare.

Under Civ. Code, § 2188, a passenger, with a ticket affirmatively showing he had no right to transportation on the street car, could not insist that the conductor accept his explanation of mistake by another conductor in issuing the ticket, and when he refused either to pay cash fare or to leave the car, the conductor and motorman were justified in attempting to eject him, using as little violence as possible, and at some stopping place or near some dwelling house.

2. Carriers ⟸267—Regulation of road that transfer good only at point for which it read reasonable.

Regulation of defendant street railway that a conductor could not accept a transfer except at the transfer point where its face read it might be used is reasonable, and a transfer is not valid for passage when presented elsewhere, so that, under Civ. Code, § 2188, when a passenger presents a transfer void at the point and refuses to pay cash fare, a conductor can use reasonable force to eject him.

3. Carriers ⟸385—Findings held not to indicate car crew used more than reasonable force to eject passenger.

In an action against a street railway by its passenger for injuries sustained when the conductor and motorman attempted to eject him for refusal to pay cash fare after tendering an invalid transfer, findings that the conductor pulled plaintiff passenger from his seat to the rear platform, called the motorman to his assistance, and that both with great force pulled, twisted, and jerked plaintiff, *held* not expressly or by implication to indicate that the car crew used more force than was reasonably necessary to remove plaintiff from the car, so as to render defendant railway liable.

4. Evidence ⟸471(17)—Whether a motorman used more than necessary force to eject passenger not a conclusion.

In an action against a street railway by its passenger for injuries sustained when the conductor and motorman attempted to eject him for refusal to pay cash fare after tendering an invalid transfer, testimony of a witness as to whether or not the motorman used more force than was necessary in attempting to eject plaintiff, *held* not inadmissible as constituting a conclusion.

5. Appeal and error ⟸856(2)—New objection that question called for conclusion cannot be urged by appellee.

In an action by passenger for injuries sustained when attempt was made to eject him for refusal to pay cash fare, where the only ground on which proffered testimony as to whether the car crew had used more than necessary force was rejected was that the railway's employés did not use enough force to remove plaintiff from the car, plaintiff appellee will not be heard to urge to sustain ruling that the question was not properly framed and called for a conclusion.

In Bank.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by M. L. Wasserman against the Los Angeles Railway Corporation. From judgment for plaintiff, defendant appeals. Reversed.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for appellant.

Frank Karr, of Los Angeles, R. C. Gartner, E. E. Morris, of Los Angeles, amicus curiæ (W. R. Miller, of counsel), for Pacific Electric Ry. Co.

Humphrey Marshall and Frederick A. Preston, both of Los Angeles, for respondent.

LAWLOR, J. This is an appeal by the defendant, Los Angeles Railway Corporation, a corporation, from a judgment in favor of the plaintiff, M. L. Wasserman, in the sum of $350, in an action to recover damages for personal injuries alleged to have been sustained as the result of an attempt by defendant's employés forcibly to eject plaintiff from one of defendant's cars.

There is practically no dispute as to the facts. On October 6, 1915, respondent boarded one of defendant's cars bound north on Grand avenue, in the city of Los Angeles. He paid his fare, and requested and received a transfer to the East First street line. According to his testimony, he was without his eyeglasses, and therefore unable to read the transfer, so that he asked the conductor where he should change cars, to which the conductor answered "Transfer at Seventh and Broadway." The transfer point as printed on the slip was First and Spring. Respondent descended from the Grand avenue car at Seventh and Broadway, and there boarded a car of the East First street line. When his fare was demanded he presented the transfer, but the conductor told him it did not entitle him to ride from Seventh and Broadway, refused to accept it, and demanded that respondent either pay a cash fare or leave the car. Respondent refused to comply, and explained that he had been told by the first conductor the transfer was good at Seventh and Broadway, that he did not have any money with which to pay a cash fare, and that he was hurrying "to go to work on a job." The conductor reiterated his refusal to accept the transfer and his demand that respondent pay a cash fare or get off the car, and, upon the latter's continued refusal to do either, attempted to eject him. Respondent resisted, the motorman was called, and together he and the conductor seized respondent. A struggle ensued, in the course of which respondent suffered the injuries complained of. Finally the conductor accepted the payment of a cash fare for respondent from one of the other passengers, and respondent was allowed to remain on the car. The cause was tried before the court without a jury. The court made findings of fact and conclusions of law, and, as already noted, rendered judgment for the respondent in the sum of $350.

[1] 1. Appellant concedes that respondent "was negligently misdirected by the conductor of the Grand avenue car," but claims that "a passenger, * * * with a ticket which affirmatively shows he has no right to transportation, cannot insist on the conductor * * * accepting his explanation against the face of the ticket," and that when respondent refused either to pay a cash fare or voluntarily to leave the car, the employés were justified in using the force necessary to eject him. This contention must be sustained. Section 2188 of the Civil Code provides:

"A passenger who refuses to pay his fare or to conform to any lawful regulation of the carrier, may be ejected from the vehicle by the carrier. But this must be done with as little violence as possible, and at any usual stopping-place or near some dwelling-house."

This section merely states the general rule which is thus expressed in 10 C. J. 730:

"A carrier has a right to adopt reasonable rules and regulations for the conduct, comfort, and protection of its passengers, and may enforce such rules or regulations by ejecting from its cars or premises one who wrongfully fails or refuses to comply therewith. * * *"

See, also, Krueger v. Chicago, etc., Ry. Co., 68 Minn. 445, 71 N. W. 683, 684, 64 Am. St. Rep. 487.

[2] In the case at bar, appellant offered in evidence "Bulletin No. 357, Notice to Conductors," which set forth certain of the regulations governing the acceptance of transfers. Among these regulations was the rule under which the second conductor acted in refusing to accept respondent's transfer at Seventh and Broadway. An objection to the admission in evidence of this bulletin was sustained, but it was marked for identification, "Defendant's Exhibit A," and is included in the record on appeal. Furthermore, W. G. Miller, the conductor who refused to accept respondent's transfer and a witness for appellant, testified with reference to said transfer:

"I told him I could not accept it; it was contrary to our rules to accept it only at First and Spring. * * * I told him at the time I handed it back to him that the transfer was only good where it was punched, First and Spring."

Was this a reasonable regulation? We think it was. As was said in the note to Shortsleeves v. Capital Traction Co., 28 App. D. C. 365, 8 L. R. A. (N. S.) 287:

"The right of a street railway company to designate the place of transfer of passengers from one car to another in making a continuous trip for one fare clearly falls within the power which common carriers possess to make reasonable rules and regulations for the conduct of their business. Such a regulation is frequently necessary to prevent crowding at transfer points and to insure honesty in the use of transfers."

See, also, Ex parte Lorenzen, 128 Cal. 431, 435, 61 Pac. 68, 50 L. R. A. 55, 79 Am. St. Rep. 47; Percy v. Metrop. St. Ry. Co., 58 Mo. App. 75. The principle thus announced is clearly applicable to the facts herein. In a city the size of Los Angeles, thousands of transfers must be issued daily. If it were held that a transfer, which shows on its face that it is "good only at First and Spring streets," must be accepted for passage at Seventh and Broadway upon the oral statement of the passenger that he had been misdirected by another conductor, it would follow that any other condition or limitation appearing on the transfer could be disregarded upon the ex parte declaration of a passenger. If this were so, it would be incumbent on the conductor to decide then and there whether the representation of the passenger was correct, and thus assume the risk of defrauding his employer. To make the conductor the judge of the truth of the pas-

senger's statements against the conditions printed on the transfer itself would tend to demoralize the orderly conduct of the business of the carrier, and give rise to disputes and breaches of the peace. We think the correct and more practicable rule is that the passenger must present the transfer only at the place or places thereon indicated, and that the transfer is not valid for passage when presented elsewhere. It must be held, therefore, that the regulation under which rspondent's transfer was rejected was a reasonable one, and that, under section 2188 of the Civil Code, if appellant's employés used reasonable force to eject respondent, their conduct was justified.

Several authorities are cited by respondent in support of his contention that where a passenger is ejected from a car on the ground that a tendered transfer erroneously issued by another conductor is defective the carrier is liable for the ejection. None of these authorities is applicable here. In Sloane v. Southern Cal. Ry. Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193, the plaintiff had been wrongfully deprived of her ticket by the first conductor. She was required to change cars, and the second conductor refused to accept her explanation of the loss of her ticket. She voluntarily left the car and sued to recover damages, not for personal injuries received in an attempt to eject her, as in the instant case, but for the humiliation, delay, and inconvenience primarily caused by the negligence of the first conductor and aggravated by the breach by the second conductor of the defendant's original contract. Appellant concedes that—

"If the carrier has not furnished the passenger with the proper evidence of his right to transportation he has, notwithstanding, the right to such transportation, when he has acted in good faith and is without fault, and the carrier will be liable in damages if he is expelled from the car."

This is the well-established rule, but, to repeat, the injuries for which respondent here seeks damages were the result of his attempt to resist an ejection, and were not proximately caused by the appellant's negligence in misdirecting him as to the transfer point, and our conclusion is that a passenger who does not comply with the reasonable regulations of the carrier as to the proper transfer point, even though such noncompliance be the result of a misdirection by another of appellant's employés, is not justified in resisting an attempt to eject him from the car in the event of his refusal to pay a cash fare.

Clare v. Northwestern R. R. Co., 21 Cal. App. 214, 131 Pac. 323, may be distinguished on the same ground as the Sloane Case.

In Gorman v. So. Pac. Co., 97 Cal. 1, 31 Pac. 1112, 33 Am. St. Rep. 157, the plaintiff had paid his fare, and, upon the conductor's demanding it again, refused to pay a second time. It appeared that the conductor thereupon ejected him, using more force than was reasonably necessary so to do. It was properly held there was no regulation with which plaintiff was bound to comply that a passenger must pay his fare a second time, and recovery was allowed for damages resulting from the use by the conductor of excessive force.

[3] 2. Since appellant is not liable for the attempt of its employés to eject respondent, if such attempt was not accompanied by unnecessary force, we shall next consider whether there was unnecessary force. The theory upon which the court decided the case is made apparent from its ruling in excluding certain testimony of the witness Miller:

"Q. Did you or the motorman use any more force than was necessary?

"The Court: I think objection would be good to that. *It is evident they didn't use enough.*" (Italics ours.)

It is plain that the court regarded it as immaterial whether or not the force used by the conductor and motorman was excessive, on the theory that the respondent was entitled to recover if *any* force was used. And the findings, after setting forth the misdirection by the first conductor, the respondent's boarding of the East First street car, the refusal of the second conductor to accept the transfer, and respondent's explanation, state that the conductor seized the respondent by the arm, "pulled him from his seat to the rear platform of said car, and then attempted to eject him from said car"; that he was unsuccessful in removing respondent, and called the motorman, whereupon "both conductor and said motorman seized plaintiff by the hands and coat collar, and with great force pulled, twisted, and jerked plaintiff in the attempt to eject him from said car." It will be noted it is not found that any "unnecessary" or "excessive" force or violence was used. Giving the findings the construction most favorable to respondent, it cannot be said that, either expressly or by implication, they indicate appellant's employés used more force than was reasonably necessary to remove respondent from the car. For it might be necessary to use "great" force in a justifiable attempt to remove respondent. In the absence of a finding of "excessive" or "unnecessary" force, or language of similar import, we must assume that it was because of its misconception of the law on the first point we have discussed, and not because appellant's employés used excessive force in attempting to eject respondent, that the court gave judgment in his favor.

[4, 5] Inasmuch as the cause must be remanded for a new trial, we shall consider the assignment of error in the court's refusal to allow Miller to answer the question already quoted. The testimony should have been admitted. Upon the issue of excessive force it was competent for appellant to controvert the evidence of respondent tending to show

that the employés used such force. Respondent defends the ruling on the ground that the question called for a conclusion of the witness. But no objection whatever was interposed to the question by respondent. It is clear that the only ground upon which the proffered testimony was rejected was that appellant's employés did not use "enough" force to remove respondent from the car, and not that the question called for a conclusion of the witness. In this state of the record respondent will not be heard to urge for the first time on appeal that the question was not properly framed.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; WILBUR, J.; SLOANE, J.; LENNON, J.

184 Cal. 216

NATIONAL PACIFIC OIL CO. v. WATSON.
(L. A. 4869.)

(Supreme Court of California. Oct. 22, 1920. Rehearing Denied in Bank. Nov. 18, 1920.)

1. Vendor and purchaser ⟸334(6)—Purchaser entitled to recover payments made, on his rescission of contract.

If a contract of sale of land is rightfully rescinded by the buyer by reason of a breach by the seller in failing to give possession, the seller is liable for the return of the money which he has received.

2. Vendor and purchaser ⟸214(1)—Assignee of contract entitled to recover payments made by assignor on rescission.

One, who holds a contract for sale of land by assignment, and because of a breach of the contract by the seller rightfully rescinds it, has the right, by virtue of his ownership of the contract, to recover all moneys paid under the contract, whether paid by him or by those who held the contract prior to him.

3. Vendor and purchaser ⟸159—Three years and nine months more than reasonable time for giving possession.

Three years and nine months was more than a reasonable time for the vendor of the land to delay compliance with his obligation to give vendee, under contract of sale, possession of the land, and vendee had right to rescind.

4. Vendor and purchaser ⟸157—Immediate possession construed by parties to obligate vendor to place vendee in possession.

A provision in a contract to give a quitclaim deed to land that "said buyer shall be entitled to immediate possession of said premises" *held* to evidence an obligation on part of the vendor to put the vendee in peaceable possession, and not simply that the vendee was privileged to take possession if he could get it, in view of subsequent arrangements between the parties, on discovering that the property was claimed by third persons by adverse possession, whereby vendor was not to receive more installments until vendee was put in possession.

5. Novation ⟸4—Arrangement held not novation of contract of sale.

An arrangement, after it was discovered that immediate possession could not be given under a contract of sale of land, relating to matter of payments, in view of continued failure of defendant to give possession, *held* not a novation of the contract of sale, but only a change in the agreement of the parties as to when the purchase price should be paid.

6. Pleading ⟸32—Legal effect of writing set forth need not be alleged.

Where a writing is set forth in a pleading, it is not necessary to plead its legal effect in addition.

7. Vendor and purchaser ⟸116—Tender of purchase price before rescission not necessary where futile.

A purchaser, under a contract of sale of land, in order to rescind by reason of failure of defendant to perform his obligation to place him in possession need not make tender of the balance of the purchase price due, where it would have been wholly futile, in that defendant admittedly could not give possession.

8. Vendor and purchaser ⟸52—Agreement to convey by quitclaim may obligate putting vendee in possession.

The rule that an agreement to convey by quitclaim does not require the vendor to convey a good title, and Civ. Code, § 1113, have no application to a case where from other considerations it is plain that contract is conditioned upon the vendee's being let into actual possession.

9. Vendor and purchaser ⟸114—No waiver of right to rescind contract to purchase on failure to put in possession.

Although vendee in contract of sale of land waived right to rescind for vendor's failure to give possession immediately, as required by contract, by entering into an arrangement with the vendor whereby the payments were placed in escrow until such time as vendor might give peaceable possession, right to rescind for failure of the seller to perform within a reasonable time was not thereby waived.

10. Vendor and purchaser ⟸116—No demand for possession necessary, where possession could not be given.

It was not necessary for vendee, under a contract of sale, in advance of rescinding, to demand possession, where it was definitely understood on both sides that the vendor could not give possession.

In Bank.

Appeal from Superior Court, Los Angeles County; J. W. Curtis, Judge.

Action by the National Pacific Oil Company against W. E. Watson. Judgment for plaintiff, and defendant appeals. Affirmed.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Goodwin & Morgrage, of Los Angeles, for appellant.

Gibbon & Shelton and W. C. Shelton, all of Los Angeles, for respondent.

OLNEY, J. This is an appeal from a judgment for the plaintiff in an action brought upon the alleged breach of a contract for the sale of real property to recover payments on account of the purchase price made the defendant as vendor. The facts are practically undisputed, and are these:

The defendant by written contract agreed to sell to one Reynolds a certain 40 acres of land in the oil district of Kern county for $25,000. Although it is not so specified in the contract, which calls directly for the sale of the land as distinguished from a sale of the defendant's title, the land was government land, and the defendant's only title thereto was under an unpatented mineral location. Twenty-five hundred dollars of the purchase price was paid down, and the balance was to be paid in subsequently maturing installments. Upon the payment of the last installment, the vendee was to receive a quitclaim deed to the property. Time was expressly made of the essence of the contract, and it was also provided that the buyer should be entitled to immediate possession and to the right to take oil from the property. Shortly after the making of the contract, Reynolds, the buyer, assigned it to the Consolidated Midway Oil Company.

Not long after the execution of the contract and before the date fixed for the payment of the first deferred installment of the purchase price, it was found that the land was, and since before the execution of the contract had been, in the adverse possession of others than the defendant, and that, because of this adverse possession, the vendee and his assignee could not have possession under the contract. To cover this situation, a further arrangement was made, evidenced by written escrow instructions signed by both parties, whereby the installments of the purchase price as they became due were to be paid to a certain bank, to be by it paid over to the defendant, when, but not before, peaceable possession of the land was delivered to the assignee of the buyer. The escrow instructions contain no provision whatever for the possible contingency that peaceable possession might not be delivered for an indefinite time or at all, and in fact make no mention whatever of that contingency.

Three installments, aggregating $12,500, were paid into the bank as they became due. When the last of them was paid the property was still being held adversely, and shortly thereafter, and before the next installment became due, a third arrangment was made, also in writing, whereby the money in escrow was divided between the parties, $7,500 to the vendor and $5,000 to the vendee's assignee, and it was provided that no further payments on the purchase price need be made until 30 days after the delivery of possession, when all of the purchase price unpaid, including the $5,000 to be received back from the escrow by the vendee's assignee, should be paid. In the case of this arrangement also, although it was called forth by the continuing inability of the defendant to deliver possession, no provision is made for the contingency that such inability might continue indefinitely.

The money in escrow was divided in accordance with this last arrangement, and not long afterwards the vendee's assignee in turn assigned the contract to the plaintiff. The date of the last arrangement was May 27, 1910. After it was made, the inability of the defendant to give possession continued, and from time to time proposals were made on both sides for a final settlement of the transaction. None of these proposals, however, came to anything, and after the matter had run along in this fashion until February 18, 1914, with the defendant still unable to give possession, the plaintiff notified the defendant that because of his failure and inability in this respect it demanded back the $10,000 which the defendant had received, $2,500 as the original payment on account, and $7,500 from the money in escrow. This demand, which was practically a notice of rescission, was refused, and the plaintiff immediately brought the present action, which resulted, as we have said, in a judgment in its favor, from which the defendant appeals.

[1] It is manifest at once that the primary question in the case is whether or not the defendant's continued failure and inability to give possession from the date of the last arrangement between the parties, May 27, 1910, to the date of the notice of rescission, February 18, 1914, a period of nearly four years, constituted a breach of the contract in such an essential particular as to entitle the plaintiff to rescind it. If it did, the contract having been rightfully rescinded, the defendant is liable for the return of the money which he received. Before considering this question, however, there is another, which should be disposed of preliminarily. It is contended on behalf of the defendant that, even if the contract were properly rescinded, the defendant's obligation to return the money he received is one to return it to the parties who paid it, who were not the plaintiff, but the original vendee, Reynolds, and his immediate assignee, the Consolidated Midway Oil Company, that the plaintiff cannot recover except as the assignee of these last-named parties of the right to the money, and that the assignment of the contract to the plaintiff was not an assignment of this right. The crux of the contention, of course, lies in the proposition that an assignment of the contract was

not an assignment of the right to recover moneys paid upon the contract in case of its breach and consequent rescission.

[2] It is to be noted that the assignment of the contract was prior to the rescission, so that upon this point the question is, has one, who holds a contract by assignment, and who because of a breach of the contract rightfully rescinds it, the right, by virtue simply of his ownership of the contract, to recover all moneys paid under the contract, whether paid by him or by those who held the contract prior to him. The answer to this question is not doubtful. It is said, first, that the money must be regarded as money in the defendant's hands had and received for the use of those who paid it, who were not the plaintiff, but his assignors. But this begs the question. It is true, that, the contract being rescinded, the money paid upon it is considered as if originally paid the defendant for the use and benefit of those paying it. But the real question is, Did the assignment by those parties of the contract under which they paid the money have the effect of assigning their right to recover that money in case the contract were subsequently rescinded for a breach. Upon this point it would seem plain enough that when the assignor assigns the contract, he intends to assign, and does assign, all benefits under it, including the benefit of any payments that have been made on account of it.

It is said, second, that the recovery of the money is upon an implied contract to repay, that this implied contract is wholly distinct from the contract of sale, which is ended by the rescission, and that the conclusion follows that an assignment of the contract of sale is not an assignment of the separate and distinct implied contract for the return of the moneys. This argument is in point, but the fallacy of it lies in its failure to appreciate the essential character of the so-called implied contract. The implied contract has no existence in fact. It is but a fiction of law, designed for the sole purpose of affording relief under the limited forms of action permitted by the common law and necessitated by the fact that only certain forms of action were recognized by the common law. Essentially the so-called implied contract is, in such a case as the present, but a remedy given for a breach of the contract. In this respect it differs in no wise from the other remedy afforded by law as distinguished from equity, that of the recovery of damages. The two remedies are inconsistent in the sense that the injured party cannot have both, but if the breach goes to the essence of the contract, he can have one or the other, as he chooses. They are nothing more than different kinds or measures of relief for the same wrong. This being the case, it follows that he, who is the owner of the breached contract and who by virtue of his ownership is the one entitled to whatever relief the law may give for the breach, is the one entitled to recover the moneys paid on the contract, since that recovery is but a form of relief given by law for the breach.

The exact contention which the defendant now makes was made in Latimer v. Capay Valley Lumber Co., 137 Cal. 286, 290, 70 Pac. 82, and the same answer was given to it, although in a much more condensed form. We would not have felt under any necessity to amplify the discussion in that case or to do more than refer to it as determinative, had it not been for the importance given the point by the District Court of Appeal, which, because of it, reversed the judgment. We deem it only right to say, however, that the responsibility for not following this previous decision rests primarily, not with the District Court of Appeal, but with counsel for the respondent. The point was clearly and emphatically urged by the appellant in his opening brief. No adequate reply whatever was made in the respondent's brief, and in particular attention was not called to the fact that the point had already been determined both in this state and elsewhere. The court was practically left in the dark to grope its way as best it might, and it was not until this court was petitioned for a hearing that attention was called to the fact that the question was now hardly a controvertible one, in view of the decision referred to, a decision which would undoubtedly have been followed by the District Court of Appeal if it had been brought to its notice.

Coming now to the primary question in the case, it is, as we have said, this: Was the defendant's continued inability and failure to give possession for a period of nearly four years after the last arrangement between the parties a breach of the contract in such an essential particular as to give the plaintiff a right to rescind it? It is evident at once that if there was a breach of the contract in this respect, it was a breach in so essential a particular as to give the right to rescind. A more important feature of the performance of the contract than that of giving possession it would be difficult to imagine, and a failure of performance in this respect would go to the very essence of the contract. Without possession, the contract was practically valueless.

[3] It is also evident that if the defendant was obligated to give possession, the lapse of nearly four years was more than a reasonable time for performance by him. Time is expressly made of the essence of the contract, and it is stipulated that the vendee should have the right to possession forthwith. The very nature of the property, oil land, with its sharp fluctuations in value and the possibility of its being drained of oil either by those in adverse possession or by

wells adjoining it, would without any express provision that time was of the essence, make it of the essence that possession as contracted for be had within a short time. The period of three years and nine months, during which possession was delayed, was more than a reasonable time for the vendor to comply with his obligation in this particular, if such obligation existed. The finding of the lower court that possession had been delayed for more than a reasonable time was clearly correct.

[4] The question, therefore, is reduced to the simple one as to whether or not the vendor was under any obligation to put the vendee in peaceable possession. The language of the original contract is that "said buyer shall be entitled to immediate possession of said premises." Simply taking this by itself, it might be said to mean either one of two things, either that the buyer is entitled to have possession from the seller, or, as was held of very similar language in Tewksbury v. Laffan, 1 Cal. 129, that he was privileged to take possession if he could get it, but without any responsibility on the part of the seller to see that he did get it. But while, perhaps, either of these constructions is possible, taking the language by itself alone, the parties themselves, by their subsequent conduct, plainly took the view that the vendor was bound to give possession, and this is conclusive as to their real intent and the true construction of the contract. The conduct by which the parties manifested their view of the contract was the making of the two subsequent arrangements as the result of the continued inability of the defendant to give possession. There would have been no occasion for making these arrangements, if the vendor were under no obligation to give possession, since the failure of the vendee in that case to obtain possession would not have affected the rights of the parties, and the defendant could have insisted that the payments of the purchase price be made to him as the contract provided. Instead of this, it was provided by the first arrangement that all payments should go into escrow until he gave possession, and by the second arrangement, the vendor's inability to give possession still continuing, that the money already in escrow should be divided, and no further payments whatever be required until possession was given. These arrangements both plainly interpreted the original contract as requiring possession of the defendant, and imply that that obligation was a continuing one.

[5] It is contended on behalf of the defendant that the last arrangement was a novation, meaning by that that it was in complete substitution for the previous contract and arrangement between the parties. But there is not a word in the new arrangement to that effect, and it refers to the original contract, and then goes on to provide merely for the matter of payments in view of the continued failure of the defendant to give possession. It does not purport to do anything more than to change the agreement of the parties as to when the purchase price should be paid. It was clearly intended simply to change the old contract in that particular and nothing more. Considering together the original contract and the two modifications made of it, the understanding between the parties was very evidently that the vendor should put the vendee in possession, and that if he did not do so there was an essential failure to perform upon his part.

[6] The conclusion just stated is practically decisive of the case, but there are a number of points made on behalf of the defendant which should perhaps be noticed. It is claimed that the complaint fails to state a cause of action, for the reason that, while it sets forth in full the three writings between the parties, it fails to allege that by these writings the defendant was bound to deliver possession to the vendee. But such an allegation would be nothing more than pleading the legal effect of the writings, and the rule is familiar that where a writing is set forth in a pleading it is not necessary to plead its legal effect in addition.

[7] It is contended that no tender of the balance of the purchase price was alleged or shown. But such tender was not necessary, since it would have been wholly futile. The plaintiff had the right to insist as a condition of the tender that it receive possession, and this admittedly the defendant could not give.

[8] It is urged that the deed called for by the contract was a quitclaim deed only, and that the rule is that an agreement to convey by quitclaim does not require the vendor to convey a good title. This may or may not be the rule in this state, where, unlike many states, warranty deeds are not usual, and the form of deed usually employed, a a grant deed, does not, any more than a quitclaim deed, imply a warranty of good title. Section 1113, Civ. Code. Furthermore, we are not concerned in this case with the question as to whether the vendor had to give a good title, but with that as to his being required to give peaceable possession. But, however all this may be, the conclusive consideration is that the rule stated by counsel is at most a rule as to the construction and meaning to be given a contract. It can have no application to a case where from other considerations it is plain that, although only a quitclaim deed was called for, the contract was conditional upon the vendee being let into actual possession. Of this sort is the present case.

[9] It is next objected that a party desiring to rescind must not subsequently affirm the contract, and must rescind promptly on

the occurrence of the cause for rescission, and that in this case the vendee waived the right to rescind upon the failure of the defendant to deliver possession immediately, both by making the two arrangements which in effect affirmed the contract and by failing to rescind promptly at that time. The answer to this is that, while the vendee for both these reasons undoubtedly waived or lost the right to rescind for the vendor's failure to give possession immediately upon the execution of the contract, that is not the ground upon which rescission is now claimed. By the arrangements between the parties, the vendor's original obligation to give immediate possession was transformed into one to give possession within a reasonable time after the making of the last arrangement, that of May 27, 1910. It is for the failure to perform this obligation that the plaintiff finally sought to rescind, and there was no waiver of this failure in any manner.

[10] The point is also made that the plaintiff failed to demand possession of the defendant in advance of endeavoring to rescind, and that without such demand the defendant could not be put in the wrong. Such a demand would have been necessary, if the defendant had been in a position where he could have complied with it. But he was not, and the demand would have been wholly futile. At the time the plaintiff demanded back the payments on the purchase price, it was definitely understood on both sides that the defendant could not give possession, and the plaintiff's demand for the money was made upon that basis. There are no further points which require discussion.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

(Mr. Justice SLOANE, deeming himself disqualified, does not participate.)

(49 Cal. App. 120)

OUTER HARBOR DOCK & WHARF CO. v. CITY OF LOS ANGELES. (Civ. 2076.)

(District Court of Appeal, Third District, California. Aug. 30, 1920.)

1. Taxation ⊂⊃178—Leasehold interests in tidelands subject to tax.

Leasehold interests in tidelands belonging to the state are subject to taxation.

2. Courts ⊂⊃91(1)—First of two conflicting decisions of Supreme Court deemed wrong.

Where there are two conflicting decisions of the Supreme Court, the former must be deemed wrong and the latter right.

3. Courts ⊂⊃100(3)—Taxes paid not recovered under theory of right under a decision overruled.

Decision of the Supreme Court, to the effect that leasehold interests in tidelands belonging to the state were not subject to taxation, did not have the effect of a statute, and one paying taxes on such an interest under protest was not entitled to a refund, where the Supreme Court subsequently, in another case, declared such interests to be taxable.

4. Pleading ⊂⊃214(1)—Demurrer admits facts alleged.

A demurrer admits the facts as alleged.

5. Taxation ⊂⊃178, 180—Possessory right in improvements on public lands subject to tax; improvements not taxable if part of land.

Where improvements made on tidelands owned by the state have become a part of the land to the extent of the reversionary interest, or the fee, they are not subject to taxation, but the lessee has a possessory interest that is subject to taxation, Const. art. 13, § 2, providing for separate assessment of land and improvements, not converting realty into personalty.

6. Taxation ⊂⊃543(3)—Actions for refunded taxes must be filed within three years.

In view of Pol. Code, § 3804, actions cannot be maintained for the repayment of taxes paid under protest, unless brought within three years.

7. Taxation ⊂⊃543(3)—Action to recover taxes may be brought within three years.

Pol. Code, § 3819, providing that one, claiming an assessment to be void, may bring action within six months to recover back the tax paid, affords a concurrent remedy with that afforded by section 3804, providing that claims for refunds must be filed within three years, and an action may be brought any time within three years after the payment of the tax.

8. Estoppel ⊂⊃62(4)—City not estopped from levying tax by reason of action to quiet title.

A city was not estopped from assessing taxes against a leasehold interest in tidelands owned by the state, although a suit by it against the lessee was pending to quiet title to and obtain possession of the property; the lessee actually remaining in possession and enjoying the fruits of its claim.

9. Taxation ⊂⊃537—No recovery of undue assessment paid; the remedy being an application to proper tribunal for relief.

When a party believes that his property has been unduly assessed, in order to obtain relief he must make application to the tribunal created for that purpose, and cannot pay the assessment under protest and subsequently bring an action for a refund; his remedy being an application to the proper tribunal.

10. Estoppel ⊂⊃62(2)—Not to be lightly invoked against power to levy tax.

The doctrine of estoppel is not to be lightly invoked against the exercise of the sovereign power of the state to levy and collect taxes for the support of the government.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Actions by the Outer Harbor Dock & Wharf Company against the City of Los Angeles.

Judgments for defendant, and plaintiff appeals. Judgment in one case affirmed, and judgment in other reversed, with directions.

Andrews, Toland & Andrews, of Los Angeles, for appellant.

Chas. S. Burnell, Jesse E. Stephens, and William P. Mealey, all of Los Angeles, for respondent.

BURNETT, J. The appeal involves two cases between the same parties in which the same questions are raised, and which by stipulation are presented in one record and as one appeal. The actions were brought to compel the city of Los Angeles to refund taxes alleged to have been illegally and erroneously collected by the tax officers of said city during the years 1911, 1912, 1913, and 1914, from plaintiff, on assessments against "improvements" upon the tidelands within the city of Los Angeles and fronting upon the navigable waters of Los Angeles harbor, and for the years 1915 and 1916 against plaintiff's leasehold interest in a certain wharf and two warehouses upon said tidelands, and for the year 1915, against plaintiff's leasehold interest in said tidelands, said tidelands being owned by the state of California and held by plaintiff under lease from the city of San Pedro, the municipal predecessor of the city of Los Angeles. The lease was made in February, 1906, and was approved and ratified by the Legislature by an act of March 23, 1907. The lease was rewritten in July, 1907, in order to conform to certain changes in the harbor lines as made by the United States War Department. The general scope and purpose of said lease may be gathered from the following quotation from Koyer v. Miner, 172 Cal. 448, 156 Pac. 1023:

"This lease and agreement were given by the city as a means for improving the harbor of San Pedro, and facilitating navigation and commerce therefrom. The agreement provided that Miner and his successors should erect a sea wall on the harbor front line as soon as same was located by the federal government, should improve the same for purposes of navigation, should reserve a certain portion thereof to the city for a public harbor front, should fill in and reclaim the land between said front and the shore, and dedicate appropriate parts thereof to public use for streets, and that he and his successors should thereupon have * * * a lease thereof for the term of 50 years."

Plaintiff entered upon said work as required by said lease, and within the time therein provided made and constructed said improvements. In addition to said work of reclamation the lessee proceeded to build and construct bulkheads, warehouses, dry docks, and other structures. The said wharf and warehouses were constructed as a necessary part of the reclamation, and are imbedded in or permanently rest upon said land. For the years 1911 to 1914, inclusive, the city assessed, without further designation or segregation, all the "improvements" upon said leased tidelands. For the recovery of the money so collected the first action herein was brought. The second action was to recover money paid as taxes upon an assessment as follows:

"1915. Leasehold interest in tidelands, Val. $222,200, tax $3,198.78; two warehouses situated on tidelands, Val. $75,000, tax, $1,080.02; 5,200 feet of wharf situated on tidelands, Val. $195,000, tax $2,807.26. 1916. Two warehouses situated on tidelands, Val. $75,000, tax, $855.00; 5,200 feet wharf situated on tidelands, Val. $195,000, tax, $2,233.00."

These taxes were paid involuntarily and under protest and to prevent a sale of plaintiff's property. Thereafter plaintiff presented to and filed with the city clerk of the city its claim, duly verified, demanding the repayment to it of said taxes. Said demand was thereafter rejected at a regular meeting of the city council of said city. Subsequently said actions were instituted for the recovery of said amounts. Demurrers to the said complaints were sustained by the court without leave to amend; and from the judgments rendered thereon the appeals were taken.

[1-3] The first point made by appellant is that—

"Plaintiff's leasehold interest in said tidelands was not and is not a property to be assessed or taxed and the assessment and collection of taxes against the same for the years 1915–1916 were, and each thereof was, erroneous and illegal."

In support of its position appellant cites San Pedro, etc., Ry. Co. v. City of Los Angeles, 167 Cal. 425, 139 Pac. 1071, 52 L. R. A. (N. S.) 991. It was, indeed, in that case expressly held that—

"A leasehold is property under certain circumstances and for certain purposes, but it is not property for purposes of taxation under our revenue and fiscal laws, notwithstanding the fee is owned by the state, and hence is not taxable."

But that decision was just as clearly and unequivocally overruled in San Pedro, Los Angeles & Salt Lake Railroad Co. v. City of Los Angeles, 179 Pac. 393, wherein it is held that—

"Leasehold interests in tide lands belonging to the state are subject to taxation."

That there might be no possible doubt of the effect of the later decision, it was declared therein:

"Upon the views thus expressed, it follows that the decision in 167 Cal. 425, 139 Pac. 1071, 52 L. R. A. (N. S.) 991, must be deemed overruled."

It is due, however, the learned counsel for appellant to say that their opening brief was filed before said later decision was rendered. Respondent in its answering brief, having

called attention to said case in 179 Pac., appellant takes this position:

"We had a right to rely upon the declared law of the state at that time, and we did rely upon that case as the law, and we paid the tax as in the case of any other erroneous and illegal assessment and collection of taxes, and to avoid a seizure and sale of our property, and thereafter instituted proceedings to recover the same as provided by law. Our money and our right to recover our property became vested on the strength of the former ruling of the Supreme Court in effect at that time,"

—and, it is further declared that the former ruling in the San Pedro Case was the declared law of the state for four years and was as effective as a statute. Hence it is argued that the collection of said tax was unlawful and could not be validated by a subsequent decision to the contrary, any more than the operation of a statute in full force and effect would be nullified by a subsequent repeal. Before considering the citations, we may remark that if said decisions had been in the inverse order, if, for instance, in 1914, the Supreme Court had decided that such assessment was entirely legal, and in 1919 that it was illegal, appellant could hardly derive any comfort from the doctrine that a decision of the Supreme Court has the effect of a statute. However, as in two conflicting decisions the former must be deemed wrong, and the latter right, in the case suggested, appellant having paid the tax, it would undoubtedly appear that, by reliance upon a wrong decision, appellant had been injured, and therefore, having paid out money to which the tax collector was not entitled, in equity and good conscience the money should be refunded. But the case here is different, inasmuch as appellant paid to the tax collector what was due, although the Supreme Court had held that it was not a legal tax. How can it be said that appellant was injured by doing right, although it was erroneously thought to be wrong?

How does the question appear in the light of the cases cited by appellant? In Kelley v. Rhoads, 7 Wyo. 160, 51 Pac. 593, 39 L. R. A. 594, 75 Am. St. Rep. 904, it is said:

"The effect of a decision of the Supreme Court construing a statute renders it the law for the time being as so construed. Parties have a right to act upon such a decision, and no injury ought to be allowed to result, by reason of a dependence thereon, if the decision is subsequently changed, any more than in case of a repeal of a statute."

But in that case the change in the decisions affected only the remedy to be pursued by the party claiming to have been illegally assessed. There was no conflict in the decisions as to the validity of the assessment, and the claimant therein acted upon and in accordance with the earlier decision, whereas herein appellant acted contrary and in opposition to the earlier decision.

In Taylor v. Ypsilanti, 105 U. S. 60, 26 L. Ed. 1008, it is said:

"The rights of the plaintiff, as the owner of bonds issued under a statute which, when passed, was valid by the laws of Michigan, as declared and acted upon by departments of its government, are not affected by decisions of the Supreme Court of the state rendered after the railroad company, to whose rights plaintiff succeeded, had earned the bonds under contract with the city, made in conformity with the statute."

In that case it is clear that to have made the bonds subject to the later decision would have been to impair vested contract rights, and the Supreme Court properly followed its own adjudications in similar cases. It is not necessary to notice specifically the other decisions of the United States Supreme Court further than to quote from Douglas v. Pike Co., 101 U. S. 687, 25 L. Ed. 968, the following clear statement of the generally recognized principle:

"The true rule is to give a change of judicial construction in respect to a statute the same * * * operation on contracts and existing contract rights that would be given to legislative amendment, that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

The two California decisions In re Dorris, 93 Cal. 612, 29 Pac. 244, and Schoonover v. Birnbaum, 148 Cal. 548, 83 Pac. 999, add nothing to the situation. They simply emphasize the reluctance of appellate tribunals to overrule former decisions when the effect would be to disturb and impair vested interests.

But, as already intimated, we are not dealing with a case of contract, or contract rights acquired under the former decision. It is, rather, an instance of the payment of a just obligation to the government, although mistakenly supposed at the time to be unjust. Of course, if in such cases a decision of the Supreme Court is to have the full effect of a statute, the contention of appellant would be sound, but, as we understand it, that rule is to be applied only when considerations of justice and equity demand it. Such is not the case here.

It is perhaps unnecessary to add that if said decision in 167 Cal. had been rendered in this cause, it would, of course, constitute the law of the case, and we would be bound by it, but since this is entirely different litigation, we are at liberty to apply the just and correct rule.

[4] Again, it is claimed that the "improvements" were improperly assessed, since they were exempt as a part of the realty. In re-

sponse to the suggestion of respondent that the lease did not contain any agreement to that effect, or that they should become the property of the lessor, appellant points out that the complaints expressly allege that said improvements belong to the public, and that, since it appears that the lessee affixed said improvements to the land of the lessor without any agreement permitting their removal, it follows as a matter of law, by virtue of section 1013 of the Civil Code, that the improvements belong to the owner of the land. The demurrer, of course, admits the facts as alleged, and we must therefore necessarily consider appellant as the owner of said improvements.

[5] The question then arises whether they are assessable. That the land and the improvements are to be separately assessed for purposes of revenue is not disputed. The Constitution of the state so provides (article 13, § 2), and the Legislature and the courts have recognized the validity of such procedure. San Francisco v. McGinn, 67 Cal. 110, 7 Pac. 187. The separate assessment, however, cannot in the least affect the character of the improvements or their ownership. If they constitute real property, the assessment does not and cannot convert them into personalty. If they belong to the public, they will remain so, notwithstanding they have been separately assessed. If the entire title to the improvements belongs to the state, they are not taxable at all any more than is the land itself. But, like the land, they are subject to a possessory right in a private person, while the fee is in the state. Such is the case here as disclosed by the complaint. The land, and the improvements which have become a part of the land, to the extent of the reversionary interest or the fee, undoubtedly belonged to the public; but appellant had a possessory interest, the right to the use and occupation of the land and the improvements, and that was subject to taxation. This is made clear by a careful consideration of said decision in 179 Pac., and the cases therein cited. This possessory right, therefore, and no more, should have been assessed to appellant. Such was the course pursued as to the land itself, the assessment being against the "leasehold interest in tidelands."

As to the improvements a similar situation exists as to the assessments for 1915 and 1916. It is true that the complaint alleged:

"That within the time provided by law, the assessor of the city of Los Angeles, without authority or right so to do did assess the said leasehold interest in said lands and the improvements on said leased land, above described, to this plaintiff, * * * at and for the following sums," etc.

But when we turn to the exhibits attached to the complaint containing the demand that was made upon the treasury for the return of the money claimed to have been illegally exacted, we find it recited by appellant that the assessment was made upon and against "the possessory interest of claimant in and to two warehouses," and "against and upon the possessory interest of claimant in and to 5,200 feet of wharf," etc. While the express allegation of the complaint might leave the matter in doubt, therefore, whether it was the complete title or merely the possessory right that was assessed, taking in view the exhibits, we must conclude that the assessment was levied upon the interest that was subject to taxation, namely, the right to the possession and use of said improvements under the terms of said lease.

The case is different as to the assessments for the earlier years. The allegation as to 1911 is:

"The assessor of the city of Los Angeles, without authority or right so to do, did assess the said improvements on said leased land above described, under the designation of 'improvements on leased land' to the plaintiff."

The allegations are similar as to 1912, 1913, and 1914. The claims presented to the treasurer also recite that said taxes were levied and assessed against "said improvements on said leased tidelands." It cannot be doubted that such assessment covers the entire title and interest in and to said improvements. If there had been a similar assessment of the land, no one would dispute that it included the entire interest. If the leasehold or possessory right alone had been intended, it should have been so designated. The reversionary interest, however, both in the land and the improvements, was not subject to taxation, and since the assessment of the improvements included this interest and is indivisible, it is difficult to see how it can be sustained.

Respondent, though, claims that the decision in 67 Cal. is to the contrary. Therein it was said:

"It is not necessary to follow and answer in detail the various reasons given by defendant why he should not be held liable; it is sufficient to say that, for the purposes of revenue, the Legislature of this state has observed a distinction between real estate and improvements, and that distinction has been recognized by this court. * * * We are of opinion that, for the purposes of revenue, the defendant was the owner of the property assessed, and that he is liable for the taxes."

But in that case attention was not directed to the distinction between the possessory right and the title to the improvements. Indeed, it was claimed by the city that McGinn was the owner of said improvements, and entitled to remove them, and it was so found by the trial court. While ownership was denied by him, yet his counsel in their opening brief filed in the Supreme Court declared:

"There is no admission that the improvements belong to defendant, but that proposition is immaterial under the statutes,"

—the main contention being that under the contract of the parties the city was obligated to pay the taxes.

A recent decision upon the subject is the case of City of Oakland v. Albers Bros. Milling Co., 184 Pac. 868, wherein it was held that improvements erected by the lessee upon land belonging to the public were not subject to taxation. It is true that in the lease therein it was expressly provided that the improvements should be the property of the city, while herein a similar result is effected by operation of the statute. The material fact, though, appears to be the same; that is, that the improvements belonged to the public. In that case, as in this, the assessment was to the lessee upon "the buildings and improvements as improvements on leased land." An examination of the briefs in that case discloses that the attention of the appellate court was called to the fact that "a tax on the leasehold interest of the defendant or on its beneficial use of the property of the plaintiff (either land or improvements), is not the subject of this controversy."

[6, 7] It was also emphasized in the briefs for respondent that in the McGinn Case the trial court had found that the improvements therein belonged to McGinn, and the Supreme Court seemed satisfied with that finding. If the improvements belonged to McGinn, of course, they were taxable, and the conclusion of the Supreme Court based upon that premise is unassailable.

But section 3804 of the Political Code, under which these actions were brought, provides that—

"No order for the refund of taxes, penalties or costs under this section shall be made except upon a verified claim therefor * * * which said claim must be filed within three years after the making of the payment sought to be refunded."

It appears from the complaint herein that the claims for the repayment of the taxes for 1911 and 1912 were not filed within said three years, and hence as to those amounts the demurrer was properly sustained. The same objection does not apply to 1913 and 1914, but respondent contends that the whole action is barred by reason of section 3819 of the Political Code, providing that one claiming his assessment to be void "may at any time within six months after such payment bring an action against the county, in the superior court to recover back the tax so paid under protest." But it was held by the Supreme Court in Stewart Law & Collection Co. v. Alameda County, 142 Cal. 660, 76 Pac. 481, that said section and section 3804 of the same Code afford concurrent remedies, and that, in accordance with the latter, the action may be brought within three years after the payment.

[8] Another important contention of appellant is that the municipality was estopped from levying this tax. The theory is based upon the fact that in August, 1911, the city commenced a suit against the company to quiet title to and to obtain possession of said property, averring in the complaint that said city was the owner and entitled to the possession of the property, and that the defendant had no interest therein or right to the possession thereof; that the trial of said action was had in the superior court in June, 1915, and that the decision of said court was in favor of said city as to a large portion of said property; "that, because of said claims of said city of Los Angeles to said property, and because of said litigation affecting the same, brought and instituted by the city of Los Angeles against this plaintiff, and still pending, said plaintiff has suffered great loss and damage in its possession thereof and in its operations thereon, and said property has been thereby at all of said dates and times herein mentioned, and still is, greatly depreciated in value, and rendered practically of no value for sale, rental, or any other purpose, and should it be held by this honorable court that said property hereinabove described, or any part thereof, is or was, at any of the dates and times herein mentioned, taxable as against this plaintiff, plaintiff alleges that the assessed valuation placed thereon by said city assessor, as aforesaid, was and is greatly inflated and in excess of its said value, or any reasonable value, and that said value, if such or any assessment was or is lawful, should not be, nor should it be upon the whole thereof, fixed at more than the sum of $100,000." In support of its claim appellant cites Moore v. Morledge, 42 Iowa, 26; Iowa R. Land Co. v. Story Co., 36 Iowa, 48; Calhoun County v. Am. Emigrant Co., 93 U. S. 124, 23 L. Ed. 826.

In the first of these the county was under obligation to convey the lands to the railroad company, but it refused to do so, and in the meantime, and while the county was thus refusing to convey said lands to the railroad company, and was itself holding the title and denying the claim of the railroad company to it, the said county caused said lands to be taxed, and afterwards caused the same to be sold for such taxes. It was in view of this situation that the Supreme Court of Iowa said:

"Under these facts we do not stop to inquire what would be the rule respecting liability for taxes, as between vendor and purchaser, in cases where the latter, by performance of his contract, has become the owner, though the legal title is in the former, because we grounded our support of the plaintiff's case upon this plain rule of fair dealing and the broad principle of equity, that a party shall not wrongfully withhold the title to property and the benefits of ownership thereof from one entitled thereto and at the same time subject the property to burdens for the benefit of the party thus wrongfully withholding the title. In other words, the county having, during those years, denied the right and title under which

the plaintiff claims, is now equitably estopped from asserting that it then had the title."

The later case from Iowa involved similar facts, and the Supreme Court based its decision upon the ruling in 36 Iowa, 48.

In the County of Calhoun Case, supra, the county in levying the tax violated its stipulation and agreement that the property should not be assessed, and in view of the bad faith of the county the Supreme Court of the United States deemed it proper to say:

"Corporations, quite as much as individuals, are held to a careful adherence to truth and uprightness in their dealings with other parties; nor can they be permitted, with impunity, to involve others in onerous obligations, by their misrepresentations or concealments, without being held to just responsibility for the consequences of their misconduct or bad faith."

In those cases, it is to be observed that a degree of perfidy characterized the conduct of the taxing power, and that the burden was wrongfully and unjustly imposed; whereas, in the case at bar, there is no suggestion of mala fides or oppression. We must assume that there was an honest difference of opinion as to whether appellant was entitled longer to remain in possession of the property, and we must remember that appellant actually did remain in possession all these years and enjoyed the fruits of its claim. This possessory right was subject to assessment; and, while it was actually enjoyed by appellant, we can see no injustice in requiring the payment of the tax. The situation is somewhat like that of American Emigrant Co. v. Iowa Railroad Land Co., 52 Iowa, 323, 3 N. W. 88. Therein, after referring to certain decisions, including two of those cited by appellant herein, it is said:

"We are now asked to go a step further, and hold, if the county brings an action to set aside a conveyance alleged to have been obtained by fraud, that it is estopped from levying taxes on the land conveyed. The proposition amounts to this: That if the county seeks to set aside the conveyance it is estopped therein by a levy of taxes, and if it levies taxes it is estopped from bringing an action to set aside the conveyance. We do not believe the estoppel should work both ways. Under the circumstances the county had done all it contracted to do. It never agreed not to bring an action to set aside the conveyance on the ground of fraud. The intervener received the conveyance subject to this contingency. The lands were therefore taxable."

[9] Of course, if there had been a final judgment in this case or if appellant had been deprived of the use and enjoyment of the property before the assessment was levied, we would have a different situation. But no judgment has been rendered, and appellant has remained in possession. There is an allegation, it is true, that the value of appellant's interest has greatly depreciated in consequence of said litigation, but manifestly, this was a consideration to be presented to the board of equalization. When a party believes that his property has been unduly assessed, in order to obtain relief, he must make application to the tribunal created for that purpose. Fall v. City of Marysville, 19 Cal. 391. There is no pretense that such course was pursued herein.

[10] It may be added that the doctrine of estoppel is not to be lightly invoked against the exercise of the sovereign power of the state to levy and collect taxes for the support of the government. This authority is so important and commanding that, assuredly, it cannot be successfully challenged upon the showing made herein. There may be instances of such gross injustice, as suggested by the decision cited, wherein it would be proper to say that the government is estopped to claim a tax, but, ordinarily, where a mistake is made in the assessment or levy or an unjust burden has been imposed, the aggrieved party, in order to obtain relief, must pursue the remedy provided by the statute.

We think the judgment in the case "No. B 52531" is correct, and should be affirmed; that the judgment in "No. B. 38539" is erroneous as to the assessments for 1913 and 1914, and that the complaint states a cause of action to recover the same, and that said judgment should be reversed and such further action taken as herein indicated.

It is so ordered.

We concur: HART, J.; NICOL, Presiding Judge pro tem.

47 Cal. App. 194

OUTER HARBOR DOCK & WHARF CO. v. LOS ANGELES COUNTY. (Civ. 2077.)

(District Court of Appeal, Third District, California. April 21, 1920. Rehearing Denied May 21, 1920. Hearing Denied by Supreme Court June 17, 1920.)

Taxation ⟸180—Improvements on public lands taxable.

Though land may be exempt from taxation because it belongs to a city, the state, or to the United States, yet improvements, made thereon by an individual for his own use and benefit, are subject to assessment and taxation.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by the Outer Harbor Dock & Wharf Company against the County of Los Angeles. Judgment for defendant, and plaintiff appeals. Affirmed.

Andrews, Toland & Andrews, of Los Angeles, for appellant.

A. J. Hill and Robert B. Murphy, both of Los Angeles, for respondent.

BURNETT, J. The action was brought to compel the defendant to refund taxes assessed and collected on a wharf and two warehouses constructed by plaintiff on certain lands at San Pedro, owned by the state of California, and leased to the plaintiff. The case, in some general respects, is similar to that by the same plaintiff against the city of Los Angeles (No. 2076), the opinion in which is filed herewith (Outer Harbor Dock & Wharf Co. v. City of Los Angeles, 193 Pac. 137 [1]), and we shall not repeat the facts therein set forth. The only contention of appellant herein is that said improvements are exempt from taxation by reason of the fact that, being attached to the land, they are in contemplation of law a part of the land, and therefore in the same category as the land itself, which is not taxable, since it belongs to the state. In San Francisco v. McGinn, 67 Cal. 110, 7 Pac. 187, the question, though, is directly met and unequivocally decided contrary to appellant's claim. Therein a certain school lot in the city of San Francisco, which had been dedicated for school purposes forever (and therefore incapable of private ownership) was, pursuant to a special statute, leased to McGinn for a period of 50 years. The lease contained no provision relating to the construction of improvements by the lessee, or entitling the lessee to remove any improvements. McGinn constructed a four-story frame building, with basement, with a brick foundation, permantly imbedded in and attached to the soil. The improvements were assessed for taxation to McGinn for the year 1881–1882, and the suit was brought to collect said taxes. In McGinn's answer to the complaint he alleged that—

"Said property mentioned in the complaint, and the whole thereof, at the time of the making of said supposed assessments and the levying of said supposed taxes, * * * was, and the whole thereof, and still is, the property of the city and county of San Francisco, and lawfully dedicated to public school purposes forever, for the public school educational purposes of said city and county, and of the state of California.

"That the improvements mentioned in the complaint are and always have been permanently attached to and are part of said real estate and lot of land described in the complaint, and themselves real estate.

"That the property mentioned in the complaint as having been assessed is not, nor any part thereof, and has never been, personal property."

The foregoing indicates the theory of McGinn upon which he claimed his exemption from taxation. The lower court however, rejected his contention, and the Supreme Court affirmed an order denying the motion for a new trial. Appellant suggests that the opinion in said cause is extremely short, and that probably the question involved was not thoroughly considered. There is also an intimation that the case is distinguishable by reason of the fact that therein the fee was capable of private ownership. But, in answer, it may be said that the decision has not been overruled; on the contrary, has been recognized since as sound by the Supreme Court, and that on appeal substantially the same points were made by counsel for McGinn as appear in appellant's brief herein. It should be sufficient, therefore, to quote from said decision the following:

"It is not necessary to follow and answer in detail the various reasons given by defendant why he should not be held liable; it is sufficient to say that, for the purposes of revenue the Legislature of this state has observed a distinction between real estate and improvements, and that distinction has been recognized by this court. * * * We are of opinion that, for the purpose of revenue, the defendant was the owner of the property assessed, and that he is liable for the taxes."

Indeed, the rule is thoroughly settled in California that, though the land may be exempt from taxation because it belongs to the city, to the state, or to the United States, yet improvements made thereon by an individual for his own use and benefit are subject to assessment and taxation. In support of the proposition, we may cite these additional decisions of our Supreme Court: Fall v. City of Marysville, 19 Cal. 391; People v. Shearer, 30 Cal. 645; Los Angeles v. The Los Angeles Water Works Co., 49 Cal. 638; San Pedro, Los Angeles & Salt Lake R. R. Co. v. City of Los Angeles, 179 Pac. 393.

The doctrine of the law as thus expounded relieves us of the necessity for a consideration of other cases cited by the parties herein or any independent investigation of the subject.

It is due appellant's counsel to say that they have filed no reply brief, having concluded, no doubt, that respondent's position is impregnable.

The judgment is affirmed.

We concur: ELLISON, Presiding Judge pro tem.; HART, J.

[1] The opinion in the case cited was originally filed April 21, 1920. A rehearing was granted May 21, 1920, and on August 30, 1920, a new opinion was filed, which reads as set forth at the reference above given.

49 Cal. App. 206

HUGHES v. HUGHES. (Civ. 3501.)

(District Court of Appeal, First District, Division 1, California. Sept. 7, 1920.)

1. Frauds, statute of ⊂⊃4—Oral agreement to convey property in consideration of marriage invalid.

Under Civ. Code, § 178, all contracts for marriage settlements must be in writing, and executed, acknowledged, or proved in like manner as a grant of land, and an antenuptial agreement, made orally by defendant husband to convey plaintiff wife valuable lands in consideration of marriage, etc., was invalid, not only under the statute specified, but also under the statute of frauds (Civ. Code, § 1624, subds. 3, 7).

2. Frauds, statute of ⊂⊃129(1) — Subsequent marriage does not lift bar of statutes from oral antenuptial agreement.

The fact that the parties were afterwards married does not operate to lift the bar of Civ. Code, §§ 178, 1624, subds. 3, 7, from defendant husband's oral antenuptial agreement to convey valuable land to plaintiff wife in consideration of the marriage.

3. Frauds, statute of ⊂⊃129(1) — Husband's making of will not part performance of invalid oral antenuptial agreement.

Subsequent making of defendant husband's will in favor of plaintiff wife following their marriage *held* not such part performance of the oral antenuptial agreement between them to make such will as to take the alleged contract out of Civ. Code, §§ 178, 1624, subds. 3, 7.

4. Frauds, statute of ⊂⊃129(1)—Act done by husband does not estop husband to invoke statute against wife seeking to enforce invalid antenuptial agreement.

An alleged act of performance by the husband, lifting the bar of the statute from the invalid oral antenuptial agreement sought to be enforced, not having been done by plaintiff wife, does not estop defendant husband from invoking the bar of the statute.

5. Frauds, statute of ⊂⊃119(1)—Husband not guilty of fraud entitling wife to enforcement of invalid antenuptial agreement.

Defendant husband, sued by plaintiff wife for specific performance of his invalid oral antenuptial agreement to convey valuable property to her in consideration of marriage, *held* not guilty of such actual fraud as to entitle plaintiff wife to equitable relief against him, despite the unenforceable character of the oral agreement under Civ. Code, §§ 178, 1624, subds. 3, 7.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by Gertrude O. Hughes against Thomas Hughes. From judgment for defendant, plaintiff appeals. Affirmed.

See, also, 193 Pac. 148.

Thos. K. Case, of Los Angeles, for appellant.

G. P. Adams, of Los Angeles, for respondent.

WASTE, P. J. Plaintiff brought this action against her husband, seeking specific performance of an alleged oral antenuptial agreement to convey real and personal property after marriage. A demurrer to the amended complaint was sustained, and, plaintiff declining to further amend, judgment was entered for the defendant, from which plaintiff appeals.

It is alleged in the amended complaint that the defendant is 72 years of age, and possesses property of the value of more than $5.000,000. Between April 30, and December 24, 1918, the defendant importuned plaintiff to marry him, and offered, if she would do so, to convey to her property worth $600,000. To all these proposals the plaintiff turned a deaf ear. While the plaintiff was absent from the state of California, the defendant, pursuant to a design and intention to compel the plaintiff to marry him, moved himself and his personal belongings into the residence of plaintiff in Los Angeles, and there took up his abode. He caused to be inserted and published in various newspapers, statements to the effect that the plaintiff and himself were to be married about Christmas time, and caused copies of a photograph of plaintiff, which he took without her knowledge, or consent, from her residence, to be published in connection with these notices.

Finally, so it is alleged, the defendant, by pretending he was seriously ill, induced the plaintiff to go to him at Santa Barbara, where he then was. On her arrival there she found that the defendant was not ill, but had so represented himself, in order to cause her to come to him. She then learned for the first time of the stories the defendant had published in the newspapers concerning the approaching nuptials. She discovered that he had also invited guests to be present at a certain time, had provided a wedding dinner, secured a marriage license, and had arranged for a minister to be present to perform the wedding ceremony. Plaintiff still persisted in her refusal to marry defendant. He thereupon stated that he would be ruined politically, that his social standing would be impaired, he would be disgraced and humiliated, and his opportunity to represent the state of California in the United States Senate, which he asserted had been entirely arranged and determined upon between himself and the Governor of the state, would thereby be lost to him. He promised that if plaintiff would marry him he would give her, as her own, a valuable diamond ring, a diamond stickpin, an ermine coat, and an automobile. At the same time

defendant orally reiterated his promises that, if plaintiff would marry him, he would, immediately after the marriage, convey to her the real property formerly agreed to be given to her, and would erect an imposing residence on land owned by plaintiff. He promised, also, to purchase other land for her, and erect thereon an apartment house, at a cost of $100,000. He further agreed to pay off, and discharge, a $60,000 mortgage upon property belonging to the plaintiff. Believing and being deceived by all of these representations, so plaintiff alleges, she relied upon the oral promises of the defendant to transfer and convey the property to her, and married him upon the day set.

As a part of said oral antenuptial agreement, it is further alleged, defendant promised to execute and deliver to plaintiff his last will and testament, devising and bequeathing certain real and personal property to her. In apparent keeping with this promise defendant did, on the second day of January, 1919, execute and deliver to the plaintiff a will, which is set out in the complaint, whereby he devised and bequeathed to her real and personal property, and wherein he nominated plaintiff sole executrix without bonds. In no other respects have the antenuptial promises been carried out. On the contrary, so it is alleged, the defendant has refused to perform his agreement. Plaintiff seeks a decree requiring the defendant to transfer, convey, and assign to her the real and personal property which she alleges he agreed to give to her, and asks for the appointment of a receiver to carry out its provisions. She further asks that, in case specific performance cannot be decreed as to any of said property, she be awarded damages to the extent of its value. The demurrer was both general and special, but the principal question to be considered on this appeal is the sufficiency of the allegations of the amended complaint, in view of the lower court's determination that it does not contain facts sufficient to state a cause of action. The conclusion we have reached upon that point is determinative of the entire case.

[1] According to the allegations of the amended complaint, the plaintiff and defendant "by and through said oral antenuptial agreement, * * * and pursuant to the defined terms thereof, as stated by said defendant to said plaintiff, * * * were to effect a disposition of defendant's properties in plaintiff's favor, so that upon the assumption of the marital relation said property rights of said plaintiff should become fixed and determined." Plaintiff has thereby pleaded an agreement required by the statute to be in writing. All contracts for marriage settlements must be in writing, and executed and acknowledged, or proved, in like manner as a grant of land is required to be executed, acknowledged or proved. Civ. Code, § 178. It is equally clear that the agreement alleged by the plaintiff to have been made by the defendant, and pleaded as an antenuptial contract, is not only one required to be in writing, but also falls within the inhibition of the statute of frauds, and is therefore invalid. Agreements made upon consideration of marriage, other than mutual promises to marry, and agreements to devise or bequeath any property, or make any provision for any person by will, are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or his agent. Civ. Code, § 1624, subds. 3, 7; Peek v. Peek, 77 Cal. 106, 108, 19 Pac. 227, 1 L. R. A. 185, 11 Am. St. Rep. 244; Monsen v. Monsen, 174 Cal. 97, 98, 162 Pac. 90.

[2] The fact that the parties were afterwards married does not operate to lift the bar of the statute. "A promise made in anticipation of a marriage, followed by a marriage, is the exact case contemplated by the statute. It is plain that the marriage adds nothing to the very circumstances described by the statutory provision which makes a writing essential; in fact, until a marriage takes place, there is no binding agreement independent of the statute, so that the marriage itself is a necessary part of every agreement made upon consideration of it, which the Legislature has said must be in writing." Hunt v. Hunt, 171 N. Y. 396, 400, 64 N. E. 159, 160 (59 L. R. A. 306); Pomeroy's Equitable Remedies, par. 829; Welch v. Whelpley, 62 Mich. 15, 22, 28 N. W. 744, 4 Am. St. Rep. 810; Adams v. Adams, 17 Or. 247, 254, 20 Pac. 633. The allegations of the amended complaint bring the promises of the defendant in the instant case squarely within this rule. Again and again it alleged that the defendant promised plaintiff "that if she would marry him he would transfer and convey (the property) to her immediately after said marriage." In fact, every single promise is predicated upon the proposition, that, "if she [plaintiff] would marry him [defendant] he would" do thus and so, "soon after," or "immediately after," marriage. The only consideration, therefore, for the defendant's promises was the marriage of the parties, which was not of itself sufficient to take the contract out of the statute of frauds. Peek v. Peek, supra; Trout v. Ogilvie, 182 Pac. 333.

[3, 4] The subsequent making of defendant's will, in favor of the plaintiff, following the marriage, was not such part performance of the oral agreement to make such will as to take the alleged contract out of the statute of frauds. Gould v. Mansfield, 103 Mass. 408, 409, 4 Am. Rep. 573; Swash v. Sharpstein, 14 Wash. 426, 44 Pac. 862, 32 L. R. A.

796; In re Edwall's Estate, 75 Wash. 391, 134 Pac. 1041, 1046; McClanahan v. McClanahan, 77 Wash. 138, 137 Pac. 479, Ann. Cas. 1915A, 461. Furthermore, the alleged act of performance in that regard was not done by the plaintiff, who is the party seeking to enforce the contract, and does not estop the defendant from invoking the bar of the statute. Foster v. Maginnis, 89 Cal. 264, 267, 26 Pac. 828; Fritz v. Mills, 12 Cal. App. 113, 118, 106 Pac. 725; Rathbun v. Rathbun, 6 Barb. (N. Y.) 98, 106.

Conceding that the marriage of the parties was not, of itself, sufficient part performance of the parol contract to convey the property in consideration of the marriage, the appellant yet seeks to avoid the interposition of the bar of the statute, upon the ground of equitable fraud. Her marriage, she contends, was brought about by the actual fraud of the defendant, and she takes the position that the acts, representations, and promises of the defendant induced her to so irretrievably change her condition as to afford her ground for relief in equity. Her allegation is that her marriage with the defendant was procured by artifice and fraud, and upon the faith that the settlement of the property rights would be made. Her contention, therefore, is that the defendant should be required to make good his agreement, and not permitted to defeat it by pleading the bar of the statute. Peek v. Peek, 77 Cal. 106, 19 Pac. 227, 1 L. R. A. 185, 11 Am. St. Rep. 244, a case claimed by her to be almost exactly similar to the one at bar, is relied upon by appellant as conclusively establishing the doctrine contended for by her. In that case Peek orally promised his intended wife that if she would marry him he would, on or before the marriage, convey to her certain property. She relied upon this promise, and married him "for no other reason, or consideration." The conveyance was not made. Peek put it off by excuses and protestations, and on the morning of the marriage, without the knowledge of the intended wife, conveyed the property to his minor son by a former marriage. After the wedding, the parties went to live upon the property. A year later Peek deserted his wife, and the minor, by his guardian, brought suit against her to recover possession of the property, and obtained a judgment in his favor. The Supreme Court, in its opinion reversing the case, held that the foundation of the wife's claim, set up by way of cross-complaint, being the promise of Peek, was within the statute of frauds, and that the subsequent marriage of the parties was not such part performance as would induce a court of equity to give relief. But the fact that the marriage was brought about by the actual fraud of Peek, in inducing his wife to marry him, by promising to convey the property to her, when at that very time he had no intention of so doing, and was conveying it to some one else, seemed to the court to make a difference, and it held that, as the fraud had brought about an irretrievable change of the position of the wife, to wit, the marriage, equity should enforce the agreement.

The particular language of the opinion of interest in this discussion is found in the following quotation:

"We do not say that the mere fraudulent omission to have an agreement reduced to writing would of itself be ground for specifically enforcing the agreement. But where the fraudulent contrivance induces an irretrievable change of position, equity will enforce the agreement. And the marriage brought about by the fraudulent contrivance is a change of position within the meaning of the rule. In Glass v. Hulbert, 102 Mass. 24, 3 Am. Rep. 418, in reasoning upon somewhat different facts, to the conclusion that, in order to be ground for the enforcement of the oral contract, the fraudulent contrivance must have induced some irretrievable change of position, the court said: 'The cases most frequently referred to are those arising out of agreements for marriage settlements. In such cases the marriage, although not regarded as a part performance of the agreement for a marriage settlement, is such an irretrievable change of situation that, if procured by artifice, upon the faith that the settlement had been made, or the assurance that it would be executed, the other party is held to make good the agreement, and not permitted to defeat it by pleading the statute.' This, we think, is a correct statement of the law." Peek v. Peek, supra.

The case of Glass v. Hulbert, quoted from in the Peek Case, was one relating to an oral contract for the sale of real property, and the language so strongly approved by our Supreme Court was pure dictum. The Massachusetts court, however, cites the early English case of Maxwell v. Mountacute, Prec. in Ch. 526, another and better report of the same case being found in Mountacute v. Maxwell, 1 Eq. Cases Abr. 19. The full report of these cases will be found in 24 English Reports (full reprint) Precedents in Chancery, at pages 235 and 541, respectively. In that case the plaintiff, the wife, brought a bill against the defendant, her husband, "setting forth that the defendant before her intermarriage with him did promise that she should enjoy all her own estate to her separate use; that he agreed to execute writings to that purpose, and had instructed counsel to draw such writings, and that when they were to be married, the writings not being perfected, the defendant desired this might not delay the match, in regard his friends being there it might shame him, but engaged that upon his honor she should have the same advantages of the agreement, as if it were in writing drawn in form by counsel and executed, upon which the marriage took

effect, and afterwards the plaintiff wrote a letter to the defendant, her husband, putting him in mind of his promise, to which the defendant, her husband, wrote her an answer under his hand, expressing that he was always willing she should enjoy her own fortune as if sole, and that it should be at her command." To this bill the defendant pleaded the statute of frauds and perjuries which Lord Chancellor Parker allowed, saying:

"In cases of fraud, equity should relieve, even against the words of the statute; as if one agreement in writing should be proposed and drawn, and another fraudulently and secretly brought in and executed in lieu of the former; in this or like cases of fraud, equity would relieve; but where there is no fraud, only relying upon the honor, word, or promise of the defendant, the statute making those promises void, equity will not interfere." Mountacute v. Maxwell, supra.

In the earlier citation of the case the Chancellor said:

"That where, on a treaty for a marriage, or any other treaty, the parties come to an agreement, but the same is never reduced into writing, nor any proposal made for that purpose, so that they rely wholly on their parol agreement, that unless this be executed in part, neither party can compel the other to a specific performance, for that the statute of frauds is directly in their way; but if there were any agreement for reducing the same into writing, and that is prevented by the fraud and practice of the other party, that this court will in such case give relief; as where instructions are given, and preparations made for the drawing of a marriage settlement, and before the completing of it the woman is drawn, by the assurances and promises of the man, to perform it, and after to marry him." Maxwell v. Mountacute, supra.

See, also, Browne on Statute of Frauds, par. 444.

When read in the light of what we believe to be the only reasonable and true rule, as announced by the Chancellor, and having in mind the actual facts upon which the decision was based, the case of Peek v. Peek, supra, loses the weight of authority appellant would impart to it. It ceases to have compelling force in the instant case, in which, as we shall presently show, the circumstances relied upon by the appellant did not amount to such fraud as to bring the situation of the parties within the purview of a court of equity. To give that case, disassociated from its facts, the full construction sought by the appellant would have the practical effect of making it an authority for holding that marriage is such part performance of oral antenuptial agreements as to remove them from the operation of the statute of frauds, which is not the law. We think the broad application of the doctrine contended for by appellant is not warranted by the principle, or sustained by the authorities.

The other cases, relied upon by the appellant, are either based upon facts, as was the Peek Case, bringing the decisions within the application of the doctrine announced by the English Chancellor, or they may be otherwise distinguished from the case at bar. In each there has been something more than mere failure, or refusal upon the part of the promisor, to execute an oral antenuptial agreement for a property settlement. In Petty v. Petty, 43 Ky. (4 B. Mon.) 215, 39 Am. Dec. 501, the wife charged that her husband promised that immediately after marriage he would settle on her at his death certain property, on which promise she closed the contract of marriage. A few days after the marriage, her husband disclosed to her that he had been induced to, and had, by an irrevocable deed of gift executed just before the marriage, made over all of his property to his children by a former marriage. On appeal the court held that it had no power to enforce the marriage settlement, but upon the theory that the transfer was a fraud upon the dower right of the wife, allowed by the laws of that state, it directed the entry of a decree annulling the deed for the lands, so far as the same affected or incumbered the complainant's right to dower thereon. In Offutt v. Offutt, 106 Md. 236, 67 Atl. 138, 12 L. R. A. (N. S.) 232, 124 Am. St. Rep. 491, it was held that a definite and specific proposition in writing, made by the husband before the marriage, and accepted by the intended wife, followed by the consummation of the contract, entitled the wife to specific performance. Moore v. Allen, 26 Colo. 197, 57 Pac. 698, 77 Am. St. Rep. 255, was an action in ejectment by one claiming under the husband. The wife, by way of cross-complaint, alleged a parol antenuptial agreement between herself and husband, who at the time was the owner of the property, whereby he agreed to convey the same to her after their marriage. In compliance with his promise, he placed her in actual possession of the property before the marriage. She made lasting and valuable improvements thereon, but the husband neglected and refused to convey the property to her. It was held that the facts stated took the parol agreement out of the statute of frauds. In Daily v. Minnick, 117 Iowa, 563, 91 N. W. 913, 60 L. R. A. 840, the deceased orally agreed to convey land to a child, in consideration of being allowed to name it. The child was named according to his wishes, and continued to bear such name to the time of the trial of the action. It was held that such contract was not void under the statute of frauds, since the naming of the child, and his bearing the name, constituted payment of the purchase price of the land, within the exception prescribed by the Code of Iowa, declaring that an oral contract to

convey land shall not be void where the purchase money, or any portion thereof, has been received by the vendor. In Green v. Green, 34 Kan. 740, 10 Pac. 156, 55 Am. Rep. 256, a widow possessed of 160 acres of land, which was all her property, and her sole means of support, induced Green, a cripple, possessed of only a few hundred dollars, to make a matrimonial engagement with her and marry her, upon her verbal promise and agreement that the farm was her own, and that its proceeds should go to their support after their marriage, as long as they lived. After the marriage Green furnished the rooms, bought food and clothing for the family, including the children of his wife by a former marriage, and with his own money paid off a mortgage upon the farm. As a matter of fact, the widow had secretly deeded the property to her daughters by the former marriage, on the eve of the wedding with Green, the consideration being love and affection. It was held that the deeds to the daughters were a fraud upon the rights of the husband, and that he was entitled to have them set aside. In Kelly v. McGrath, 70 Ala. 75, 45 Am. Rep. 75, it was held that a court of equity should set aside, as a fraud on the marital rights of the husband, a secret conveyance, or settlement of her property by the intended wife, executed without his knowledge and in contemplation of the marriage. An almost identical situation was considered in Freeman v. Hartman, 45 Ill. 57, 92 Am. Dec. 193.

[5] From our examination of the foregoing, and many other authorities, we are convinced that the distinguishing feature of the case at bar did not amount to such actual fraud as to entitle the plaintiff to any equitable relief. The facts present nothing more than the mere omission to put the contract into writing before the marriage, and a failure to perform it thereafter. It does not appear that the defendant in any manner prevented the due execution of a valid marriage settlement in writing, such as would have satisfied the statute. It is not alleged, or contended, that the plaintiff was induced through deceit, false statement, or concealment of the defendant to waive a written agreement and rely upon the promises in parol, before entering into the marriage relation. 2 Pomeroy's Equity Jurisprudence, Fourth Edition, par. 921. For aught that appears in the amended complaint, the defendant may have entered into his engagements in the highest good faith, and with every good intention, and with full ability to perform. Granting, for the purpose of the discussion, that the plaintiff may have been led into the marriage by the Lochinvar courtship of the aged swain, the inducement went only to that relation. By no fraud, trick, or device, so far as the record discloses, was she prevented from securing what the law sanctions, a written marriage settlement. Equity, therefore, can afford her no relief.

The judgment is affirmed.

We concur: KINSELL, Justice pro tem.; RICHARDS, J.

49 Cal. App. 217

HUGHES v. HUGHES. (Civ. 3502.)

(District Court of Appeal, First District, Division 1, California. Sept. 7, 1920.)

1. Costs ⊂=154—May be allowed for taking of deposition unsigned.

Costs may be allowed for taking of a deposition not finally signed, it being for the trial court to determine under all circumstances whether the taking of the deposition was really essential to the rights of the party taking it.

2. Costs ⊂=154—Defendant not required to force plaintiff to sign deposition.

In an action by wife against her husband for specific performance of his alleged antenuptial agreement with her, it was not incumbent on defendant husband to take steps, by means of court proceedings, to force plaintiff to sign her deposition, taken at defendant's instance, before it could become a legitimate item of cost in preparing for the defense of the action; he having become liable for the expense before the trial court sustained demurrer to the complaint and entered judgment for him.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Gertrude O. Hughes against Thomas Hughes. From an order after judgment allowing costs to defendant, plaintiff appeals. Affirmed.

See, also, 193 Pac. 144.

Thos. K. Case, of Los Angeles, for appellant.

G. P. Adams, of Los Angeles, for respondent.

WASTE, P. J. This is an appeal by plaintiff from an order made after judgment, which allowed as costs claimed by defendant the sum of $101.40 for a deposition.

Plaintiff filed her complaint against the defendant, her husband, seeking specific performance of an alleged oral antenuptial agreement. In anticipation of being compelled to go to trial the defendant applied for, and the court made an order based upon an affidavit, that the deposition of plaintiff be taken before a notary public. At the time appointed plaintiff appeared with her attorney and stipulated that the deposition be taken in shorthand, and when transcribed, should be sworn to and subscribed by the witness. Plaintiff was sworn, and her testimony was taken. The testimony was long, the ex-

amination taking parts of two days, and it was stipulated that the matter of taking the deposition should be continued to a definite date, on which the plaintiff would read over, correct, and sign it. When the deposition was transcribed the plaintiff requested, and was furnished with a copy, that she might go over it at the office of her attorney, or at her home, compare it with a transcription of her testimony prepared by a stenographer of her own choosing who was present at the examination, and make any corrections necessary. Many discrepancies, over 100 the appellant says in her affidavit, were noted and corrected. There appear to have been several conferences by the respective counsel, over the matter, and the signing of the deposition dragged along for a month. Before it was signed the court sustained a demurrer to the plaintiff's amended complaint. She declined to further amend, and judgment was entered in favor of the defendant. Plaintiff appealed, and the judgment has been affirmed. Hughes v. Hughes, No. 3501, 193 Pac. 144, this day decided.

After judgment entered, defendant filed his cost bill, including the expense of taking the deposition. Plaintiff objected to the item, and moved to strike it out, which motion the court denied. Plaintiff appeals from the order, claiming that, as the deposition was never completed and signed, and was not used on the trial, it was an improper item of costs.

[1] The fact that the deposition was not finally signed does not, in our opinion, alter the situation of the parties. A special reason is not presented thereby why the costs incurred in the taking should be disallowed. It is frequently proper, and often it seems necessary, for a party to have a deposition taken, although afterward the case may take such a course as to make it unnecessary to use it. It is for the trial court to determine whether, under all the circumstances, the taking of the deposition was reasonably essential to the protection of the rights of the party taking it. Lindy v. McChesney, 141 Cal. 351, 353, 74 Pac. 1034; California, etc., Co. v. Schiappa-Pietra, 151 Cal. 732, 745, 91 Pac. 593; Lomita Land & Water Co. v. Robinson, 154 Cal. 36, 52, 97 Pac. 10, 18 L. R. A. (N. S.) 1106; Welch v. Alcott, 178 Cal. 530, 532, 74 Pac. 34.

[2] The deposition in this case was secured by the defendant after he appeared in the action, and in a bona fide initiative on his part to prepare for a trial, which he had reasonable grounds to anticipate would be had. The plaintiff says, in her affidavit used on the motion to tax costs in the court below, that while she would, if requested, have signed her testimony as transcribed by her own stenographer, she would, had she been asked to do so, have refused to sign what purported to be her deposition as taken by the reporter for the notary. We do not believe that it was incumbent upon the defendant to have taken steps, by means of court proceedings open to him to force the plaintiff to sign the deposition, before it could become a legitimate item of cost in preparing for the defense of the action. He had become liable for the expense of taking the deposition before the lower court sustained the demurrer, and entered its judgment. It has determined that the cost was properly and necessarily incurred. We are convinced that the evidence before it showed a case warranting such a conclusion.

The order appealed from is affirmed.

We concur: KINSELL, Justice pro tem.; RICHARDS, J.

(49 Cal. App. 229)

WHITNEY v. WEST COAST LIFE INS. CO.
(Civ. 3537.)

(District Court of Appeal, First District, Division 1, California. Sept. 10, 1920. Hearing Denied by Supreme Court Nov. 9, 1920.)

1. Appeal and error ⟸1213—Evidence at second trial held insufficient to change law of the case.

Where the Supreme Court on a previous appeal had held that a verdict allowing recovery on a life policy was contrary to evidence that assured had consulted physicians and been informed he had heart disease which he concealed from the insurance company, evidence at a subsequent trial by another physician and by personal friends that they did not know of assured having such disease does not change the effect of the former ruling as law of the case, so that a directed verdict for defendant was proper.

2. Appeal and error ⟸1099(7)—Prior decision as to sufficiency of evidence is law of the case, in absence of new evidence.

A decision on a former appeal that the evidence was insufficient is the law of the case, and must be followed by the trial court at a subsequent trial if the evidence was the same.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Anna St. John Whitney against the West Coast Life Insurance Company. Judgment for defendant on directed verdict, and plaintiff appeals from the judgment and from the order denying new trial. Affirmed.

Norman A. Eisner, of San Francisco, for appellant.

Myrick & Deering and Scott, of San Francisco, for respondent.

WASTE, P. J. Plaintiff brought this action to recover upon a life insurance policy for $10,000, issued by the defendant on the life of her husband, and in her favor. In the first trial of the cause a verdict was

rendered in favor of the plaintiff. A motion for a new trial was made and denied. On appeal to the Supreme Court, the judgment and order were reversed. Whitney v. West Coast Life Insurance Co., 177 Cal. 74, 169 Pac. 997. On the second trial the court directed the jury to bring in a verdict in favor of the defendant, which was done, and judgment thereupon entered. A motion for a new trial was made and denied, and the plaintiff has appealed.

Mr. Whitney died June 10, 1914, of acute myocarditis, a disease of the heart. The defense at the first trial was based upon the assertion that Arthur L. Whitney, the assured, made false representations in his application to the defendant for insurance, and was guilty of fraud in securing the policy, in that he concealed from the defendant's medical examiner the fact that, before making his application, he had consulted certain physicians as to his physical condition, and failed to report the results of their examination, as given to him. By the terms of the policy all insurance thereunder was based upon the written and printed application therefor, which, by attached copy, was made a part of the contract. In his answers to questions contained in the application for insurance, Mr. Whitney made, among others, the following representations:

"Q. Have you now or have you ever had shortness of breath? A. No.

"Q. Have you now or have you ever had disease or palpitation of the heart? A. No.

"Q. Give particulars of any injury or illness or attendance of physician that may have occurred during the past seven years. A. Burn of arm and chest. Dates, 1911. Duration, one week. Physician consulted, Dr. Chidester."

Whitney had been afflicted with a shortness of breath, which seemed to him so alarming as to cause him to seek the advice of a physician some four months prior to the time when he sought life insurance. He was examined by Dr. Cheney, who informed him that he was suffering from myocarditis, a weakness of the heart, an incurable condition, which would persist as long as the patient lived. He also consulted Dr. Hewlett, who advised him that he probably had weakness of his heart muscles. After a careful review of the evidence and a consideration of the authorities relied upon by the respondent on the first appeal, the Supreme Court held that, notwithstanding the liberal rules which properly favor the upholding of verdicts of the sort rendered in this case, the fact remained that by the uncontradicted testimony of two physicians of standing, Mr. Whitney was shown to have concealed facts about his condition and his consultations with medical men, which could not have been unconsciously withheld, and the withholding of which information clearly amounted to fraud. The court then said, in reversing the judgment and order denying the motion for a new trial:

"We are therefore forced to the conclusion that he consciously and intentionally withheld from the examining physician information which might have prevented, nay, probably would have prevented, the issuance to him of a policy of insurance. Of course, we cannot tell what new evidence may be forthcoming if the cause be retried, but unless some very positive proof be available to overcome the necessary deductions arising from the conduct of the assured, it would be the duty of the trial court to decline to submit the question of fact to a jury."

[1] Much of the testimony introduced at the first trial was read into the record on the second hearing, and practically the identical evidence considered by the Supreme Court appears to have been before the trial court at the conclusion of the case. Four witnesses, who had not appeared in the first trial, testified at the second. Dr. Ebright, produced by the plaintiff, testified that he was a personal friend of Mr. Whitney, knew him intimately, met him frequently, and noticed nothing wrong about decedent, and never heard him complain of his heart or shortness of breath. When examined as an expert, he gave as his opinion that Whitney was suffering from indigestion, and not from heart disease. If that were true, we are unable to perceive how the testimony of Dr. Ebright in any way assists the appellant. On the contrary, it tends to add to the gravity of the concealment alleged to have been perpetrated by the decedent, for in his application he also stated that he had never had either dyspepsia or indigestion. Dr. Ebright would not say that the decedent did not have myocarditis, and admitted that Dr. Cheney and Dr. Hewlett were "probably accurate" in their diagnosis. The other three witnesses, Hand, Hardy, and Peterson, were intimate acquaintances of the decedent, Whitney, and merely testified to the fact that Whitney appeared to them to be in good health, and that they never observed him exhibiting any symptoms of shortness of breath. There is nothing in the evidence of any of these witnesses to change, or in the least moderate the effect of, the uncontradicted testimony, which the Supreme Court held on the former appeal so clearly established the fact that the insured was guilty of fraud in securing the policy. The facts and the evidence are the same upon both appeals, with the immaterial exception noted. The decision in the former appeal therefore becomes the law in this. Snyder v. Jack, 140 Cal. 584, 586, 74 Pac. 139, 355; Blankenship v. Whaley, 142 Cal. 566, 568, 76 Pac. 235; Kent v. Williams, 146 Cal. 3, 7, 79 Pac. 527; Brett v. Frank & Co., 162 Cal. 735, 739, 124 Pac. 437.

[2] There was nothing new in the case. The views expressed by the Supreme Court

on the former appeal must control the law of the case; and it was the duty of the trial court to give effect to those views by declining to submit the question to the jury, if convinced that the evidence was the same upon both trials. Muller v. Swanton, 17 Cal. App. 232, 235, 119 Pac. 200.

The outstanding fact remains unchallenged that Mr. Whitney died of myocarditis. In directing the jury to return a verdict for the defendant, the trial court said:

"There has been no evidence introduced which would explain in any way the reason why the decedent did not disclose to the company the information that he had been consulting, or had been attended by Dr. Cheney and Dr. Hewlett. And in my opinion that is the point upon which the case is reversed. * * *"

We are satisfied the trial court was correct in both its conclusions. No good can be accomplished by a review of the authorities cited by the appellant. Every contention made, which seems worthy of consideration, was decided against her by the Supreme Court, on the appeal following the first trial. The decision of that court so convincingly settles the matter that we feel further discussion is unnecessary.

The judgment and order are affirmed.

We concur: BEASLEY, Judge, pro tem; RICHARDS, J.

49 Cal. App. 246

PEOPLE v. WILHITE. (Cr. 528.)

(District Court of Appeal, Third District, California. Sept. 10, 1920.)

1. Indictment and information ⟸161(5) — Amended information for similar offense held valid.

Where the original and first amended information charged defendant with contributing to the dependency of a minor, a second amended information which substituted the word "wrongfully" in place of the word "feloniously" in the first information, and the words, "female under the age of twenty-one years" in place of the word "minor," the second amended information charged the same offense, and a motion to strike it out and demurrer to it were properly overruled, under Pen. Code, § 1008, allowing such amendments.

2. Criminal law ⟸369(2) — Instruction that evidence of other offenses was competent only to show disposition held proper.

In a prosecution for contributing to the dependency of a female minor by sexual intercourse with her, an instruction that the prosecution had elected to rely upon a specific act, and that evidence of other similar acts could be considered only as showing the disposition of accused and as corroboration to support the specific act, was correct.

3. Infants ⟸20—That minor was dissolute before defendant's contributory acts no defense.

It is no defense to a prosecution for contributing to the dependency of a female minor that the minor had been leading a dissolute or immoral life before the acts with which defendant was charged.

4. Infants ⟸20—Instruction that defendant's acts need not be sole cause of minor's dependency is correct.

Under St. 1915, p. 1246, § 21, making it an offense to commit any act or omit any duty which causes, or tends to cause, dependency of a minor, an instruction that defendant's acts need not be the sole cause of the dependency, but that he could be convicted if the jury found that his acts tended to cause or encourage such dependency, was correct.

5. Criminal law ⟸554—Denials by accused only raise conflict of evidence for jury.

Where the evidence offered by the prosecution was ample to sustain a conviction, denial of the charge by accused's testimony, which showed his innocence, at most raised a conflict in the evidence, which was for determination by the jury, but did not render the evidence insufficient to support a conviction.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

E. C. Wilhite was convicted of contributing to the dependency of a minor, and he appeals from the conviction and from the order denying his motion for a new trial. Affirmed.

L. J. Maddux, of Modesto, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

NICOL, Presiding Judge pro tem. The defendant was accused of contributing to the dependency of a minor under the age of 21 years. He was tried and convicted of the offense charged, and from the judgment and order denying the motion for new trial the defendant prosecutes this appeal.

The information against the defendant was filed on the 16th day of June, 1919, and was thereafter followed by two amended informations covering the same offense which was charged in the original information. The second amended information was filed December 11th, 1919, and alleges that:

"The said E. C. Wilhite, on or about the 21st day of June A. D. 1918, at and in the said county of Stanislaus, state of California, and prior to the filing of this information, did then and there, to wit, in said county of Stanislaus, state of California, willfully, unlawfully, and wrongfully have and accomplish an act of sexual intercourse with and upon one Bessie Robertson, then and there a female under the age of 21 years, to wit, of the age of 18 years, and not then and there the wife of said E. C. Wilhite. That said act by the said defendant did

then and there manifestly cause, encourage, and contribute to the said Bessie Robertson, then and there a female under the age of 21 years, to wit, of the age of 18 years, to become and remain a person coming within the provisions of section 1 of the Juvenile Court Law of the state of California, to wit, a person under the age of 21 years who is leading or from any cause is in danger of leading an idle, dissolute, lewd, and immoral life, and from which said act of sexual intercourse the said Bessie Robertson conceived and bore a child, contrary," etc.

The defendant interposed a motion to strike out this second amended information, and also filed a demurrer to the same.

[1] The difference between the original and the first and second amended informations may be briefly stated as follows: The original and the first amended informations alleged that the defendant did "willfully, unlawfully, and feloniously" and the second amended information contains the word "wrongfully" in place of the word "feloniously." The first amended information contains the words "acts of sexual intercourse" at two different places, and the second amended information contains a reference at those two places to an "act of sexual intercourse." The first and second amended informations contains the words "female under the age of 21 years" and the original information contained the word "minor" in place of the word "female." The original and the first amended informations, in referring to the said Bessie Robertson, contain the words "and who has violated the laws of the state of California, relative to living in cohabitation and adultery." These last-quoted words are not contained in the second amended information.

It is provided by section 1008 of the Penal Code that:

"An indictment or information may be amended by the district attorney without leave of court, at any time before the defendant pleads. Such amendment may be made at any time thereafter, in the discretion of the court where it can be done without prejudice to the substantial rights of the defendant. * * *"

It is clear that the offense charged in the second amended information is the same offense that is charged in the original and first amended informations, and it is apparent that the motion to strike out said second amended information was properly denied, and the demurrer to the same was properly overruled by the trial court.

[2] The appellant claims that the court erred in giving the following instruction to the jury:

"The prosecution in this case has selected the alleged acts of the defendant set forth in the information and testified to by witness Bessie Robertson, as having occurred on or about the 21st day of June, 1918, and has elected to rely on proof of such acts for a conviction in this case. Testimony has been introduced by the prosecution tending to prove other acts and conduct of the defendant towards said Bessie Robertson of a similar character to those alleged in the information. This evidence is introduced for the purpose of proving the disposition and tendency of the defendant to commit acts such as those alleged in the information and relied upon by the prosecution, and such evidence is not introduced to prove distinct offenses, but as corroborative evidence tending to support the one specific offense for which the defendant is being tried."

The giving of this instruction was not erroneous. It expressly states that the defendant was upon trial for the alleged acts set forth in the information and claimed to have occurred on or about June 21, 1918, and that evidence of similar acts or conduct of the defendant was admitted for the purpose as stated in said instruction, and not for the purpose of proving distinct offenses. The instruction is substantially in the same language as the instruction that was sustained in People v. Gasser, 34 Cal. App. 541, 544, 168 Pac. 157.

[3] Instruction No. 9, which defendant claims to be erroneous, was to the effect that, even though it may appear that the said Bessie Robertson had been leading a lewd or immoral life before the alleged offense charged in the information, that fact alone would not warrant a verdict of acquittal. This instruction contains a correct statement of the law, and finds ample support in People v. Hanford, 35 Cal. App. 800, 171 Pac. 112. In that case the defendant was convicted of the crime of violating section 21 of the Juvenile Court Law. The evidence showed that the defendant knowingly permitted the prosecuting witness to commit acts of prostitution in defendant's house, and encouraged the commission of the same. The court said:

"It is no defense that the prosecuting witness may have been leading an idle, dissolute, and immoral life prior to and at the time she went to the house of the defendant. * * *

"Thus it is apparent that the juvenile court law not only denounces and condemns acts which tend to make a minor a prostitute, but also those which tend to cause one, already a prostitute, to remain a prostitute. In short, the clear purpose and intent of the statute is to reclaim the fallen as well as protect the virtuous."

[4] There was no error in the court instructing the jury:

"That it is not necessary for you to find, in order to convict the defendant in this case, that any act or acts of said defendant charged in the information, if you find that he committed said acts or any of them, were the sole or entire cause of said Bessie Robertson leading, or being in danger of leading, an idle, dissolute, lewd, or immoral life, if you find that she was leading, or was in danger of leading, an idle, dissolute, lewd, or immoral life, but it is suffi-

cient upon that point if you find that said act or acts, or any of them, although not the sole or entire cause thereof, did tend to cause, or tend to encourage, or tend to induce, the said Bessie Robertson to lead, or become in danger of leading, an idle, dissolute, lewd, or immoral life."

This instruction was proper as informing the jury that it was not necessary that the evidence should actually show that the alleged acts of defendant caused the prosecuting witness to lead an idle, dissolute, lewd, or immoral life, but that it was only necessary to show by the evidence that the alleged acts did "tend" to cause said prosecuting witness to lead an idle, dissolute, lewd, or immoral life. Section 21 of the statute under which the defendant was convicted, among other things, provides, that:

"Any person who shall commit any act or omit the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of twenty-one years to come within the provisions of any of subdivisions 1 to 13 inclusive of section one of this act, or, which act or omission contributes thereto, or any person who shall, by any act or omission, or by threats, or commands, or persuasion, induce or endeavor to induce any such person, under the age of twenty-one years, to do or to perform any act or to follow any course of conduct, or to so live as would cause or manifestly tend to cause any such person to become or to remain a person coming within the provisions of any of subdivisions 1 to 13 inclusive of section one of this act, shall be guilty of a misdemeanor. * * *" Stats. 1915, p. 1246. People v. Hanford, 35 Cal. App. 799, 800, 171 Pac. 112.

[5] The final contention of the defendant is that the evidence is insufficient to support the verdict. The evidence produced by the prosecution is ample and sufficient to establish the crime charged. The defendant in his testimony denies absolutely that he committed the act charged against him. The most that can be said is that thereby a conflict in the evidence was created. His own story undoubtedly exculpates him, but it was for the jury to say whether or not that story should be believed. People v. Rongo, 169 Cal. 71, 75, 145 Pac. 1017.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

49 Cal. App. 289

PEOPLE v. WYETT. (Cr. 909.)

(District Court of Appeal, First District, Division 1, California. Sept. 15, 1920.)

1. Criminal law ⊂=507(7)—Ten year old complaining witness held not an accomplice.

In prosecution for the infamous crime against nature in violation of Pen. Code, § 286, complaining witness, under 10 years of age, *held* not an accomplice, within rule requiring corroboration of an accomplice's testimony.

2. Criminal law ⊂=822(13)—Instruction as to proof on information charging two crimes held not misleading.

In prosecution of a defendant charged in two counts with different crimes, where court fully instructed as to duty of each juror to be satisfied beyond a reasonable doubt as to first count, and in a separate charge required each juror to be satisfied as to guilt of crime charged in second count, instruction that district attorney was "not required to allege or prove the exact date of the commission of either of the offenses charged, and if you are satisfied from the evidence beyond a reasonable doubt that the defendant committed the crimes, or either of them, as charged, at any time within three years of the date of the filing of the information, you should render a verdict of guilty," *held* not so indefinite, taking the charge as a whole, as to have misled jury to find defendant guilty on each count on proof satisfying them as to guilt of either offense.

3. Criminal law ⊂=369(1)—Testimony as to commission of other crime against other person held inadmissible in solving prosecution.

In prosecution for the infamous crime against nature, in violation of Pen. Code, § 286, evidence as to commission of a similar offense against a boy other than the complaining witness, committed subsequent to the commission of crime charged, *held* inadmissible.

4. Criminal law ⊂=1186(4) — Admission of testimony as to other acts held reversible error.

In prosecution for infamous crime against nature, in violation of Pen. Code, § 286, where defendant was convicted on testimony of the prosecuting witness alone, whose testimony was in some respects uncertain, and was strongly supported in the minds of the jury by corroborating evidence as to similar act committed on a person other than the prosecuting witness, the admission of the testimony as to such other acts *held* reversible error, notwithstanding Const. art. 6, § 4½, prohibiting reversal except in case of a miscarriage of justice.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Frank Wyett was convicted of the infamous crime against nature, and he appeals. Reversed.

H. L. Meyers, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

RICHARDS, J. This is an appeal from a judgment against the defendant upon his conviction of the charge of having violated section 286 of the Penal Code, relating to the infamous crime against nature.

[1] The appellant makes three contentions upon this appeal, the first of which is that he was convicted upon the uncorroborated

testimony of an accomplice. The complaining witness was one Ernest Houx, a boy under 10 years of age at the time of the trial, and the victim of the defendant's alleged offense. In claiming that the witness Ernest Houx was an accomplice of the defendant in the commission of the crime the appellant relies on the case of People v. Robbins, 171 Cal. 466, 154 Pac. 317. In that case, however, the complaining witness was a boy of the age of 16 years, and in holding that he was an accomplice the Supreme Court expressly differentiated between that case and the case of People v. Dong Pok Yip, 164 Cal. 143, 127 Pac. 1031, in which latter case the child upon whom the crime was committed was of the age of 9 years, and was held not to be accomplice. We are of the opinion that this case comes within the rule laid down in People v. Dong Pok Yip, supra, and hence that the trial court was not in error in holding that the complaining witness herein was not an accomplice whose testimony required corroboration.

[2] The appellant's second contention is that the court erred in submitting to the jury the following instruction:

"In this connection you are instructed that the district attorney is not required to allege or prove the exact date of the commission of either of the offenses charged; and if you are satisfied from the evidence beyond a reasonable doubt that the defendant committed the crimes, or either one of them as charged, at any time within three years of the date of the filing of the information, you should render a verdict of guilty."

There were two counts in the information against the defendant herein, in one of which he was charged with the infamous crime against nature, and in the other of having been guilty of certain lewd and lascivious conduct toward the complaining witness. The criminal act charged to have been committed in each count was stated in each to have been committed on or before the 1st day of May, 1919. The foregoing instruction was expressly disapproved in the case of People v. Elgar, 36 Cal. App. 114, 171 Pac. 697, and would seem to be subject to the strictures made upon it in that case. The trial court, however, fully instructed the jury in other portions of its charge with respect to the duty of each member of the jury to be satisfied beyond a reasonable doubt as to the guilt of the defendant upon the first of said counts, and also and in a separate and distinct charge as to the second of said counts in the information. It would seem, therefore, that, taking the charge of the court as a whole, the jury could not have been so far misled by the indefiniteness of the above instruction as to have expressly found the defendant guilty upon each of said counts separately, but that their verdict as to each was the result of their unanimous conclusion as to his guilt upon each of said counts. We do not, therefore, feel that we should reverse this case upon that ground.

[3, 4] The defendant, however, makes a further objection to the verdict and judgment herein, based upon his contention that evidence was offered and admitted over his objection with relation to the commission of another offense by him similar to that charged in the first count in said information, but against a person other than the prosecuting witness. One Floyd Menasco was called as a witness by the prosecution, and was permitted to testify to the commission of said crime by the defendant upon his person upon a date after that upon which the defendant was alleged to have committed a like offense upon the present prosecuting witness. This evidence was offered and permitted to be introduced for the purpose of showing the lewd and lascivious disposition and tendency of the defendant to commit acts of that character. The respondent herein undertakes to justify the action of the trial court in the admission of such evidence under the authority of People v. Gasser, 34 Cal. App. 541, 168 Pac. 157. The record of that case, however, discloses that the evidence therein consisted of proof of other acts of a lewd and lascivious nature committed upon the person of the complaining witness, and it was therein held that such evidence was admissible for the limited purpose for which it was offered. But neither that case, nor any other case to which our attention has been called, which upholds the admission of such evidence, has gone so far as to approve the admission of evidence of lewd and lascivious acts committed upon other persons than the complaining witness in the particular case, but, on the other hand, in every case to which we have been cited, the courts of this and other jurisdictions have held that such testimony constitutes evidence of another and distinct crime, for which the defendant could have been informed against and tried, but for which he cannot be tried in the particular case. People v. Letoile, 31 Cal. App. 166, 159 Pac. 1057; People v. Elliott, 119 Cal. 593, 51 Pac. 955; People v. Stewart, 85 Cal. 174, 24 Pac. 722; People v. Bowen, 49 Cal. 654; State v. Williams, 36 Utah, 273, 103 Pac. 250; Janzen v. People, 159 Ill. 440, 42 N. E. 862; Shaffner v. Commonwealth, 72 Pa. 60, 13 Am. Rep. 649. We are of the opinion that the error of the trial court in the admission of this evidence was sufficiently prejudicial to compel a reversal in the present case. The defendant was convicted upon the testimony of the prosecuting witness alone, whose evidence, while it would seem to be sufficient to uphold the verdict, was in some respects quite uncertain, and was doubtless strongly supported in the minds of the jury by the corroborating evi-

dence as to similar acts of the defendant committed upon the person of the boy Menasco. We are therefore of the opinion that section 4½ of article 6 of the Constitution cannot be given application to the case at bar.

Judgment reversed.

We concur: WASTE, P. J.; KINSELL, Judge pro tem.

49 Cal. App. 268

In re HUNTER et al. (Cr. 521.)

(District Court of Appeal, Third District, California. Sept. 14, 1920.)

1. Infants ⇐19—Child's welfare is test in removing from parental control.

Under Juvenile Court Law, § 1, subds. 2, 11, providing that the law applies to minors who have no parent or guardian willing or capable of exercising proper control, etc., or who are in danger of leading an idle and dissolute life, and section 9b, declaring that no ward of the juvenile court shall be taken from custody of his legal parent or guardian without the consent of such parent, etc., unless the parent shall be incapable of providing, or shall have neglected to provide proper maintenance, training, and education, the primary consideration in determining whether custody of a child shall be taken from the parent is the child's own welfare.

2. Infants ⇐19—Custody of infant girls held properly taken from their parents.

Where the parents were not educating their infant daughters, aged 16 and 17, and were encouraging one of them to marry a Hindu, and it appeared that the children were in danger of being led into a life of immorality, it was proper, under the Juvenile Court Law, to declare them wards of the court, and remove them from the custody of the parents.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

In the matter of Pearl Hunter and Ruby Hunter, wards of the Juvenile Court. Appeal from an order committing the minors to the custody of the juvenile court. Affirmed.

See, also, 188 Pac. 63.

W. E. Davies, of Marysville, for appellants.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for respondent.

BURNETT, J. These minors, of the age of 17 years, were found to be delinquent and neglected children, and were committed to the Boys' and Girls' Industrial School, at Lytton Springs, conducted by the Salvation Army. The court found that their parents were incapable of exercising over these children proper parental control; that their home, by reason of neglect on the part of the parents, was an unfit place for them; that for a long period of time they were not properly disciplined or controlled; that they were in great danger of being led astray into bad and immoral practices; that their education has been neglected, due to the indifference or carelessness of the parents; that they are in great need of proper parental training, care and control; and that it is for the best interests of these minors that they be declared wards of the juvenile court, and that their care, custody, training, and education be committed to other hands than their parents.

[1] The legal foundation for the action of the court is found in subdivisions 2 and 11 of section 1 and section 9b of the Juvenile Court Law (Stats. 1915, p. 1225). It is therein provided that among the persons to whom the law applies is one "who has no parent or guardian willing to exercise or capable of exercising proper parental control; or who has no parent or guardian actually exercising such proper parental control and who is in need of such control" and one "who is leading, or from any cause is in danger of leading, an idle, dissolute, lewd or immoral life." A limitation upon the authority of said court to deprive the parents of the custody of the delinquent is found in said section 9b, as follows:

"No ward of the Juvenile Court as defined in this act shall be taken from the custody of his parent or legal guardian, without the consent of such parent or guardian unless the court shall find such parent or guardian to be incapable of providing or to have failed or neglected to provide proper maintenance, training and education for said person * * * or unless the court shall find that the welfare of said person requires that his custody be taken from said parent or guardian."

Taking up first the general consideration of the welfare of these girls, it is quite apparent that the determination of the court that their interests both material and intellectual, would be promoted by committing them to said institution, is amply justified. They were taken away from an abode of abject poverty, encompassed by circumstances utterly unfavorable to comfortable and decent living, the family of five occupying one small room, in which all the ordinary functions of the domestic relations, cooking, dining, and lodging were centered, there being only a partition between this room and the shed or stable wherein were housed the horses and cattle. But of more importance is the fact that the education of these girls was not receiving the attention that its importance demands, and they were permitted to associate with men of an alien race, and one of them even encouraged by the parents, if not openly at least tacitly, to become the wife of a Hindu, with whom she seems to have been quite intimately acquainted. Other

circumstances appear also which we need not detail specifically, that justly excite apprehension that the girls were likely to be led into a life of lewdness and immorality. To exchange such a situation for the comfortable, wholesome, educational, and moral surroundings of the home at Lytton Springs would be immediately characterized as favorable to the welfare of these girls by every right-thinking person.

[2] It is to be observed that the statute makes the actual welfare of the minor the chief consideration, but conceding, as stated by Mr. Justice Sloane in the case of In re Gutierrez, 190 Pac. 200, that "it is only in instances where there is demonstrated incapacity or something akin to criminal neglect that the law is justified in interfering with the natural relations of parent and child," there is evidence in the record to support the inference that the parents manifested such incompetence. This was due, no doubt, to their ignorance. They are not, of course, to be condemned for their poverty. It excites pity rather than condemnation, although, as suggested by appellant, it is often a blessing in disguise. But most people, no doubt, would prefer to have more of the material comforts of life. Indeed, no one without the deepest regret that his declining days should be spent in discomfort can contemplate the condition of this old man, who offered his life for his country and who fought under the gallant Custer in the war for the preservation of the Union. He deserves a better fate than seems to have befallen him, but in this connection we do not overlook the fact that there are two grown sons who should see that the necessities of their parents are supplied.

In the other matters, though, we think there is room for the opinion that the parents are not altogether blameless, due, as we have suggested, to their inability to appreciate the greatest and most imperative needs of their daughters. That they should have at least a common school education no one will deny. That their intimate companions should be people of their own race goes without saying. And, of course, marriage between a white girl and a Hindu, whatever his character, is abhorrent and unthinkable to every enlightened and right-thinking Caucasian. From the foregoing impending evils, no doubt, the trial judge thought to rescue these girls, and being in a much better position than this court to appraise at their true value all the surrounding circumstances of the case, his judgment should not be disturbed without more cogent reasons than appear in the cause.

The orders are affirmed.

We concur: NICOL, Presiding Judge pro tem.; HART, J.

49 Cal. App. 263

PEOPLE v. DEWAR. (Cr. 893.)

(District Court of Appeal, First District, Division 1, California. Sept. 13, 1920.)

1. Criminal law ⟸1144(18)—Presumed that motion for new trial was based on all grounds specified in Code.

Where respondent, convicted of grand larceny, whose motion for new trial was granted, on the state's appeal from the order, in his brief says it was based on each and every ground specified in Pen. Code, § 1181, in the absence of showing to the contrary, the appellate court will presume the motion was so made.

2. Criminal law ⟸1144(18)—Rule of presumption on appeal from order granting new trial applicable in civil cases not applicable.

There is nothing in the Penal Code, in its provisions relative to new trials, making applicable to the procedure in the trial of criminal cases the rule applicable in civil cases under Code Civ. Proc. § 657, that when new trial is granted on grounds of insufficiency of the evidence to sustain verdict the order shall so specify; otherwise, on appeal from the order, it will be presumed it was not based on such grounds.

3. Criminal law ⟸938(1)—New trial for newly discovered evidence discretionary.

In a prosecution for grand larceny, order granting defendant's motion for new trial on the ground of newly discovered evidence *held* within the trial court's discretion.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

William Dewar was convicted of grand larceny, and from an order granting him a new trial, the People appeal. Affirmed.

U. S. Webb, Atty. Gen. (John H. Riordan, Deputy Atty. Gen., and Bert Schlesinger, of San Francisco, of counsel), for the People.

E. D. Knight and E. V. McKenzie, both of San Francisco, for respondent.

WASTE, P. J. The defendant, after conviction on a charge of grand larceny, moved for a new trial. His motion was granted, and from the order made in that behalf the people appeal.

[1, 2] The record is silent as to the grounds upon which the motion for a new trial was made and granted. Respondent, in his brief, says it was based upon each and every ground specified in section 1181 of the Penal Code. In the absence of a showing to the contrary, therefore, we will presume that the motion was so made. One of the grounds specified in that section is that the verdict is contrary to the evidence. Appellant seeks to eliminate that ground from consideration on this appeal by invoking the rule, applicable in civil cases, that when a new trial is granted upon the ground of the

insufficiency of the evidence to sustain the verdict the order shall so specify; otherwise, on appeal from such order, it will be presumed that the order was not based upon that ground. Code Civ. Proc. § 657. But we find nothing in the provisions of the Penal Code relating to new trials making the rule in civil actions applicable to the procedure in the trial of criminal causes. From the the transcript of the proceedings on motion for a new trial we are given some evidence that the question of the sufficiency of the evidence, newly discovered evidence, and possibly the alleged improper admission of certain testimony, entered into the trial court's consideration of the matter.

The defendant was charged with stealing and carrying away five boxes of cyanide precipitates, of the value of $4,000, the personal property of Paul Hahnewald. It is the contention of the prosecution that the evidence of defendant's guilt was overwhelming. Paul Hahnewald, a witness for the state, testified that the precipitates had been stolen from his mill in Storey county, Nev., in 1919, and were later found in the possession of the defendant, who had been employed at his mill during that year. The defendant shipped the precipitates as paint to the Selby Smelting Works of San Francisco, to which concern he sought to sell them, alleging that he had secured them in Mexico. He seems to have made a number of conflicting statements as to the source from which the precipitates came, finally asserting that he found them in a woodshed, where they had laid unnoticed for nearly 10 years. Defendant testified that the precipitates originally belonged to a man named Tobner, his wife's first husband. The precipitates found in the possession of the defendant and produced in court were identified by Hahnewald and by his mine superintendent and other experts, who also testified that the precipitates were fresh in appearance, were not discolored, and were apparently not of the age as claimed by the defendant. Defendant's testimony as to the age and ownership of the precipitates was also rebutted by Tobner, who was corroborated by his former partner, Jurian. Tobner and Jurian had engaged in the mining business some 10 years previously, and it appeared that Jurian had kept a sample of the precipitates from their mill. This was produced in court and submitted to the jury for comparison with the precipitates claimed to have been stolen from Hahnewald.

In support of his motion for a new trial, defendant produced the affidavits of Henry Tobner and John L. Martell, witnesses for the prosecution; of Richard Beckert, a witness for the defense; the affidavit of his attorney, E. D. Knight; and one made by himself. The purpose of these statements was to discredit the evidence of the witnesses for the prosecution as to the means of identifying the source from which derived and the age of the alleged stolen precipitates. Their further effect was to indicate that the defendant and his counsel were not prepared for the testimony to be given by Tobner and Jurian, and did not, at the time of the trial, appreciate its probable effect upon the jurors. After the trial Beckert and Martell made an independent examination of a portion of the alleged stolen precipitates and the sample produced by Jurian as coming from the Tobner mill. The alleged result of this examination was that there was no discernible difference in the degrees of, or the extent of, oxidation as between the two; that it was impossible to discern which was the older of the two; that both might have been produced by the same cyaniding process, in the same mill, at the same time, from the same ore, and thereafter differently kept. These matters are made to appear from the affidavits. Tobner, who had been one of the chief witnesses for the prosecution on rebuttal, made similar statements, and added some details concerning the disposition of the precipitates and bullion from his mill some 10 years previously. The result of his affidavit was to weaken the effect of his previous testimony and in a sense to widen the scope of his testimony, which might have been done upon cross-examination at the trial. The affidavit of the attorney for the defendant, in substance, is based upon an alleged hurried conclusion of the trial, by reason of the pressure of the business of the court, a preliminary misunderstanding of what Jurian and Tobner would testify to, and a misapprehension of the apparent effect upon the jury of their testimony and the production in court of the sample of the precipitates produced from their mine. He also asserts that the examination by the jury of the Tobner precipitates was had at a time when the courtroom was poorly lighted. Both defendant and his counsel assert that it was impossible to have ascertained the various facts relied upon before or during the trial.

At the hearing of the motion Andrew Jurian was produced and permitted by the court to testify on behalf of the defendant to the same effect as if he had made an affidavit. His testimony, in brief, was to the effect that the sample of the precipitates produced by him was in the same condition as when taken by him some years previously, the apparent purpose of which was to show that no change had taken place in the precipitates during that time. No counter affidavits were produced by the prosecution, nor was any attempt made to counteract the showing thus made.

[3] Appellant contends that the court abused the wide discretion vested in it in the matter of passing upon motions for a

new trial, when it granted the motion in the instant case; but in the light of the well-settled rules applicable to the consideration of the appeals from orders of trial courts granting or denying such motions we do not see how we can properly so hold. As was said in People v. Byrne, 160 Cal. 217, 225, 116 Pac. 521, 525:

"The claim of newly discovered evidence warranting a new trial is universally looked upon by the courts with distrust and disfavor."

There is much in the record of the present case bearing out the suggestion of the Attorney General that the theory upon which the defendant in the court below sought a new trial was but the putting forward of an afterthought and a subterfuge. But that was a question peculiarly addressed to the discretion of the trial court. People v. Sing Yow, 145 Cal. 1, 4, 78 Pac. 235. And it has been determined by that court, no doubt with a full realization of the responsibility involved, that the motion should be granted. Disassociated as we are from the atmosphere of the trial of this cause, and uninfluenced by those considerations, which the lower court, from his intimate knowledge of the situation presented to him by the motion for a new trial, no doubt gave to the matter, we would have little hesitancy in upholding the position of the appellant. But, as was said in People v. Canfield, 173 Cal. 309, 312, 159 Pac. 1046, 1048:

"We can hardly manufacture in fancy a hypothetical situation in which a reviewing court would be justified in questioning the discretion of a trial court who should grant a new trial in a case involving a criminal charge. * * * We must assume that the learned judge of the trial court acted with a full appreciation of his duties and obligations, * * * and that the conclusion which he reached was not governed by any idle nor any mere technical reasons."

The order granting a new trial is affirmed.

We concur: RICHARDS, J.; KINSELL, Judge pro tem.

49 Cal. App. 281

BECK v. EDMISON et al. (Civ. 3354.)

(District Court of Appeal, Second District, Division 1, California. Sept. 14, 1920.)

1. Taxation ⊂=615—Statutory provisions to be strictly complied with to divest owner of property.

In order to divest an owner of his property by a sale thereof for taxes, the law requires a strict compliance with every statutory provision enacted for his benefit.

2. Taxation ⊂=656, 734(10) — Sale of land for taxes more than 30 days after first publication void, and gave purchaser no title.

A sale of land for taxes, made 33 days from the time of the first publication of the notice, was void, and purchaser acquired no title, under Pol. Code, § 3767, providing that day of sale must be not less than 21 nor more than 28 days from the time of the first publication of the notice.

3. Taxation ⊂=814(2)—Owner seeking affirmative relief as defendant in action by purchaser at tax sale to quiet title held not entitled to judgment without reimbursing plaintiff.

Where purchaser at void tax sale brought action against the owner to quiet title under Code Civ. Proc. § 738, and defendant denied the allegations of the complaint, and alleged that the title was vested in defendant, and prayed for a decree, quieting the same, court erred in rendering judgment for defendant, quieting his title, without reimbursing plaintiff for amounts paid by him in redeeming the property from delinquent taxes under Pol. Code, § 3771, as a condition precedent to receiving his deed.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by S. Beck against Fred E. Edmison and others. From an adverse judgment, plaintiff appeals. Reversed.

John F. Poole and Hocker & Austin, all of Los Angeles, for appellant.

Overton, Lyman & Plumb and George W. Prince, Jr., all of Los Angeles, for respondents.

SHAW, J. By a complaint in the usual form in such actions, plaintiff sued to quiet title to certain lots of real estate. The answer denied the allegations of the complaint, and alleged that title was vested in defendants, who, as against plaintiff, prayed for a decree quieting the same. Judgment went for defendants as prayed for, from which plaintiff appeals.

Defendants, in whom title to the property was at the time vested, failed to pay the taxes thereon for the fiscal year of 1912, whereupon the property was sold to the state. Thereafter proceedings were had and taken, which, on the 8th day of July, 1918, resulted in a sale of the property made by the tax collector to plaintiff, who, upon redeeming the property from delinquent taxes accruing subsequent to the year 1912, as provided in section 3771, Political Code, received a deed to the same, executed by the tax collector. Plaintiff's title, therefore, is made to depend upon the validity of the proceedings under which the tax deed was executed.

Appellant urges two grounds upon which he bases his claim for a reversal of the judgment: First, that the court erred in holding the publication of the notice of sale to be insufficient; and, second, that in no event were defendants entitled to a decree quieting their title, except upon reimbursing

plaintiff for tax levies made for the years subsequent to 1912, so paid by him, and the validity of which is not questioned.

[1, 2] As to the first point, it appears that, in accordance with the statute, the property was duly sold to the state in 1913 for delinquent taxes accruing thereon for the year 1912; that in the absence of any redemption of the property from said sale the county tax collector caused to be published in the Los Angeles Daily Journal, which was a newspaper published in the county wherein the land is situated, a notice of the fact that said property was delinquent in the payment of taxes for the years succeeding the sale thereof, and designated the property as having been sold to the state in 1913 for delinquent taxes of 1912, and that unless such taxes, together with costs and penalties, were paid, the property would be sold; all as provided in sections 3764 and 3765, Political Code. While this notice was, as required by section 3766, published for three successive weeks, to wit, on the 5th, 12th, and 19th days of June, 1918, it specified July 8, 1918, as the day on which the sale would be made. It thus appears that the notice fixed the day of sale 33 days from the date of the first publication of the notice, which was in direct violation of the provisions of section 3767, Political Code, which provides that the day of sale must be not less than 21 nor more than 28 days from the time of the first publication of the notice. In order to divest an owner of his property by a sale thereof for taxes the law requires a strict compliance with every statutory provision enacted for his benefit. The Legislature has seen fit to provide that such sales shall be made within a specified time after the first publication of the notice, and there can be no deviation from the rule which requires a strict compliance with such a provision. The rule is so well settled and of such universal application that it would seem an idle act to cite authorities in support thereof. However, see Los Angeles Olive Growers' Association v. Pozzi, 167 Cal. 454, 140 Pac. 581; Holland v. Hotchkiss, 162 Cal. 366, 123 Pac. 258, L. R. A. 1915C, 492; Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 Pac. 936; Warden v. Broome, 9 Cal. App. 172, 98 Pac. 252. It follows that since the sale of the property was made more than 28 days from the time of the first publication of the notice, plaintiff by reason thereof acquired no title to the property, and that the deed so executed to him by the tax collector is void.

[3] As to the second point, it appears that at the time of the sale of the property there was due and unpaid to the state on account of taxes for the subsequent years, including penalties, interest, and costs, the sum of $104.14, which plaintiff, as a precedent condition of receiving the deed on account of his purchase, paid, thus, as provided in section 3771, Political Code, redeeming the property from taxes the validity of which is conceded. Notwithstanding such redemption of the property so made by plaintiff, the court, in response to defendants' prayer for affirmative relief based upon the allegations of their answer, rendered judgment, not only denying plaintiff's asserted title to the property, but declaring the same was vested in defendants, whose title as against plaintiff was quieted, all without requiring defendants, as a condition of granting the relief sought, to reimburse plaintiff for the money expended in redeeming the property from delinquent taxes. In so doing the court erred. As said in Moyer v. Wilson, 166 Cal. 261, 135 Pac. 1125:

"Where the purchaser under a sale which is not effective to pass title proceeds against the owner, the latter may stand upon his strict legal rights, and defend his title without tendering payment of any tax."

Defendants, however, did not restrict themselves merely to a defense of their title, but, as they were entitled to do, by answer asserted title in themselves, and prayed for affirmative relief, thus bringing themselves within the rule announced in Holland v. Hotchkiss, 162 Cal. 366, 123 Pac. 258, L. R. A. 1915C, 492, which is that—

"Where the owner comes into equity asking equitable relief to remove or cancel a tax deed or sale as a cloud upon his title, or to obtain a judgment which, in effect, will invalidate such sale or deed, the court should refuse any relief except upon the condition that he first repay to the tax purchaser, * * * the taxes, penalties, interest, and costs justly chargeable upon the land and which the purchaser has paid at the sale, or afterward upon the faith of it, with legal interest from the time of such payment, less rents received, if any, if the purchaser has been in possession."

This rule is applicable to actions instituted under section 738, Code of Civil Procedure (Holland v. Hotchkiss, supra), where each party may be an affirmative actor in his own right (Klumpke v. Henley, 24 Cal. App. 35, 140 Pac. 289, 313). While in the instant case defendants did not initiate the suit, but were haled into court by plaintiff in an action to quiet his asserted title, nevertheless defendants, by seeking affirmative relief instead of confining themselves merely to defensive matter, come within the rule thus laid down as fully as though they had in the first instance brought an action under the provisions of section 738 to have their title quieted and plaintiff enjoined from asserting any interest in the land.

Our conclusion, therefore, is that, while the sale made to plaintiff was void by reason of the irregularity in the publication of no-

tice thereof, the defendants were not entitled to judgment quieting their title and enjoining plaintiff from asserting an interest in the land, save and except upon reimbursing plaintiff for the amounts paid by him in redeeming the property from delinquent taxes, as to the validity of which no attack is made.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

49 Cal. App. 300

RIEGEL v. WOLLENSHLAGER et ux. (Civ. 3220.)

(District Court of Appeal, Second District, Division 2, California. Sept. 16, 1920.)

1. Bills and notes ⟸92(4)—Inadequacy of consideration as defense to note.

$19,400 was sufficient consideration for a note for $20,000, in the absence of fraud, undue influence, or a definite promise to advance the full sum.

2. Contracts ⟸53—Inadequacy of consideration no defense.

Inadequacy of consideration is no defense to the enforcement of a contract voluntarily made.

3. Pleading ⟸8(4)—Allegation of failure of consideration a conclusion of law.

Mere statement in an action on a note that the consideration failed was a conclusion of law.

4. Bills and notes ⟸125—Note and mortgage providing for 7 per cent. interest bears interest from start.

A note and mortgage providing for interest at 7 per cent. bears interest from execution, although Civ. Code, § 1917, provides that, unless there is an express contract in writing fixing a "different rate," interest is payable on all moneys at the rate of 7 per cent. per annum "after they become due."

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Andrew Riegel against John Wollenshlager and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

William H. Fuller, of Los Angeles, for appellants.

Frank L. Stobbs and Hyman Schwartz, both of Los Angeles, for respondent.

WELLER, J. The complaint seeks the foreclosure of a mortgage given to secure the payment of a note for the sum of $20,000, dated August 1, 1914, due in three years, with interest at the rate of 7 per cent. per annum from date, payable quarterly, and, if not so paid, to be compounded.

The answer alleges that the only consideration received by defendants for the execution of the note was $19,400, and that the consideration for the note in any greater sum has wholly failed. As a further defense, defendants allege that under the provisions of section 1917 of the Civil Code plaintiff is not entitled to interest prior to the maturity of the note, and that there had been paid prior to the commencement of the suit the sum of $3,150, which should be credited on the $19,400, and judgment entered for the principal sum of $16,250, with interest from the date the note fell due by its terms. By way of counterclaim, defendants aver that they borrowed the sum of $19,400 and executed their note for $20,000; that they have paid $3,150, which should be offset against the $19,400 borrowed; and pray that $3,950 shall be deducted from the amount found due on the note. There is nothing to show how appellants arrive at the figure $3,950.

The court found that the note was executed for $20,000 and interest, as alleged, and secured by the mortgage set out in the complaint; that the sum of $3,198.96, and no more, had been paid; that the full amount of the principal, with interest as provided in the note, less the sum so credited, was due from the defendants; and ordered a decree accordingly.

Appellants specify three points upon which they rely: (1) That the court failed to find on material issues; (2) error in refusing to admit testimony regarding the amount of the consideration for the note; and (3) mistake in date from which interest should be computed.

[1-3] **1.** It is contended that the court should have made specific findings upon the issues presented as to the alleged partial failure of consideration, and as to the payment of $3,150 on the principal of the note, as set forth in the so-called counterclaim. The allegation in the answer which forms the basis of this contention is both ambiguous and insufficient. It avers that the only consideration for the execution of the note was $19,400, which is $600 less than the principal sum mentioned, or, in other words, that there was no consideration to the extent of $600. In the same sentence it is alleged that the consideration failed to the extent of the same sum of $600. These averments are not sufficient to tender an issue. If plaintiff loaned defendants $19,400, it was a sufficient consideration for the note for $20,000, in the absence of fraud, undue influence, or a definite promise to advance the full sum, and there is no allegation of any of these elements. Inadequacy of consideration is no defense to the enforcement of a contract voluntarily made. The answer is also utterly lacking in the statement of any facts, occurring after the execution of the note, showing a failure of consideration; but the pleader contents himself with the mere statement that the con-

sideration failed—a conclusion of law. Gushee v. Leavitt, 5 Cal. 160, 63 Am. Dec. 116.

2. Defendant John Wollenshlager testified that he had paid $3,198.96 as interest, but offered no proof of any other or further payment, or any showing in support of his counterclaim. The findings gave credit for the full amount he claimed to have paid. The rulings of which appellants complain relate to the admission of testimony regarding the amount received by defendants at the time of the execution of the note and mortgage. Apparently the purpose of this testimony was to prove that the plaintiff deducted the sum of $600 from the face of the note as a commission for making the loan, and thus attempt to show lack or failure of consideration. As we have shown, there was no sufficient issue tendered on this matter, and the questions were therefore immaterial.

[4] 3. Appellants cite section 1917 of the Civil Code as authority for their claim that interest can be allowed only from maturity, because the rate fixed by the note is 7 per cent. This is based upon the wording of the section, which provides that, unless there is an express contract in writing fixing a different rate, interest is payable on all moneys at the rate of 7 per cent. per annum after they become due. The argument is novel and startling. Counsel concedes that, if any other rate is fixed, the agreement controls; but, simply because the parties chose the legal rate, the lender must be denied interest on his money for three years, and the borrower enjoys its use without compensation. We do not so construe the language. The phrase "on moneys lent" is not modified by the preceding portion of the section referring to maturity, but is an independent clause, specifying the rate only in the absence of provision in the contract. Section 1914 of the Civil Code provides that a loan of money is presumed to be made on interest, and by section 1918 the parties can agree in writing for the payment of any rate, which shall be allowed according to the terms of the agreement.

There is no merit in any of the points raised by appellants.

Judgment affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

49 Cal. App. 257

LUCID v. CITIZENS' INV. CO. (Civ. 2161.)

(District Court of Appeal, Third District, California. Sept. 13, 1920. Rehearing Denied Oct. 13, 1920.)

Landlord and tenant ⊜167(7)—Landlord not liable for injury to tenant's customer, falling through trapdoor left open by tenant.

A trapdoor in the floor of a leased store, not being so constructed that it was a nuisance in itself, but being such by the manner of its use by the tenant, being left open, the landlord is not liable for injury to a customer of the tenant, injured in falling through it when so left open.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by F. J. Lucid against the Citizens' Investment Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Gordon A. Stewart, of Stockton, for appellant.

Nutter, Hancock & Rutherford, of Stockton, for respondent.

HART, J. This is an action for damages for personal injuries, and the appeal is by the plaintiff from the judgment of dismissal of the action entered after and upon the order sustaining the demurrer to the second amended complaint, the plaintiff having failed or refused further to amend, notwithstanding that he was by the court given leave to amend within 10 days from and after the making of the order sustaining the demurrer. The salient facts stated in the complaint may be given in a summary fashion as follows:

That the defendant, a corporation, was and had been for a long period of time the owner of a certain building in the city of Stockton, and that the ground floor of said building was subdivided into storerooms and the same rented to tenants engaged in various lines of business; that one of said storerooms was rented by the defendant for a period of 5 years, at a stated and stipulated rental, to H. L. Anthony and Frank Coster to conduct therein a retail liquor business; that prior to the time Anthony and Coster entered into the possession of said premises the defendant "carelessly and negligently cut a hole in the floor of said premises of the dimensions of about 7 feet in length and about 3 feet in width, and carelessly and negligently constructed a trap door of the dimensions of said hole, and so constructed it as to fit in said hole and to lie even with the floor when closed." This door, so the complaint proceeds, weighed about 40 pounds and was opened by lifting the same upon two hinges attached to one side of said door, and the latter could be opened from above by means of a handhold placed upon the opposite side of said door, "but in the ordinary and reasonable use of said door, the same could not be opened from above." The use to which said "hole" in the floor was to be and in fact is put is to enable the tenants of the storeroom to enter the basement thereof from the saloon to get merchandise stored in said basement, there being a stairway (also constructed by the defendant)

leading from the trapdoor to the basement, "That the defendant carelessly and negligently, in the construction of said trapdoor, omitted and neglected to provide any guard about said trapdoor," and carelessly and negligently constructed said trapdoor in such a manner that in the operation thereof said trapdoor did not of itself and by the manner of its construction create in itself and by its use a guard or protection to a person in said premises from falling through said hole into said basement, "That in the ordinary and reasonable use of said door, its use left the hole unguarded and unprotected, and created thereby a dangerous nuisance, in that said use of said door invited hurt and injury to any one in or about said premises."

It is alleged that the defendant well knew, at the time it constructed said hole in the floor and said trapdoor, the purpose for which the said premises were to be used by the said tenants, and that the public would be permitted and privileged to enter into and upon said premises to trade and deal with said tenants, and that said tenants would be dependent upon such patronage to pay the defendant the rent provided for by the lease whereby said premises were demised to said tenants; that defendant knew, when it constructed said trapdoor, etc., that said tenants, in the course of their business, would be required to use said trapdoor and entrance into the basement of said premises, and that said door would be left open while in use, and that during the times of its use divers persons would be in and about said saloon. It is then alleged that on or about the 10th day of February, 1918, the plaintiff, with the consent and permission of said tenants, then in the said saloon and that portion of the said building where said trapdoor or hatchway existed and was maintained as above described, without any fault or carelessness on his part, he then being unaware of the existence of said trapdoor and hole, "and said trapdoor or hatchway being then and there open for the use and purpose for which said trapdoor was constructed by defendant, thereby exposing an open space in said floor, and the said opening being without any guard or railing about the same," fell through said opening, striking with great force and violence upon the stairway leading into the basement from said trapdoor, thereby sustaining "a comminuted fracture of the right tibia and fibula near the ankle, a transverse fracture of the right arm, near the shoulder, a cut upon his head, and bruises about his body," etc.

The established criterion by which it is to be determined whether the landlord or owner of demised premises is legally liable to a party injured on such premises through a nuisance existing thereon while they are in the exclusive occupancy and control of a tenant is, in general terms, stated in Kalis v. Shattuck, 69 Cal. 593, 597, 11 Pac. 346, 348 (58 Am. Rep. 568), quoting from Gandy v. Jubber, 5 Best & S. 73, 485, as follows:

"The nuisance must be one which is in its very essence and nature a nuisance at the time of the letting, and not something which is capable of being thereafter rendered a nuisance by the tenant. * * * The nuisance must be, if I may so term it, a normal one."

In other words, or in the language of other cases, the landlord is not liable for the consequences of an accident to a party sustained through a nuisance maintained on demised premises unless:

"(1) The nuisance occasioning the injury existed at the time the premises were demised; or (2) the structure was in such a condition that it would be likely to become a nuisance, in the ordinary and reasonable use of the same for the purpose for which it was constructed and let, and the landlord failed to repair it (Jessen v. Sweigert, 66 Cal. 182; Rector v. Buckhart, 3 Hill, 193; Mullen v. St. John, 57 N. Y. 567; Hussey v. Ryan, 11 Cent. Rep. 626; Wood on Nuisances, §§ 295, 676; Wood on Landlord and Tenant, 918); or (3) the landlord authorized or permitted the act which caused it to become a nuisance occasioning the injury." Kalis v. Shattuck, supra; Rider v. Clark, 132 Cal. 382, 387, 64 Pac. 564.

The rule is well stated in the footnotes in 92 Am. St. Rep. 524, as follows:

"It is not sufficient to render a lessor liable that the premises leased by him are capable of a use which will prove a nuisance to strangers. 'If a landlord demise premises which are not in themselves a nuisance, but may or may not become such, according to the manner in which they are used by the tenant, the landlord will not be liable for a nuisance created on the premises by the tenant. He is not responsible for enabling the tenant to commit a nuisance if the latter should think proper to do so [citing Owings v. Junes, 9 Md. 108; Rich v. Basterfield, 4 Com. B. 805, 56 Eng. Com. L. 782]. In such a case in may be said, in one sense, that the landlord permitted the tenant to create the nuisance, but not in such a sense as to render him liable.' Maenner v. Carroll, 46 Md. 193. The landlord will not be liable for the use of the premises in such a way as to do harm, merely because there was a manifest possibility of their being used in such a way." Clifford v. Atlantic Cotton Mills, 146 Mass. 47, 15 N. E. 84, 4 Am. St. Rep. 279.

See, also, Joyce v. Martin, 15 R. I. 558, 10 Atl. 620; Schroeck v. Reiss, 46 App. Div. 502, 61 N. Y. Supp. 1054; Opper v. Hellinger, 116 App. Div. 261, 101 N. Y. Supp. 616; Duffin v. Dawson, 211 Pa. 593, 61 Atl. 76; Frischberg v. Hurter, 173 Mass. 22, 52 N. E. 1086.

The case of Damrieyer et al. v. Vorhis, 63 Ind. App. 427, 113 N. E. 764, is very similar in its facts to the instant case. There the action was for damages for personal in-

juries received by the plaintiff by falling into a cellarway leading from the sidewalk to a basement of a building owned by the defendants (appellants) and under lease by one Stark. The charge in the complaint was that said owners "negligently failed to provide any guard or light around said opening, and that a guard could have been erected to protect pedestrians against injury when said cellar doors were open; that said Stark opened said doors on said night [the night on which the injuries complained of were sustained, as above stated] and negligently failed to provide any guard or danger signals, and while so open appellee fell into said opening and down said stairway" and received the injuries for which he sued. The defendants (owners of the building) demurred to the complaint for want of facts, but the demurrer was overruled, and a trial resulted in a verdict for the plaintiff as against the said defendants. The theory of the action against the owners of the premises was that they were negligent in failing to provide a guard or light around the opening or cellarway, when the doors were raised or open. The Appellate Court of Indiana reversed the case, holding that the demurrer to the complaint should have been sustained, but, it having been overruled, the trial court should have granted the defendants a new trial, and thereupon allowed the demurrer. Among other things, the court, in its opinion, said:

"Since it is not contended otherwise than that the cellarway and doors were properly constructed, were in good condition, and that the walk over the doors was safe when the doors were closed, during all the time appellants owned the building, it cannot be held that the premises constituted a nuisance per se, but became so by the act of the tenant in leaving the doors open. Under the facts alleged in the complaint, the question of duty to repair and negligence in failing to repair does not arise, but the only question is as to the duty to guard the opening when open. This duty, we must hold, devolved upon the tenant."

In Joyce v. Martin, supra, it is said:

"When property is demised, and at the time of the demise is not a nuisance, and becomes so only by the act of the tenant while in his possession, and injury happens during such possession, the owner is not liable."

See, also, Adams v. Fletcher, 17 R. I. 137, 20 Atl. 263, 33 Am. St. Rep. 859; Henson v. Beckwith, 20 R. I. 165, 37 Atl. 702, 38 L. R. A. 716, 78 Am. St. Rep. 847.

The present case must be decided according to the principles established by the above cases, and, so examining the averments of the complaint here, the conclusion seems irresistible that the plaintiff has wholly failed to state a cause of action for the relief demanded as against the lessor or owner of the premises in question. Nowhere is it alleged that the doors over the hatchway were not properly constructed, or were not in good condition, and therefore it is not made to appear that the hatchway was a nuisance per se. To the contrary, the complaint itself shows that the hatchway could become a nuisance, and hazardous to life and limb, only by the manner of its use. In other words, it is clear from the averments of the complaint that, in the ordinary and usual use to which it might be put for the purpose for which it was designed, the hatchway could become a nuisance and dangerous to customers of the tenants or other persons entering their establishment only by the negligent manner in which it might be used by the tenants. It follows that the owner of the premises owed no duty to the plaintiff with respect to the hatchway. If by its negligent use the plaintiff was injured, the tenants in possession of the property at the time the injuries were received were solely to blame and culpable, for, the hatchway in and of itself not being a nuisance, the duty was cast upon them to so use it as that no one invited by them to enter in and upon the premises to transact business with them was injured thereby.

Of course, as the cases above referred to plainly point out, if, at the time the lease was made and the tenants entered into the possession and occupancy of the premises, the hatchway was so defectively constructed that the reasonable, ordinary, and expected use thereof must result in a nuisance, the landlord is chargeable with the consequences of any accident to person or property occasioned thereby. But, as we have shown, the complaint makes out no such case. The conclusion thus arrived at is decisive of this appeal; hence it is not necessary to notice the point made by the respondent that the complaint disclosed on the part of the plaintiff contributory negligence, which proximately caused the injuries of which he complains.

The judgment is affirmed.

We concur: NICOL, Presiding Judge pro tem.; BURNETT, J.

49 Cal. App. 307

HUTCHINSON CO. v. MARSHALL. (Civ. 3508.)

(District Court of Appeal, First District, Division 1, California. Sept. 16, 1920.)

Trial ⊂⊃390—Delay in signing findings held immaterial.

The provisions of Code Civ. Proc. § 632, requiring findings to be filed within 30 days after a submission of the cause, is only directory, and where no detriment is shown by reason of a delay of more than 30 days, nor any abuse of discretion on the part of the trial court, judgment entered on the findings finally signed will not be reversed by reason of the delay.

Appeal from Superior Court, Alameda County; W. M. Conley, Judge.

Action by the Hutchinson Company against Charles S. Marshall. Judgment for plaintiff, and defendant appeals. Affirmed.

Howard Harron, of San Francisco, for appellant.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

RICHARDS, J. This action was commenced to foreclose a street assessment lien. Upon the trial of the cause on July 7, 1917, the plaintiff introduced evidence to sustain the material allegations of its complaint; the defendant introduced no evidence, and accordingly at the close of the trial the court announced that judgment would be given in the plaintiff's favor. Findings, not having been waived, were to be thereafter prepared and submitted to the court. Nothing further was done in the cause, so far as the record discloses, until December 6, 1918, when findings were presented to the trial judge, and were signed a few days later over the objection of the defendant, and, judgment having been entered thereon, defendant has appealed from the judgment.

The only error of law which the appellant urges upon this appeal is that the court erred in signing findings in the cause after the lapse of time between the trial and the date of their presentation; the appellant contending that the court had lost jurisdiction over the case. There is no merit in this contention. The provisions of section 632 of the Code of Civil Procedure, requiring findings to be filed within 30 days after the submission of the cause, has been held to be directory. Eddy v. American Amusement Co., 21 Cal. App. 487, 132 Pac. 83; Kepfler v. Kepfler, 134 Cal. 205, 66 Pac. 208. This being so, and the appellant having failed to show any detriment by reason of the delay or any abuse of discretion on the part of the trial court, or any error committed by said court, either upon the trial of the cause of in making the findings therein, which it finally signed, we hold that this appeal is without merit, and the judgment is therefore affirmed.

We concur: WASTE, P. J.; KINSELL, Judge pro tem.

49 Cal. App. 275

PEOPLE v. MAZZURCO. (Cr. 905.)

(District Court of Appeal, First District, Division 1, California. Sept. 14, 1920.)

1. Criminal law ⊂⊃742(1)—Credibility of prosecutrix for the jury.

In prosecution for rape, the degree of credibility to be given to the testimony of the prosecutrix and the weight to be accorded to such testimony was for the jury.

2. Criminal law ⊂⊃427(5)—Evidence held to prove conspiracy.

In prosecution for rape, evidence *held* to establish the existence of a conspiracy to force, entice, or seduce prosecutrix into a marriage with a coconspirator of defendant, of which the rape was a part.

3. Criminal law ⊂⊃423(1)—Evidence of statements and acts of all parties to conspiracy admissible against coconspirator.

Where the evidence is sufficient to prove a conspiracy, all statements, acts, and declarations made by any of the parties, pending the commission of the crime, and looking toward its consummation, is competent against each and every conspirator.

4. Criminal law ⊂⊃424(1)—Admissions of conspirators not admissible against coconspirator after termination of conspiracy.

Whenever the objective of a conspiracy is at the end, the conspiracy has terminated, and the crime has been committed, and the admissions of coconspirators are not admissible against others.

5. Criminal law ⊂⊃423(9), 736(1)—Conspirator's declaration held admissible; whether conspiracy had terminated following commission of offense held for jury.

In prosecution for rape, where there was evidence proving existence of conspiracy to force prosecutrix into marriage with defendant's coconspirator, of which the commission of such crime was a part, evidence as to statements of coconspirators to prosecutrix in defendant's absence after the commission of the crime, in which they urged her to marry such coconspirator, *held* admissible as against contention that conspiracy had terminated and the question of whether conspiracy had terminated or whether such statements were pursuant thereto was for the jury.

6. Witnesses ⊂⊃387—Refusal to permit cross-examination of prosecutrix as to whether she had given similar testimony on trial of coconspirator held error.

In prosecution for a crime, in which evidence established existence of conspiracy refusal to permit attorney for defendant, after quoting from her testimony on direct exami-

nation, to cross-examine prosecutrix as to whether she had similarly testified at the examination or trial of a coconspirator, on objection that there was no foundation laid for impeachment, *held* error, since such questions were not by way of impeachment, but were asked to test the credibility of the witness and her attitude and fairness toward defendant.

7. Criminal law ⊜1170½(5)—Curtailment of cross-examination held harmless.

In prosecution for crime, refusal to permit counsel for defendant to cross-examine prosecutrix as to whether she had given similar testimony on trial of a coconspirator *held* harmless, under Const. art. 6, § 4½, where the evidence was amply sufficient to establish defendant's guilt, and where there was no showing of prejudice.

8. Criminal law ⊜1163(1)—Error must be affirmatively shown to have been harmful.

Under Const. art. 6, § 4½, injury is not presumed from error, but must affirmatively appear after an examination of the entire case, including the evidence, or from the nature of the error itself.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Frank Mazzurco was convicted of rape, and from a judgment of conviction and from order denying motion for new trial, he appeals. Affirmed.

W. E. Foley and C. D. Cavallero, both of San Jose, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

WASTE, P. J. The appellant was charged with the crime of rape, in that he assisted and abetted one Salvador Ciulla, in the commission of an act of sexual intercourse, accomplished by said Ciulla, with force and violence upon Mary Schiro. He was convicted, and from an order denying his motion for a new trial, and from the judgment of conviction and sentence, he appeals.

According to the testimony of the prosecutrix, a young Italian woman, early on the morning of April 7, 1919, while she was proceeding to her work in the city of San Jose, she was seized and forcibly placed in an automobile by three men, Salvador Ciulla, Sam Mazzurco, and one Carcuffa. She was conveyed to the ranch of appellant some six miles from the scene of the kidnapping. When she arrived at the house she was taken inside by the three men already named, assisted by Mona Mazzurco, Mrs. Frank Mazzurco, and the appellant. She was dragged by these people into a bedroom where she was left with Ciulla. Once or twice after that all the parties came into the bedroom, and the appellant, together with the others assisted in forcibly taking off her clothes. She was left with Ciulla, the door being closed and locked from the outside. Ciulla then forcibly committed the acts of sexual intercourse upon her.

[1] The appellant devotes a large portion of his argument to a discussion of the evidence of the complaining witness, which he claims was of a "very weak character." The question of what degree of credibility should be given to the statements of the prosecutrix, while on the stand, and the weight to be accorded to her testimony, was one addressed solely to the discretion, and consideration of the jurors. People v. Compton, 123 Cal. 403, 407, 56 Pac. 44; People v. Durrant, 116 Cal. 179, 200, 48 Pac. 75.

The defendant attempted to establish an alibi, as part of his defense. Three witnesses, one a neighboring landowner and the other two his employés, testified as to seeing the defendant at work in his orchard at various times during the morning upon which the alleged rape was perpetrated. Appellant argues from an analysis of their testimony that it was impossible for him to have been present in the house, and to have assisted in the commission of the acts testified to by the complaining witness. But the jurors may have disbelieved the testimony tending to prove an alibi, or, what is more probable, may have reached the conclusion that, either the witnesses for the defense may have been mistaken as to the hours during which they saw the defendant at work in the orchard, or that possibly he might have absented himself from his employment long enough to have taken part in carrying the girl into the house and in removing her clothes as she testified. People v. Sears, 119 Cal. 267, 270, 51 Pac. 325; People v. Shehadey, 12 Cal. App. 648, 657, 108 Pac. 146.

[2, 3] Over the objection of the defendant, the court admitted the testimony of the prosecutrix, and several other witnesses, as to what occurred when she was forcibly seized in San Jose, and carried in the automobile to the appellant's ranch. The defendant was not present and took no part in the actual kidnapping. He contends, therefore, that the evidence should not have been admitted. Ciulla was madly in love with the Schiro girl, and sought to marry her. She rejected his proposal. There is evidence tending to show that a conspiracy existed on the part of Ciulla, Ciulla's sister, Mrs. Frank Mazzurco, and her husband, Frank Mazzurco, this defendant and appellant, the latter's brother, Sam Mazzurco, his wife, Mrs. Sam Mazzurco, and one Carcuffa, to force, entice, or seduce the complaining witness, Mary Schiro, into a marriage with Ciulla. From all that transpired it appears that raping the girl, by Ciulla, was undoubtedly a part of this plan. It was in pursuance of this scheme that the girl was kidnapped, on her way to work, in the city of San Jose, by Ciulla, Sam Mazzurco, and Carcuffa, and car-

ried in the automobile to the home of this appellant. There, as testified to by the prosecutrix, she was forced to undergo the indignities already described, the appellant taking part in the acts of the ill treatment to which she was subjected. The evidence as a whole if believed, was amply sufficient to establish such conspiracy. That being the fact, all statements, acts, and declarations made by any of the parties pending the commission of the crime, looking towards its consummation, were competent evidence against each and every conspirator. People v. Lovren, 119 Cal. 88, 91, 51 Pac. 22, 638; People v. Holmes, 118 Cal. 444, 456, 50 Pac. 675; People v. Ciulla, 187 Pac. 46.

[4, 5] The court admitted, over the objection of the defendant, testimony of the prosecutrix that after Ciulla had finished the acts of sexual intercourse with her, she was allowed by him to leave the bedroom, and go into the kitchen of the house. Several of the conspirators were there, and when she cried and asked for her parents she was told that she should now be ashamed to have them see her. Mrs. Mona Mazzurco then had a conversation with the girl, the purport of which was that as Ciulla had accomplished his purpose with her, she was disgraced, no other man would ever care for her, or want to marry her, and she should marry Ciulla. The defendant was not present during these conversations, and now contends that the admission of this evidence was error, as being hearsay, not connected with the defendant, and a narration of something that happened after the commission of the rape. Whenever the objective of a conspiracy, in which several persons participate, is at an end, the conspiracy terminated, and the crime has been committed, the admissions of coconspirators are not admissible against others (People v. Oldham, 111 Cal. 648, 653, 44 Pac. 312), but the facts and circumstances here raised a question for the jury to decide as to when the conspiracy, if any there was, terminated, and whether the raping of the prosecutrix by Ciulla was not merely a part of the design, and one advance in the attempt to force her to marry him. People v. Holmes, supra, 118 Cal. 459, 50 Pac. 675. There were apparently three well-defined steps in the method of procedure followed by the defendant and his associates. The first was kidnapping the girl. The second was putting her in Ciulla's embraces. The third, the attempted ingenious consummation of the plan, was to break down the girl's resistance, while she was virtually a prisoner in appellant's house, and laboring under the mental and physical distress caused by the treatment she had undergone, by representing to her that she was forever shamed and disgraced, in the sight of her parents, and the whole world, and could only save herself from her humiliation by marrying Ciulla.

The appellant united his own persuasive efforts with those of the other conspirators, after the rape, and following the conversation the girl had with Mona Mazzurco. In his talks with her, he tried to impress her with "the chances" she was throwing away if she rejected Ciulla. He also attempted to force the girl into writing untrue statements explaining her absence from work, to be delivered to her parents and sister. The further progress of the conspiracy was abruptly terminated by the timely arrival at appellant's ranch of the girl's brother, and a deputy sheriff, who rescued the prosecutrix from her pitiful predicament before any further indignities were suffered by her. The testimony as to the conversations immediately after the rape was therefore properly admitted.

[6] Appellant complains that the court placed an undue restriction upon his examination of the prosecutrix. It appears that the girl testified upon the preliminary examination and at the trial of Ciulla, who was convicted of two offenses, kidnapping and rape. People v. Ciulla, 187 Pac. 46, and 187 Pac. 49. It was the contention of the appellant that at the trial of this case, on direct examination, she gave testimany more explicitly connecting him with the affair, and testified to matters relating to him, not referred to by her in her testimony at the trial of Ciulla. On cross-examination, and for the purpose of getting before the jury the fact that the girl had not before made these statements, counsel for appellant started to read to her at some length her testimony given upon the Ciulla examination and trial. Upon being checked by the court, counsel then repeated to her various portions of the testimony given on her direct examination at the trial of appellant, and asked her if she so testified at the examination or trial of Ciulla. The court sustained the objection of the district attorney, upon the ground that the questions were incompetent, irrelevant, and immaterial in their nature, and that proper foundation had not been laid, to wit, the production and presentation to the witness of a transcript of her previous testimony, showing she had so testified. For the obvious reason that no such record existed, the appellant could not comply with the court's demand. There was no foundation for this objection and ruling. It was not contended that the witness had so testified. On the contrary, the cross-examination was to the point that she had not, and to elicit the reason why she had not, and an explanation of her present testimony. The questions were not by way of impeachment, but were more to test the credibility of the witness, and her attitude and fairness toward this defendant. Had the answers been allowed, the explanation of the witness might have been full, complete, and satisfactory. She might, for instance, have said that she was not interrogated, on the previous occasions, upon the subject at all.

At most the questions were but preliminary in their nature, and only as the witness answered, and depending upon the character of her answers, might questions by way of direct impeachment have followed. The rulings of the court constituted an unwarranted curtailment of legitimate cross-examination. People v. Jones, 160 Cal. 358, 365, 117 Pac. 176; People v. Hart, 153 Cal. 261, 266, 94 Pac. 1042.

[7, 8] Since the convictions in the two cases last cited were set aside, and the judgments reversed upon the ground of prejudicial error in unduly restricting cross-examination, section 4½ of article 6 of the state Constitution has been adopted. That section abrogates the old rule that prejudice is presumed from any error of law. People v. O'Bryan, 165 Cal. 55, 65, 130 Pac. 1042. It is no longer the case that injury is presumed from error; the injury must appear affirmatively to the mind of the court after an examination of the entire cause, including the evidence, or from the nature of the error itself. Vallejo, etc., R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 554, 147 Pac. 238. Unless from such examination it affirmatively appears that a substantial injury, as well as error, has resulted, the judgment must be sustained. People v. Merritt, 18 Cal. App. 58, 65, 122 Pac. 839, 844. Except in the instances we are now considering, no error incumbers the record in this cause. Except, also, in those particulars, the defendant was granted a very wide latitude in his cross-examination of the complaining witness. In view of the evidence, which we must take into consideration, and which we think was amply sufficient to clearly establish the guilt of the defendant to the satisfaction of the jury, and to warrant the conviction of the defendant, we are unable to perceive how appellant was prejudicially injured by the ruling of the court.

The judgment is affirmed.

We concur: RICHARDS, J.; KINSELL, Judge pro tem.

49 Cal. App. 332

SMART v. SOSEY, Constable of Pasadena Tp. (Civ. 3286.)

(District Court of Appeal, Second District, Division 1, California. Sept. 20, 1920.)

1. Execution ⟹141, 149—Levy held not kept good where goods not inventoried nor properly cared for.

There is a failure to keep good a levy on goods in a store, thus letting in a chattel mortgage, made and recorded after the levy, but before such failure, the articles not being inventoried and marked or removed, but remaining in the store; the owner retaining possession of the key, and the person placed in charge as keeper by the officer staying in another part of the city at night.

2. Chattel mortgages ⟹32 — Consideration for mortgage of seized property shown.

Finding in action by chattel mortgagee against an officer for taking the chattels on execution against the mortgagor without paying plaintiff the amount of the mortgage debt, as required by Civ. Code, § 2969, that the mortgage given to plaintiff, who was financing the execution debtor, was without consideration, *held* not sustained by the evidence.

3. Execution ⟹129—Payment required by officer of mortgage given between levies.

The lien of plaintiff's chattel mortgage having attached after the first levy on the chattels of an execution which was not kept good, but before the second levy, there attached the duty, under Civ. Code, § 2969, of the officer before taking mortgaged chattels under execution to pay to the mortgagee the amount of the mortgage debt.

4. Execution ⟹471—Debtor shown owner of seized property.

In view of contract of plaintiff to furnish the execution debtor finances for his soap business on the security of his cans, etc., *held* that a finding in action for damages, that plaintiff was not the owner of cans levied on by a third person, which were ordered by plaintiff, billed to him, and at his direction delivered at the place of business of such debtor, was sustained by the evidence.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by E. W. Smart against J. C. Sosey, Constable of Pasadena Township. Judgment for defendant, and plaintiff appeals. Reversed.

M. B. Butler, of Pasadena, for appellant.

Wilton W. Webster, Leonard L. Riccardi, and Edward R. Milliken, all of Pasadena, for respondent.

CONREY, P. J. Action to recover damages for wrongful conversion of personal property. The first count of the complaint is based upon the alleged wrongful action of the defendant, as constable, in seizing and holding and selling under execution certain personal property which was subject to a chattel mortgage in favor of the plaintiff, without compliance with the provisions of section 2969 of the Civil Code, which is as follows:

"Before the property is so taken, the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest, or must deposit the amount thereof with the county clerk or treasurer, payable to the order of the mortgagee."

The second cause of action is for the wrongful taking of certain other personal property under the same execution, said per-

sonal property being alleged to be the property of the plaintiff. Judgment in favor of the defendant, from which judgment the plaintiff appeals.

On the 20th day of January, 1919, Charles I. Hixson entered into a contract with the plaintiff relating to the manufacture and sale by Hixson of certain merchandise to be known as Hixson's Hansoap. It was provided that Smart "agrees to furnish the necessary finances to establish and carry on the manufacture of Hixson's Hansoap, upon security on the stock of manufactured goods, raw materials, cans, cases, fixtures and equipment, as may be necessary from time to time." On the 21st day of April, 1919, the sums of money advanced by the plaintiff to Hixson amounted to $500, all of which, on the 25th day of April, remained unpaid. At 9 o'clock a. m. of April 25, 1919, the defendant, as constable and acting under an execution issued upon a judgment rendered in an action wherein the State Bank of Pasadena, a corporation, was plaintiff and Hixson was defendant, levied upon all of the property described in the complaint. At 18 minutes after 1 o'clock on that day, the chattel mortgage which had been that day executed by Hixson in favor of the plaintiff upon the personal property described in the first cause of action stated in the complaint herein, was duly recorded. At the time of the execution and recording of this mortgage the plaintiff had received information from Hixson that the execution levy had been made. It thus appears that at the time of recording of the mortgage the execution was in existence as a lien on Hixson's said property prior in right to the plaintiff's mortgage. The court found that all of the property attached was and remained in the custody of the defendant under and by virtue of said writ of execution from the time when said levy was made, except that on the 28th day of April, 1919, the plaintiff and Hixson wrongfully and fraudulently seized and carried away a certain Ford automobile, which was part of the attached property, against the will of the defendant and without his knowledge or consent, and that the 3d day of May, 1919, the defendant found said automobile at the place to which it had been taken by the plaintiff, and took and retained possession thereof until the time when he made sale of the property seized by him under the execution.

[1] The evidence is not sufficient to sustain the finding last above mentioned. The facts as shown by the evidence are undisputed. On making the levy on April 25th the defendant placed in charge as keeper one William Perdue. This was on Friday, April 25, at 9 o'clock a. m. The property was left in the place of business of Hixson, and the key remained in Hixson's possession. No other lock or key was placed on the premises by the defendant. On Saturday night the keeper slept in a downtown hotel in the city of Los Angeles, and on Sunday night in another downtown hotel in that city, each hotel being located in a part of the city different from that of Hixson's premises. On Monday evening at 7 o'clock, neither the defendant nor the keeper being present on the premises, the plaintiff took the automobile away to another par of the city. On these facts we think it follows as a matter of law that the lien of the execution ceased to exist as against the plaintiff, or, at least, that it became subsequent and subject to the plaintiff's mortgage. On the 2d day of May the plaintiff served upon the defendant notice of his mortgage claim, and demanded that defendant pay the amount of the mortgage debt or release the property from execution. The nature of the possession and custody essential to the validity of an execution is indicated by the statement "that it shall be such a custody as to enable an officer to retain and assert his power and control over the property, and so that it cannot probably be withdrawn, or taken by another, without his knowing it." Freeman on Executions (3d Ed.) § 262. In the instant case, the absence of the keeper abandoned the property to the control of the debtor. The articles were not locked up, they were not inventoried or marked, or seasonably removed. Under these circumstances the levy could not have operated to defeat a subsequent execution. Dutertre v. Driard, 7 Cal. 549. The property could have been sold by Hixson to an innocent purchaser, and the title would have passed to the purchaser free from the lien of this execution. We see no reason why, under like conditions, an existing mortgage lien would not, by force of the abandonment of the execution, immediately acquire priority against it.

[2, 3] The court found that the mortgage was made without consideration, and with the sole intent and purpose on the part of both the mortgagor and mortgagee of hindering, delaying, and defrauding the creditors of Hixson, particularly the judgment creditor in whose favor said execution was issued. The evidence does not sustain this finding. We have mentioned the facts showing the actual existence of the indebtedness for which the mortgage was given. There is no evidence of insolvency of Hixson, nor of any fact which would interfere with his right to give or the right of plaintiff to receive the chattel mortgage which was executed to secure that indebtedness. The effect of the failure to keep good the levy of April 25th, followed by a new seizure of the property on April 29th and on May 3d, being times when the mortgage was an existing recorded lien, was such that it became the

duty of the defendant to comply with the provisions of section 2969 of the Civil Code.

[4] Appellant further contends with respect to his second cause of action that the court's finding, to the effect that the plaintiff was not the owner of nor entitled to the possession of the soap cans described in the second count of the complaint, is not sustained by the evidence. The evidence shows that those cans were ordered by the plaintiff, billed to him, and by his direction delivered at Hixson's place of business. Taking these facts in connection with the existing contract between the plaintiff and Hixson, we think that there was evidence sufficient to sustain the court's finding as to this matter. The contract is fairly open to the construction that materials of that kind, when purchased and delivered at said place of business, were by the parties intended to be and thus became the property of Hixson.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

49 Cal. App. 332

PACIFIC SEASIDE HOME FOR CHILDREN v. NEWBERT PROTECTION DIST. (Civ. 3211.)

(District Court of Appeal, Second District, Division 2, California. Sept. 20, 1920.)

Appeal and error ⟸70(2)—Order sustaining demurrer to amended complaint not appealable, in absence of judgment.

Order sustaining, without leave to amend, a general demurrer to amended complaint, no judgment being given, made, or entered, is not appealable under Code Civ. Proc. § 963.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by the Pacific Seaside Home for Children against the Newbert Protection District. From an order sustaining a demurrer to the complaint, plaintiff appeals. Appeal dismissed.

James Donovan, of Los Angeles, for appellant.

Clyde Bishop, of Santa Ana, for respondent.

THOMAS, J. In this action damages are sought for an alleged interference by the defendant with the natural flow of the waters of the Santa Ana river.

There was served and filed a third amended complaint, to which a general demurrer was interposed and sustained without leave to amend. No judgment was given, made, or entered. The attempted appeal is from the order sustaining the demurrer. Such an order, under our law, is not appealable. Section 963, Code Civ. Proc.

The attempted appeal is dismissed.

We concur: FINLAYSON, P. J.; WELLER, J.

49 Cal. App. 251

COTCHER v. BARTON. (Civ. 3351.)

(District Court of Appeal, Second District, Division 1, California. Sept. 11, 1920. Hearing Denied by Supreme Court Nov. 9, 1920.)

1. Limitation of actions ⟸143(6)—Mortgage a contract which can be extended by acknowledgment of grantee of mortgagor.

Notwithstanding Civ. Code, § 2911, declaring a lien extinguished by lapse of time within which an action can be brought on the principal obligation, the mortgaged property having been conveyed by the mortgagor, the note and mortgage are to be considered as separate contracts, so that, though action on the note be barred, the grantee, having in writing, signed by him, as required by Code Civ. Proc. § 360, acknowledged the existence of the mortgage, it is extended or continued for purpose of mere foreclosure action.

2. Limitation of actions ⟸146(3)—Grantee of mortgaged land held to have acknowledged contract, extending time for foreclosure.

The grantee of land on which was a mortgage, by continuing, after the statute was partly run, to send his checks to, and drawn in favor of, the mortgagee, and stating in letters transmitting them that they were in payment of the interest due on said dates on the mortgage, acknowledged in writing the existence of the contract creating the lien, within Code Civ. Proc. § 360.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by Harriet W. Cotcher against H. M. Barton. Judgment for plaintiff, and defendant appeals. Affirmed.

C. C. Haskell, of San Bernardino, for appellant.

C. E. Chapman and Halsey W. Allen, both of Redlands, for respondent.

SHAW, J. Action to foreclose a mortgage. Judgment went for plaintiff, from which defendant appeals.

It appears that on November 18, 1908, the Security Investment Company of Redlands made and delivered to plaintiff its promissory note in the sum of $10,000, payable three years after said date, and bearing interest at the rate specified therein, which interest by the terms of the note was payable quarterly. On the same date said Security Investment Company executed and delivered to plaintiff a mortgage on the real estate described therein to secure the payment of said note, which

mortgage was, on the 19th day of November, 1908, duly recorded in the recorder's office of San Bernardino county, wherein the real estate described was situated. Thereafter, on September 27, 1911, said Security Investment Company executed and delivered a grant deed, wherein no reference to the mortgage was made, conveying all its title to the property in question to defendant, who from thence up to August 18, 1915, at regular quarterly intervals paid to plaintiff the interest as called for by the terms of the note. No payments on account of accrued interest, however, were made subsequent to said last-mentioned date, nor were any payments ever at any time made on account of the principal of the note. The original complaint to foreclose the mortgage was filed on December 26, 1918, some seven years after the maturity of the note, which according to its terms, became due and payable November 18, 1911. On January 27, 1919, an amended complaint was filed wherein, in addition to the usual allegations found in complaints for the foreclosure of such liens, and for the purpose of meeting the bar of the statute of limitations, which otherwise might be invoked by demurrer upon such ground, it was alleged that defendant, H. M. Barton, on February 18, 1915, "acknowledged to the plaintiff the existence of said mortgage, and agreed to pay the same; and likewise on, to wit, May 17, 1915, and again on, to wit, August 18, 1915, said defendant acknowledged to the plaintiff the existence of said mortgage and promised to pay the same. Said acknowledgments were contained in several writings signed by said defendant, H. M. Barton"—all of which allegations were denied by defendant in his answer, in addition to which, as a defense to the cause of action, he alleged that the cause of action set up in the amended complaint was barred by the provisions of subdivision 1 of section 337, subdivision 4 of section 338, and by subdivision 1 of section 339, all of the Code of Civil Procedure. The court, upon the issue so joined by such allegations of the complaint and denial thereof, found:

"That on February 18, 1915, May 17, 1915, and August 18, 1915, the defendant, H. M. Barton, acknowledged to the plaintiff the existence of plaintiff's said mortgage, by writing letters on said dates, signed by defendant and addressed and mailed to plaintiff, Harriet W. Cotcher, and received by her, in each of which said letters defendant said that he inclosed check for $175 interest due on the mortgage on the Oxford Block, meaning the mortgage sued on in this action. That each of said letters contained a check for $175, signed by defendant, payable to plaintiff, and the same were received by plaintiff on or about said dates. That said letters and checks contained the only acknowledgment or promise to pay the note and mortgage sued on, made at any time by defendant."

Upon this probative finding and the evidence adduced in support thereof, the court, as an ultimate fact, found:

"That plaintiff's cause of action is not barred by the provisions of subdivision 1 of section 337, or of subdivision 4 of section 338, or of subdivision 1 of section 339 of the Code of Civil Procedure."

The sole contention of appellant is that the evidence is insufficient to support this finding.

[1] The action is merely to foreclose the lien of the mortgage. No personal judgment is sought, either against the maker of the note or against defendant, and since, as to the maker of the note, in the absence of any facts pleaded tolling the statute, or acts on its part constituting an acknowledgment or promise continuing the contract, as provided in section 360, Code of Civil Procedure, an action to recover on the principal obligation evidenced by the note was concededly barred when the complaint was filed, appellant, invoking the provisions of section 2911, Civil Code, which provides that "a lien is extinguished by the lapse of time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation," strenuously insists that, even though defendant did in writing signed by him acknowledge the existence of the mortgage, as alleged, an action to foreclose the mortgage given to secure its payment was likewise barred. In other words, if the holder of a note secured by a mortgage given by a third party allows the statute to run against the note, then and in such case no acknowledgment or promise made by the mortgagor, as provided in said section 360, could be deemed evidence of a continuing contract as to the mortgage. We cannot agree with appellant's contention. While the mortgage may be said to be incidental to the note, it is a distinct and separate contract. Particularly is this true where, as here, the mortgaged property has been conveyed and is held by one other than the maker of the note and mortgage. The note is a contract to pay money. While the mortgage is a contract creating a lien upon the real estate described therein to secure performance of an act, no personal obligation to perform the same is implied thereby. Section 2890, Civ. Code. Facts may exist which toll the statute as to the note, as where the maker is out of the state, but do not apply to a mortgagor who remains in the state. Wood v. Goodfellow, 43 Cal. 185, is to the effect that where third persons have acquired interests in mortgaged property subsequent to the mortgage, they may invoke the aid of the statute of limitations as against a mortgagee, even though the mortgagor, as between himself and the mortgagee, may have waived its protection. Other cases illustrative of the principle are: Ward v. Waterman, 85 Cal. 488, 507, 24 Pac. 930; Watt v. Wright, 66 Cal. 202, 5 Pac. 91; George v. Butler, 26 Wash. 456, 67 Pac. 263, 57 L. R. A. 396, 90 Am. St. Rep. 756; Gruner v. Westin, 66 Tex. 217, 18 S. W. 512; Sennin-

er v. Rowley, 138 Iowa, 617, 116 N. W. 695, 18 L. R. A. (N. S.) 223; Sparks v. Pico, 22 Fed. Cas. No. 13,211; Foster v. Bowles, 138 Cal. 347, 71 Pac. 494.

It follows, we think, that as subsequent grantee of the mortgagor defendant's relation to the mortgage was the same as though he in the first instance had executed the same on his own property, thereby creating a lien as security for the performance of the obligation of the Security Investment Company, maker of the note; that the promissory note evidencing the obligation to pay the money and the mortgage creating the lien must, under the circumstances, be deemed separate and distinct contracts, as to which the party to either contract, without affecting the right of the other to plead the statute, might continue or extend the contract to which he was a party by complying with the provisions of said section 360. While it has been frequently held, as provided in said section 2911, that the lien of a mortgage is extinguished when the principal obligation is barred, in none of them, so far as we are advised, was presented the question here involved, namely, the continuance or extension of the mortgage lien by written acknowledgment of its existence to a time beyond that when the principal obligation is barred. Hence we hold that such cases are not applicable to the facts here presented.

[2] Since we hold that, notwithstanding the note was barred, the mortgage was a contract which could be extended or continued, as provided in section 360, the next question is, Were the acts of defendant such as to justify the court in concluding that it was continued and the action thereon taken from the operation of the statute? The note was barred on November 18, 1915. It appears without contradiction that on the 18th days of February, May, and August, 1915, defendant transmitted to plaintiff his checks, drawn in her favor, for $175, stating in letters transmitting the same that they were in payment of the interest due on said dates upon the mortgage in question. The facts thus established are identical with those involved in Barron v. Kennedy, 17 Cal. 574, except in the latter case the action was against the mortgagor, there being no transfer of the property, and the payment of interest by checks was after the statute had fully run against the note and mortgage. In deciding this case, Chief Justice Field, speaking for the court, said:

"Part payment has always been held sufficient to take the debt, on which it is made, out of the statute. Unless accompanied at the time with qualifying declarations or acts on the part of the party making the payment, it is deemed an unequivocal admission of a subsisting contract or liability, from which a jury is justified and bound to infer a new promise. The authorities are uniform to this point. And it matters not whether the payment be either upon the principal or interest of the debt;" in support of which a number of cases are cited.

The language here used was quoted with approval in Concannon v. Smith, 134 Cal. 14, 66 Pac. 40, wherein it is further held that under section 360, supra, the "acknowledgment or promise" must be "contained in some writing signed by the party to be charged." It is not essential that the acknowledgment or promise should be formal, but it is sufficient if it shows the writer regards or treats the contract as subsisting, from which a promise may be implied. Manchester v. Braedner, 107 N. Y. 346, 14 N. E. 411, 1 Am. St. Rep. 829. If payments of interest so made after the statute has fully run are sufficient to renew the contract, in which case the action is upon the new promise (Rodgers v. Byers, 127 Cal. 528, 60 Pac. 42), it is equally true, we think, that where such payments are made prior to the running of the statute, they are likewise sufficient to constitute a waiver of the statute in so far as it has run, and to continue the contract within the statutory time from the date when such acknowledgment of the existence thereof was made (Dern v. Olsen, 18 Idaho, 358, 110 Pac. 164, L. R. A. 1915B, 1016, Ann. Cas. 1912A, 1), in which case the action is upon the original contract. Southern Pacific Co. v. Prosser, 122 Cal. 413, 55 Pac. 145. In our opinion, the defendant's checks and letters written to the plaintiff, wherein he stated they were in payment of the accrued interest upon the mortgage, were sufficient, within the meaning of section 360, Code of Civil Procedure, to constitute an acknowledgment in writing of the existence of the contract creating a lien upon his property, and interrupt the running of the statute in bar of the action, thus extending the time for a period of four years from the date of such acknowledgment.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

49 Cal. App. 296

SIMONS et al. v. PORTERFIELD et al.
(Civ. 3217.)

(District Court of Appeal, Second District, Division 2, California. Sept. 16, 1920. Hearing Denied by Supreme Court Nov. 15, 1920.)

1. **Courts ⟸99(1)—Supreme Court's denial of motion to dismiss appeal binds court of appeal.**

Denial by Supreme Court of motion to dismiss appeal because not taken in time is binding on the District Court of Appeal.

2. **Pledges ⟸24—Pledgee takes nonnegotiable note subject to all defenses of maker against payee.**

Trust deed nonnegotiable notes, executed by owner to contractor as consideration for performance of building contract, *held* subject to owner's offset against contractor for credits due owner by contractor on nonperformance of the contract, though in hands of contractor's pledgee, the pledgee under Code Civ. Proc. § 368, having taken notes subject to all defenses existing in favor of owner against contractor, notwithstanding pledgee's want of knowledge of equities.

3. **Bills and notes ⟸315—Caveat emptor applies to transfer of nonnegotiable instruments.**

The rule of caveat emptor applies to the transfer of nonnegotiable instruments.

4. **Appeal and error ⟸671(3)—Sufficiency of findings to support conclusions of law only question in absence of evidence.**

Where the evidence is not brought up on appeal, the question for the court's determination is whether the conclusions of law are supported by the findings of fact.

5. **Appeal and error ⟸907(2)—Sufficiency of evidence to sustain findings of fact presumed in absence of evidence.**

Where the evidence is not brought up on appeal, the facts found by the court cannot be challenged, and it will be presumed that the evidence was sufficient to sustain each finding, and that the issues were correctly decided.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Consolidated action by George W. Simons and others against W. L. Porterfield, Margaret S. Porterfield, and another. From judgment rendered, the two first named defendants appeal. Judgment modified.

Allen & Allen and W. S. Allen, all of Los Angeles, for appellants.

Perrry F. Backus, of Los Angeles, for respondent Allen.

WELLER, J. This is a consolidated action involving the relative rights of mortgagee, beneficiary under a trust deed, and mechanic's lien claimants.

The facts necessary to an understanding of the controversy are set forth in the findings of the court. It appears that defendant W. L. Porterfield was, on October 14, 1915, the owner of certain real property in Long Beach, and on that day he and his wife executed a mortgage on the property in favor of Harry E. Martin for the sum of $27,000, which mortgage was recorded October 20, 1915, and, on October 25, 1915, assigned by Martin to John Watry, the latter paying Martin the full amount of the note secured by the mortgage. Concurrently with the execution of the note and mortgage, Porterfield and wife also executed their note for $10,500, and secured payment thereof by a trust deed on the property, and on April 25, 1916, signed another note for $1,000, secured by the same trust deed. On October 15, 1915, Porterfield entered into an agreement with Martin, by the terms of which the latter undertook to construct a building upon the premises covered by the mortgage and trust deed, and to clear the title of certain other liens then existing against the property. These agreements on the part of Martin constituted the only consideration for the execution of the notes secured by the mortgage and trust deed.

On April 25, 1916, Martin borrowed of John Watry the sum of $9,500, and from Amanda M. Allen the sum of $2,000, giving his notes for these amounts to the respective parties, and as security he pledged the two Porterfield trust deed notes. At the time of the loan of the $2,000 made by Amanda M. Allen, she did not know of the contract between Porterfield and Martin, or that the building was being constructed. Martin failed to complete his contract according to its terms, and as the result Porterfield became entitled to credits against him in excess of the amount of the trust deed notes.

In its conclusions of law the court adjudged the foreclosure of the $27,000 mortgage; that the assignment of the trust deed notes was subject to the equities in favor of Porterfield, so far as Watry was concerned, but not as against Amanda M. Allen; and ordered that the proceeds of the sale of the property be first applied to the satisfaction of the mortgage, and next to the payment to Amanda M. Allen of the amount found due on her $2,000 note. This appeal is from that portion of the decree adjudging the claim of Allen to be superior to the offset of Porterfield with relation to the trust deed notes.

The notice of appeal also states that it is taken from an order denying the motion of Porterfield to enter a different judgment on the findings; but we find nothing in the record filed here upon which we can act. Neither the notice of motion nor the order made appear in the transcript. However,

this is not material, as the same result may be accomplished on the appeal from the judgment.

[1] Respondent's counsel devotes much of his brief to an argument against the consideration of the appeal, for the reason that it was taken too late. A motion to dismiss was made in the Supreme Court and denied; and we are bound by that action.

[2, 3] It is contended by appellants that the court erred in adjudging the lien of Amanda M. Allen on the trust deed notes to be superior to the offset of Porterfield as against Martin, the payee of the notes. We think this contention must be sustained. As will appear from the findings, the trust deed notes were executed in consideration of the agreement made by Martin at the time, a compliance with which on his part was prerequisite to his right to recover on the notes. Having failed to complete his contract, for which the notes were executed in payment, he would not be entitled to maintain an action against Porterfield on the notes. As the notes were found to be, and were, in fact, nonnegotiable, Allen took the assignment in pledge subject to all defenses existing in favor of the makers against the payee, her assignor. Section 368, Code Civ. Proc.; McKenney v. Ellsworth, 165 Cal. 326.[1] The fact that the pledgee had no knowledge of the existing equities of Porterfield makes no difference, as the rule of caveat emptor applies to the transfer of nonnegotiable instruments. National Hardware Co. v. Sherwood, 165 Cal. 1, 130 Pac. 881.

[4] Respondent argues that, because the evidence is not brought up, we cannot consider the proposition raised on this appeal. The record shows the facts as found by the court, and the conclusions drawn from the findings. The question for our determination is whether the conclusions of law are supported by the findings of fact. The transcript contains sufficient data for that purpose.

[5] The facts found by the court are not, and cannot be, challenged in this proceeding. It must be presumed that the evidence was sufficient to sustain each finding made, and that the issues were correctly decided. From the record it appears that the trust deed notes were nonnegotiable, that at the time of the pledge to Amanda M. Allen there were offsets existing in favor of Porterfield against Martin, the payee, and that Allen loaned $2,000 to Martin, taking the notes as security for the payment of her loan, without actual knowledge of the existence of the claims of Porterfield. This state of facts did not warrant the court in adjudging her lien to be paramount to the set-off which was awarded to Porterfield by the judgment.

The superior court is therefore directed to modify its judgment in accordance with the views herein expressed.

We concur: FINLAYSON, P. J.; THOMAS, J.

(49 Cal. App. 314)

PEOPLE v. MAYEN. (Cr. 741.)

(District Court of Appeal, Second District, Division 2, California. Sept. 18, 1920.)

1. Criminal law ⇐1084—Defendant has right to stay pending application for certificate of probable cause.

Where the trial judge revoked a certificate of probable cause granted by him, the appellate court has no discretion, but must grant a stay of execution until defendant can exercise the right granted him by Pen. Code, § 1243, to apply to a justice of the appellate court for a certificate of probable cause, which can only be done after the record on appeal is transmitted to the appellate court.

2. Criminal law ⇐1073, 1084—Attempt to escape does not defeat defendant's right to stay of execution.

An unsuccessful attempt by one convicted of a felony to escape from the county jail does not deprive him of his right to a certificate of probable cause, if there was room for honest difference of opinion as to error in the record, nor of his right to a stay of execution until he can apply to a justice of the appellate court for such certificate.

Fred H. Mayen was convicted of a felony, and he applies for a stay of execution of sentence until he can apply to the appellate court for a certificate of probable cause after the record is transmitted to that court. Stay of execution ordered.

John S. Cooper, of Los Angeles, for petitioner.

W. C. Doran, of Los Angeles, and W. J. Clark, for the People.

PER CURIAM. The defendant in this case was convicted of a felony, and sentenced to the state's prison at San Quentin. Thereafter, defendant having taken an appeal to this court, the judge of the trial court issued a certificate of probable cause. Thereafter the judge of the court below revoked his certificate of probable cause. Defendant thereupon applied to this court for a stay of execution of the sentence until such time as he can lawfully apply to a justice of this court for a certificate of probable cause, that is, until the record on his appeal shall have been transmitted to this court.

[1] We are constrained to the view that, under the authority of People v. Lane, 96 Cal. 596, 31 Pac. 580, and People v. Gal-

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] 132 Pac. 75.

lanar, 144 Cal. 656, 79 Pac. 378, we have no discretion in the matter, but must grant the stay of execution until defendant can exercise the right granted him by section 1243 of the Penal Code, i. e., the right to apply to a justice of this court for a certificate of probable cause.

[2] It has been suggested by the district attorney that, subsequent to defendant's conviction and while he was confined in the county jail in the custody of the sheriff, he attempted to escape. In our opinion, if there be probable cause for the appeal, i. e., if there is room for an honest difference of opinion as to the existence of any prejudicial error in the proceedings leading to conviction, an unsuccessful attempt to escape does not, per se, deprive the defendant of his right to the certificate of probable cause; and, if an attempt to escape does not of itself deprive a defendant of the right to the certificate of probable cause, it does not deprive him of his right to stay of execution until such time as he may properly present to a justice of this court his application for the certificate. For these reasons we have ordered a stay of execution until the record on appeal shall have been transmitted to this court.

49 Cal. App. 293

PEOPLE v. GAVIN. (Cr. 896.)

(District Court of Appeal, First District, Division 2, California. Sept. 15, 1920.)

1. Criminal law ⇐1110(6)—Remedy for omission from reporter's transcript may be by suggestion in appellate court.

Remedy for omission of proceedings from reporter's transcript need not be by appeal from order denying motion to correct, but may be, under Pen. Code, § 1247c, by suggestion in the appellate court of necessity of further transcription; the omitted matter having been included in the original application to the trial court, under section 1247, for transcription.

2. Criminal law ⇐1104(3)—Entire record to be transcribed where appellant's application declares it necessary.

Under the provisions of Pen. Code, § 1247, where defendant, after taking appeal, in his application asks for transcription of all the notes of the proceedings on the trial as necessary to present the points relied on, and no order is made limiting the extent of transcription, the entire record should be transcribed.

3. Criminal law ⇐1110(3)—Reporter ordered to add omitted notes of testimony to transcript.

It appearing to the appellate court from uncontroverted affidavits for appellant that notes of proceedings necessary to fairly present points relied on were omitted from the reporter's transcript, which under Pen. Code, § 1247, should have been included, they will, under section 1247c, be ordered added thereto.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

John Gavin was convicted of crime, and he appeals. Heard on motion for addition to transcript. Motion granted.

Mrs. E. C. Harrington, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. [1] A purported record on appeal having been filed in this court, consisting of typewritten clerk's transcript and typewritten reporter's transcript, on behalf of the defendant a motion was made for diminution of the record, which motion was supported by affidavits to the effect that the testimony of Allen G. Moran, a witness, was omitted from the record; that certain objections to adjournment on December 17, 1919, and December 18, 1919, on account of the absence of a witness for the prosecution, had been omitted; and that the proceedings, after the jurors had reported that they were unable to agree, by which they were coerced to agree to a verdict of guilty, were omitted from the record. There was no counter showing, other than the transcripts on file. On behalf of the state it was stated that a motion had been made in the trial court to correct the record, which motion had been denied, and it was contended that the only remedy of the appellant in such a case is by a direct appeal from the order denying the motion, as being a special order made after judgment.

Apart from any provisions of the law, it would seem unreasonable that one convicted of crime should be required to languish in jail during the period required for the determination of a collateral appeal, before he could present his appeal from the judgment upon a record such as is provided for in the Penal Code. It is provided in section 1247c of the Penal Code, that—

"Upon suggestion to the appellate court * * * that a further transcription of the proceedings is necessary, if in the opinion of the court it is necessary to have a further transcription of the proceedings in the trial court, it may order the same to be transcribed by the phonographic reporter within a time fixed in the order; provided that no further transcription shall be ordered upon the suggestion of the appellant unless the application therefor was included in the original application made to the trial court."

By section 1247 of the Penal Code it is provided that upon an appeal being taken—

"the defendant * * * must, within five days, file with the clerk and present an application to the trial court, stating in general terms the grounds of appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon."

It is further provided that the court shall, within two days after the filing of such application, make an order directing the phonographic reporter to transcribe such portion of his notes as in the opinion of the court may be necessary to fairly and fully present the points relied upon by the appellant. If the court fails to make the order within two days after the application is filed, the notes requested in the application shall be transcribed without such order.

[2] The record shows that within the time limited the appellant in writing requested the court to make an order as provided in section 1247, directing the phonographic reporter to transcribe all notes of the testimony of the proceedings on the trial of the defendant. No order appears to have been made by the court. The entire record, therefore, should have been transcribed.

[3] The reporter's transcript is required to have appended to it the affidavit of the reporter that it is correct. In the present case, the affidavit, omitting purely formal matters, is that—

"as such phonographic reporter, I took verbatim shorthand notes of all the testimony given and of all proceedings had, including all questions to the witnesses and the answers thereto, offers of exhibit evidence; all objections, and all motions of counsel in relation to said case, and the rulings of the court with relation thereto; the instructions requested by the defendant, and by the court refused or given or not given; all instructions and directions of the court given to the jury, including the instructions and directions to the jury after they had retired for verdict for one hour and a half and had reported to the court that they were hopelessly divided and could never agree; all proceedings upon the motion of defendant for a new trial and the proceedings upon the pronouncing of judgment. * * * That my shorthand notes so taken as aforesaid contain a full, true, and correct record in phonographic shorthand writing of all of said testimony and of all of said proceedings. That I have personally, pursuant to the order and direction of the judge of said court, based upon the defendant's statement of grounds of appeal, designating what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon, transcribed from my shorthand writing into longhand writing all of the testimony given, and each and all of the said proceedings and instructions aforesaid upon said trial as above set out. That the foregoing 37 pages of said typewritten matter is a full, true, and correct transcription of my said shorthand writing as above said, directed by the judge of said court to be so transcribed in accordance with the statement of said defendant designating said portions requested to be transcribed by defendant on appeal, and that the same is a full, true, and correct and verbatim statement of all of said matters."

It does not appear from the record that the witness Allen G. Moran testified in the case, nor are the instructions and directions to the jury after they had retired and reported that they were hopelessly divided, mentioned in the reporter's affidavit, incorporated in the transcript. The transcript does not show any objection to the continuances mentioned in the uncontroverted affidavits filed on behalf of the appellant. In view of the foregoing facts it appears to the court that a further transcription of the proceedings in the trial court is necessary, and it is ordered that the phonographic reporter, within 20 days from the date hereof, transcribe and add to the phonographic report heretofore filed herein such portions of the phonographic report of proceedings taken at said trial as were omitted from the phonographic report filed herein, if any omissions there were, so that the phonographic report, as corrected, shall constitute a transcript of all the notes of the testimony and proceedings of the trial from the time the above-entitled case was called for trial to the termination thereof.

The clerk of this court is directed to certify two copies of this order and cause the same to be transmitted, one to the clerk of the superior court of the state of California in and for the city and county of San Francisco, and the other to the phonographic reporter who certified said transcript; and the clerk of this court is authorized hereby to permit the withdrawal from the files of this court of the phonographic report, as filed, by the phonographic reporter, for the purpose of completing, perfecting, and certifying the same.

184 Cal. 244

CONSOLIDATED CONST. CO. v. PACIFIC ELECTRIC RY. CO. et al. (L. A. 6089.)

(Supreme Court of California. Oct. 26, 1920.)

1. Dismissal and nonsuit ⟸80—Dismissal is judgment supported by presumption.

Dismissal of an action is in the nature of a judgment against the plaintiff, to which the rule that every presumption is in favor of the validity of a judgment applies, so that notice of application for the order will be presumed, where the want of it does not affirmatively appear.

2. Judgment ⟸363—Statute for relief against mistake does not apply to mistake of court or adversary.

Code Civ. Proc. § 473, permitting applications by a party for relief against an order or judgment had through his inadvertence, surprise, or mistake, does not apply where the mistake was that of the court and of the opposite party.

3. Dismissal and nonsuit ⟸81(3)—Application to set aside dismissal must be made within 6 months.

An application to set aside an order dismissing an action must be made within a reasonable time, and by analogy to Code Civ. Proc. § 473, fixing 6 months as the time to apply for relief against the judgment entered by the applicant's mistake, an application for relief against a judgment entered by mistake of the court and opposite party must be made within 6 months after the dismissal became effective.

4. Dismissal and nonsuit ⟸81(2)—Dismissal not finally effective before entry on minutes.

An order dismissing an action for failure to issue summons under Code Civ. Proc. § 581a, which is supplementary to section 581, directing orders for dismissal to be entered in the minutes, does not become finally effective beyond the power of the court to vacate it until it is entered on the minutes, even if it then became effective without being entered in the judgment book, as required by other judgments by Code Civ. Proc. §§ 664, 668.

Department 1.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by the Consolidated Construction Company against the Pacific Electric Railway Company to foreclose a street assessment lien. From orders of the superior court granting the motion of Arthur T. Stewart to dismiss the action, and granting a motion to set aside an order vacating the dismissal of the action, plaintiff appeals. Order of dismissal affirmed, and order setting aside vacation of dismissal reversed.

C. F. Culver, of Los Angeles, for appellant.

Stewart & Stewart, of Los Angeles, for respondent.

OLNEY, J. This is an appeal by the plaintiff from, first, an order dismissing the action; and, second, an order setting aside an order vacating the order of dismissal. The facts are:

The action is one to foreclose a street assessment lien on a certain lot in Los Angeles. The record owner of the lot was the Pacific Electric Railway Company, and it was made the sole defendant. The complaint was filed November 12, 1915, and summons was issued the following July, and served on the defendant the following August. The defendant, however, failed to appear, and the summons was not returned until November 12, 1918. Through some oversight, no notation of the issuance of the summons was made by the county clerk in the register of actions. The result of this oversight, coupled with the failure of the defendant to appear, and the failure of the plaintiff to have the summons returned, was that on January 28, 1918, so far the record showed, summons had not been issued, although the action had been pending for more than two years. On that day, one Stewart presented ex parte his affidavit to the court to the effect that he was interested in the lot involved, and that no summons had been issued in the action, although more than 2 years had elapsed. Section 581a of the Code of Civil Procedure provides that, in case summons is not issued within a year after the commencement of an action, the action must be dismissed, either by the court upon its own motion or upon the motion of any interested party. The affidavit of Stewart and the record brought the case within the operation of the Code section, and the court without notice to the plaintiff made its order of dismissal upon that ground. This is one of the orders appealed from.

Some 10 months later, and on October 25, 1918, the attorney for the plaintiff, having discovered the dismissal, in his turn presented ex parte an affidavit to the court, setting up that summons had in fact been issued within a year of the commencement of the action, and asked that the order of dismissal be vacated. This application, likewise, the court granted without requiring notice to the adverse party, and made its order vacating the order of dismissal. This last order seems, however, to have been discovered almost immediately, for within a few days a motion was made on behalf of Stewart, this time on notice, to set aside the order of vacation on the ground that it was made without jurisdiction. This motion was granted, and the order granting it is the second one appealed from.

Before considering the merits of the appeals, we deem it worth saying that the case is a good illustration of the complications and difficulties, with their incidents of delay, expense, tribulation, and not infrequently injustice, which are fairly certain to ensue upon the courts tolerating the practice of obtaining ex parte orders in any but the plainest and most certain of cases. The propriety of the

order of dismissal in this case depended upon the existence of a fact which the court had first to find, namely, the nonissuance of summons within a year after the commencement of the action. If the attorney for Stewart had felt it incumbent upon him to give notice of his application for a dismissal, or the court had refused to consider the application without such notice, it would have at once developed that the supposed fact did not exist, and the difficulties and complications which now present themselves would have been avoided.

Passing to the merits, it is, of course, evident that the plaintiff is entitled to relief in some manner. What happened was that, without any opportunity to the plaintiff to be heard, its action was dismissed because of a pure error of fact on the part of the court, in which the plaintiff did not participate. The only question in the case is: Can it secure relief on either of these appeals?

[1] It is certain that relief cannot be had by the appeal from the order of dismissal. So far as the proceedings up to the time of making that order go, nothing appears to make the order either invalid or erroneous, and it is only such proceedings that can be considered. The order, when entered, was in the nature of a judgment against the plaintiff. If notice of the application for the order was necessary, as a jurisdictional prerequisite, the want of it does not affirmatively appear, and notice will be presumed. The rule is:

> "Every presumption is in favor of the validity of the judgment, and any condition of facts consistent with the validity of the judgment will be presumed to have existed, rather than one which will defeat the judgment." Canadian, etc., Co. v. Clarita, etc., Co., 140 Cal. 672, 674, 74 Pac. 301, 302.

As to the appeal from the order setting aside the order vacating the dismissal, the order so appealed from is of course erroneous, if the order which set it aside was valid and should not have been set aside. As to the propriety of the order set aside, the order vacating the order of dismissal, there can be no question, provided the court had the power to make it. It was a plain case for relief against a mistake. The questions on this appeal, therefore, resolve themselves into questions as to the power of the court to make the order vacating the dismissal.

[2] It is contended that the court did not have power to make the order ex parte. To support this contention reliance is placed upon section 473, Code of Civil Procedure, which provides in effect that applications by a party for relief against an order or judgment had through his inadvertence, surprise, mistake, or excusable neglect must be made upon notice. But the mistake in this case was not that of the plaintiff, but of the court or of the court and the opposite party, and to such a case section 473 of the Code of Civil Procedure has no application. Norton v. Atchison, etc., Co., 97 Cal. 388, 390, 30 Pac. 585, 32 Pac. 452, 33 Am. St. Rep. 198; Hunter v. Bryant, 98 Cal. 247, 33 Pac. 51; Crescent Canal Co. v. Montgomery, 124 Cal. 134, 143, 56 Pac. 797; Robson v. Superior Court, 171 Cal. 588, 154 Pac. 8. This, however, is not a complete answer to the objection that the order vacating the dismissal was made without authority. A dismissal, when fully perfected, is a judgment. It might perhaps be questioned if a judgment concluding the action, as distinguished from a mere order made in the course of the proceedings, and not determining the final result of the action, comes within section 937 of the Code of Civil Procedure, even though made without notice, and can be set aside without a hearing upon notice to all affected. See, however, Wiggin v. Superior Court, 68 Cal. 398, 9 Pac. 646; In re Sullenberger, 72 Cal. 549, 14 Pac. 513.

[3] However this may be, there would seem to be no doubt that the application to set it aside must, at least ordinarily, be made within 6 months. While such an application does not come within section 473 of the Code of Civil Procedure, the rule is well settled in this state that the application must be made within a reasonable time, and that by analogy to the requirements of section 473 of the Code of Civil Procedure, 6 months will be taken as the limit of what may be a reasonable time. See, inter alia, Moore v. Superior Court, 86 Cal. 495, 25 Pac. 22; Norton v. Atchison, etc., Co., 97 Cal. 388, 30 Pac. 585, 32 Pac. 452, 33 Am. St. Rep. 198; Brackett v. Banegas, 99 Cal. 623, 34 Pac. 344; People v. Temple, 103 Cal. 447, 37 Pac. 414; Canadian, etc., Co. v. Clarita, etc., Co., 140 Cal. 672, 74 Pac. 301. The application here was not made within 6 months after the making of the order of dismissal.

The rule prescribing an absolute limit of 6 months for such relief—a rule made by judicial decision, and not by statute—seems very harsh in a case where the existence of the order or judgment is not discovered by the party against whom it was given in time for him to make his application within the necessary 6 months, and it may be that it is subject to the qualification that discovery be made within time for the injured party to apply within the 6 months or he have a reasonable time after discovery to act. So far as we are aware this particular point has not been decided in this state, unless possibly Smith v. Jones, 174 Cal. 513, 163 Pac. 890, be such a decision. But, even if the rule be subject to this qualification, the plaintiff's application here was not in time. In order to extend the period beyond 6 months from the finally effective date of the order, it was certainly necessary that the plaintiff show affirmatively that it had through no fault of its own failed to discover the order in time for it to act within that period. There was no showing whatever of

this sort. So far as appears, the plaintiff may have discovered the order of dismissal the day it was made. If, then, the order of dismissal was finally effective the day it was made, the authority of the court to set it aside on motion 10 months later was gone.

[4] The question in the case, therefore, reduces itself to one as to the finally effective date of the order of dismissal. The facts in this connection are that, while the order was signed by the judge and filed January 26, 1918, it was not entered until December 31st of that year. In other words, it had not been entered at the time when the court made its order at the instance of the plaintiff vacating it. The question, therefore, is: Was such entry necessary in order to make the order finally effective, in order that there be a judgment, as distinguished from a mere order upon which a judgment could be had? If the order of dismissal was still of the latter character only, it was something over which the court still retained control, and which it could revoke, either on the motion of a party or on its own motion, if it found it had been made inadvertently and unjustly. Robson v. Superior Court, 171 Cal. 588, 154 Pac. 8. It has even been held that after rendition of a judgment, by the filing of findings of fact and conclusions of law, with a direction for the entry of a certain judgment thereon, the court has still the power, up to the time of the entry of the judgment, to change the conclusions of law and the judgment to be entered. See Brownell v. Superior Court, 157 Cal. 703, 708, 109 Pac. 91, and cases there cited. After entry of judgment, however, such power is gone. First National Bank v. Dusy, 110 Cal. 69, 42 Pac. 476.

The order of dismissal was made, as we have said, under section 581a of the Code of Civil Procedure. That section and section 581b both require the dismissal of an action in certain cases of delay in the prosecution of the action. Neither section, however, provides just how the dismissal is to be made, other than that it is to be made by the court. Both sections, however, are really supplements to section 581 of the Code of Civil Procedure, and were added to the Code by subsequent amendments. In fact, the provision of section 581a that an action must be dismissed if summons is not issued within a year was originally part of section 581. Section 581, like the two supplementary sections, provides for a dismissal by the court in certain cases; but it also provides how the dismissal is to be made. It reads that such dismissal "must be made by orders of the court entered upon the minutes thereof and are effective for all purposes when so entered." The implication is plain that the dismissal is not finally effective until the order is entered. This construction is also in accord with the view taken by this court of another very similar provision formerly found in section 581. The section provides, not only for dismissals by the court, but also for dismissals by the plaintiff. As to dismissals of the latter sort, the section before its amendment in 1897 (see Hopkins v. Superior Court, 136 Cal. 552, 69 Pac. 299) provided that upon the written request or consent of the plaintiff, the dismissal should "be made by entry in the clerk's register. Judgment may thereupon be entered accordingly." Under this language a number of cases arose involving the question as to the effect of a dismissal requested and entered in the clerk's register, but upon which judgment had not yet been entered. Thus in Page v. Superior Court, 76 Cal. 372, 18 Pac. 385, the lower court made certain orders in an action after a request for a dismissal by the plaintiff had been filed and entered in the register, but judgment had not been entered upon it. The plaintiff applied to the Supreme Court for a writ of certiorari to annul the orders so made, on the ground that the court was without authority to make them, since the action was no longer pending when they were made. It was held that the dismissal was not effective until judgment was entered, and the writ asked for was denied. See, also, Page v. Page, 77 Cal. 84, 19 Pac. 183; Acock v. Halsey, 90 Cal. 215, 219, 27 Pac. 193; Rochat v. Gee, 91 Cal. 355, 27 Pac. 670; Barnes v. Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660; Brady v. Times-Mirror Co., 106 Cal. 56, 39 Pac. 309; Evans v. Johnson, 115 Cal. 180, 46 Pac. 906; Wolters v. Rossi, 126 Cal. 644, 59 Pac. 143. In the last-mentioned case, quoting from Page v. Page, supra, it is said:

"The dismissal is not complete, in the sense that the control of the court over the cause is terminated, until the judgment is entered."

By every analogy to the rule of these authorities, it should now be held that the language of section 581 in regard to dismissals by the court, directing that they be made by orders entered in the minutes and be effective when so entered, requires that they be so entered, in order that they be effective. By very analogy, also, it should be the rule that orders of dismissal under sections 581a and 581b should, like similar orders under section 581, be at least entered in the minutes, in order that they be finally effective and constitute judgments. In fact, strong reasons may be urged why the effective character which an order of dismissal under section 581 assumes, upon its mere entry in the minutes, is an exception to the general rule that judgments must be entered in the judgment book before they become effective as judgments (sections 664 and 668, Code Civ. Proc.), and that the exception should not be extended beyond the particular case provided for by the statute. If this be the true rule, then judgment must be entered in the judgment book, in order that an order of dismissal under sections 581a or 581b be finally effective. But whether the true rule be this, or be

that prescribed by section 581, the order in the present case was not finally effective as a judgment when the order vacating it was made, since it had not been entered in the minutes, nor had judgment upon it been entered in the judgment book. It follows that it was still within the control of the court, which could vacate it, if made inadvertently or through mistake. In the present case the court was plainly called on to vacate it, if it had authority to do so. Its action in making the order of vacation was therefore proper, and its subsequent action in setting aside that order was erroneous.

Before concluding, we should, perhaps, say that when we have been speaking of an order of dismissal, or an order for judgment, as not effective until entered, we have been speaking of it only as effective as a final termination of the action, discharging the parties, so to speak, from before the court, and ending the general authority of the court over the action. In many other ways an order of dismissal or an order for judgment is effective before entered, or before judgment is entered upon it. See, for example, Fresno Estate Co. v. Fiske, 172 Cal. 583, 599, 157 Pac. 1127, and cases there cited.

Order of dismissal affirmed, and order setting aside the order vacating the order of dismissal reversed.

We concur: SHAW, J.; LAWLOR, J.

184 Cal. 265

ANDERSON v. ALEXANDER et al.
(L. A. 6400.)

(Supreme Court of California. Oct. 28, 1920.)

Mortgages ⊂=497(2)—Foreclosure judgment against real party in interest binding against trustee.

Judgment of foreclosure against the real party in interest is binding on one who holds merely the naked title as trustee for such real party in interest, and who had no beneficial interest in the property, and who was not made a party to the foreclosure proceeding.

Department 1.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Clara M. Anderson against N. P. Alexander, James Shultz, and Juliana J. Alexander and others. Judgment for plaintiff, and the two last-named defendants appeal. Affirmed.

Donald Barker and J. M. O'Brien, both of Los Angeles, Wm. H. Neblett, of Los Angeles, of counsel, for appellants.

John B. Nichols, of Santa Ann. and George L. Sanders, of Los Angeles, for respondent.

OLNEY, J. The facts in this matter are that the owner of certain property gave a mortgage upon it to the plaintiff and respondent. Subsequent to the execution of the mortgage and subject to it, the owner of the property executed three trust deeds to a person other than the plaintiff, securing certain notes. Subsequent to the execution of the trust deeds certain mechanics' liens were imposed upon the property, one or more of which were owned by a corporation known as the James Shultz Lumber Company. The James Shultz Lumber Company thereafter purchased the notes secured by the trust deeds, and proceeded to have the property sold under the power of sale contained in the deeds, and at the sale purchased the property, but took title in the name of N. P. Alexander, the appealing defendant in the present action. Thereafter the James Shultz Lumber Company brought suit to foreclose the mechanics' liens, and made the plaintiff in this action a party defendant, whereupon the plaintiff filed a cross-complaint, seeking to foreclose her mortgage. She failed, however, to make Alexander a cross-defendant. Judgment was rendered upon the plaintiff's cross-complaint, foreclosing her mortgage and directing a sale of the property as against the defendant James Shultz Lumber Company, and the property was sold and purchased by the plaintiff for the amount of her mortgage. After the time for redemption had expired without redemption, the plaintiff brought the present action, seeking to quiet her title against Alexander. He asserts an interest on the ground that the title which he acquired by the sale under the trust deeds was not foreclosed by the sale under the foreclosure judgment against the Shultz Company. Judgment went for the plaintiff in the trial court.

The finding of the trial court is express to the point that Alexander had no beneficial interest whatever in the property, but was acting throughout simply for the James Shultz Lumber Company. Under these circumstances it is well settled that the judgment of foreclosure against the James Shultz Lumber Company, the real party in interest, is binding upon Alexander, who held merely the naked title as trustee for it. The real party in interest was before the court. The finding mentioned is not attacked, and it is the crux of the present action and is decisive.

Judgment affirmed.

SHAW and LAWLOR, JJ., concur.

(184 Cal. 262)

DANIELSON v. CITY OF BAKERSFIELD et al. (L. A. 6367.)

(Supreme Court of California. Oct. 27, 1920.)

Master and servant ⊂=13—City fireman not "laborer," "workman," or "mechanic," within eight-hour day law.

A member of a paid fire department maintained by a municipal corporation is not a "laborer," "workman," or "mechanic," within the meaning of Const. art. 20, § 17, providing that time of service of such persons is eight hours, and neither does Pol. Code, § 3245, Pen. Code, § 653c, nor Bakersfield City Charter, § 142, relating to eight-hour days, apply to a fireman.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Laborer; Mechanic; Workman.]

Department 1.

Appeal from Superior Court, Kern County; T. N. Harvey, Judge.

Action by C. B. Danielson against the City of Bakersfield and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Geo. G. Graham, of Fresno, for appellant.

Wesley P. Grijalva, City Atty., of Bakersfield, for respondents.

SHAW, J. The only question in this case is whether or not a member of a paid fire department, maintained by a municipal corporation in this state, comes within the provisions of several laws establishing an eight-hour day. The Constitution (article 20, § 17) provides that the time of service of all "laborers, workmen, or mechanics" employed upon any public works by the state, a county, or a municipality is eight hours only. We think it is perfectly obvious that a fireman is not either a laborer, workman, or mechanic, as referred to in that section. Section 3245 of the Political Code contains the provision that eight hours constitutes a legal day's work in all cases where the same is performed under the authority of the state, or of any city or county within the state, and that a stipulation to that effect must be made a part of all contracts to which the state, county, or city is a party. Section 653c of the Penal Code provides that the time of service of any laborer, workman, or mechanic employed upon any public works, or upon any work for the state, shall be limited to eight hours a day, and imposes a penalty upon any one violating this provision. Section 142 of the Bakersfield charter provides that the time of service of any laborer, workman, or mechanic employed upon any public works or upon work done for the city, shall be limited and restricted to eight hours a day. All of these provisions have substantially the same meaning.

It is the opinion of the court that they do not refer to or include firemen in a paid fire department of a city, but, on the contrary, refer to persons engaged as workmen of some kind upon public work, or employed by some city or other public authority, and actually engaged in labor. The court below correctly held that they do not apply to firemen of the city of Bakersfield.

The judgment is affirmed.

LAWLOR and OLNEY, JJ., concur.

(184 Cal. 263)

PLAX v. PLAX. (L. A. 6392.)

(Supreme Court of California. Oct. 28, 1920.)

Judgment ⊂=143(16)—Court abused discretion in refusing to set aside default.

Where it appeared that defendant was an ignorant man, that he did not read the summons nor understand its purpose or effect, and that within a few days after the service thereof, and that before the time to answer had expired, he and plaintiff met and agreed upon a settlement, the court abused its discretion in refusing to set aside a default, where application was made within 20 days after it was entered.

Department 1.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Max Plax against Ben Plax. From an order refusing to set aside default and interlocutory judgment, defendant appeals. Reversed and remanded.

A. Guard Hill, of Los Angeles, for appellant.

Harry Lyons, of Los Angeles, for respondent.

SHAW, J. The court is satisfied that the court below abused its discretion in refusing to set aside the default entered against the defendant. It appeared that the defendant was an ignorant man, unable to understand the English language well, that he did not read the summons nor understand its purpose or effect, and that within a few days after the service thereof and before the time to answer had expired, he and his brother met and agreed upon a settlement of the matters set forth in the complaint. Naturally, that would lead the defendant to suppose that it was not necessary for him to appear or defend the action, and it furnished a reasonable excuse for his failure to appear or answer the complaint. The application to set aside the default was made within less than 20 days after the default was entered. This was not an unreasonable time. Under the circumstances of the case the default should have been set aside, and the defendant given a reasonable time to answer and proceed to the trial of the case on the merits.

The order refusing to vacate the default and the interlocutory judgment are reversed, and the case remanded to the court below, with directions to allow defendant to file his answer and proceed to a trial on the merits.

LAWLOR and OLNEY, JJ., concur.

184 Cal. 226

VICTOR OIL CO. v. DRUM et al. (L. A. 5155.)

(Supreme Court of California. Oct. 23, 1920. Rehearing Denied Nov. 22, 1920.)

1. Corporations ⟸30(3) — Partnership ⟸93—Owners may sell property at a profit to partnership or association they help organize.

Owners of property either real or personal may form a partnership or association with others and sell the property to the association at any price that may be agreed on between them, no matter what it may have originally cost, provided there is no fraudulent misrepresentation to associates, and are not bound to disclose the profit which they make by the transaction.

2. Corporations ⟸30(3)—Entitled to secret profits realized by promoters.

Where holder of option on land sold land to a corporation which he helped to promote, and divided the profits with certain of the other promoters without such promotors disclosing to their associates in such corporation the fact that they profited by the transaction, the corporation was entitled to recover from the promoters the secret profits made by selling land to the corporation at a price in excess of that for which they had options to purchase it.

3. Corporations ⟸30(3)—Promoter profiting by transaction with corporation has burden of showing he made full disclosure.

In corporation's action against promoter to recover secret profits realized on sale to corporation, the promoter, occupying a fiduciary relation toward the corporation and his associates therein, has the burden of showing that he made full disclosure of the fact that he was profiting by the transaction.

4. Corporations ⟸30(3)—Nonconcealment of nature of transaction of promoters with corporation not a disclosure to corporation controlled by promoters.

In corporation's action against promoters to recover secret profits realized by promoters on sale to corporation, that nature of transaction was not concealed from directors was no defense, where the defendant promoters controlled and directed the corporation.

5. Corporations ⟸30(3)—Failure to directly allege that others were induced to subscribe to corporation's stock held not fatal in action against promoters for profits.

In corporation's action against promoters for secret profits realized on sale to corporation, failure to directly allege that others were induced to become subscribers to the stock *held* not fatal to corporation, where such fact was indirectly alleged, was not in dispute, and affirmatively appeared from the answers of the promoters.

6. Corporations ⟸30(3)—Value of land sold to corporation by promoters immaterial in corporation's action for secret profits.

In corporation's action against promoters for secret profits made on sale of land to corporation, it was immaterial whether the property purchased was or was not worth what the corporation had paid for it, the wrong being in the profit that was wrongfully made, and the corporation's relief being the recovery of such profits.

7. Corporations ⟸30(3)—Joint and several judgment for full amount of secret profits against each promoter held proper.

Where promoter with options to purchase land sold land to corporation at a profit and paid for land out of proceeds of sale to corporation, and thereafter shared profits with certain of the other promoters pursuant to a fraudulent scheme to profit by organization of the corporation and the sale to it of land in excess of real price, judgment for full amount of secret profits jointly and severally against each of the promoters *held* proper.

8. Corporations ⟸30(3) — Corporation had right either to reclaim shares issued to promoter pursuant to fraudulent scheme or to recover their value.

Where promoter fraudulently sold land to corporation at a profit and received as proceeds of sale in addition to a cash consideration a certain number of shares at the rate of specified price per share, the corporation, in action for the secret profits, had the right either to reclaim the shares themselves or to recover their value as of the time of the wrong.

9. Corporations ⟸30(3)—Evidence as to the price of stock to subscribers justifies finding that such was the value of the stock.

In corporation's action to recover secret profits made by promoters on sale of land at excessive price to corporation, evidence that the stock of the corporation was being subscribed and paid for at a specified rate per share *held* to justify finding that such amount was the value of the stock.

10. Judgment ⟸704 — Against codefendants not conclusive in subsequent action in which they are adverse parties.

Under Code Civ. Proc. § 1910, judgment against codefendants did not operate as an estoppel in an action in which they were adverse parties.

11. Limitation of actions ⟸100(12)—Statute of limitations for fraud runs from time when aggrieved party is put on inquiry.

Where party who has been defrauded has received information of facts which should put him upon inquiry, and the inquiry, if made, would disclose the fraud, he will be charged with a discovery as of the time the inquiry would have given him knowledge, putting the statute of limitations for fraud under Code Civ. Proc. § 338, subd. 4, in running as of such time.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

12. Corporations ⟸30(3)—Transfer of stock from one promoter to others not constructive notice of fraudulent scheme.

Where promoter made secret profits in sale of land to corporation, and thereafter divided profits with certain other promoters, knowledge of the fact that certain shares issued to the promoter for such land had been transferred to such other promoters *held* not to put the corporation on inquiry as to whether such shares had been divided with other promoters pursuant to a scheme to defraud corporation so as to bar action for fraud commenced more than three years thereafter under Code Civ. Proc. § 338, subd. 4, in absence of information which carried a direct implication or suggestion of possible fraud.

13. Limitation of actions ⟸100(11) — Only inexcusably inattentive party charged with discovery of fraud before actual knowledge.

The courts will not lightly seize on some small circumstance to deny relief to a party plainly shown to have been actually defrauded against those who defrauded him on the ground that he did not discover the fact that he had been cheated as soon as he might have done, and it is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with a discovery in advance of actual knowledge.

14. Limitation of actions ⟸179(2) — Complaint held to sufficiently allege why fraud was not sooner discovered.

In action for fraud brought after the expiration of the statutory period of three years, complaint alleging the fact, which constituted the fraud and which showed the fraud to be a concealed one, and that the defendants concealed the facts from the plaintiff, *held* to sufficiently allege why there was no discovery of the fraud sooner.

15. Appeal and error ⟸1039(13)—Failure of plaintiff to plead circumstances under which fraud was discovered held harmless.

In action for fraud, where the evidence makes it plain that the circumstances under which the fraud was discovered did not involve a knowledge of facts upon which the plaintiff could be charged with a discovery prior to the three-year statutory period under Code Civ. Proc. § 338, subd. 4, plaintiff's failure to plead the circumstances under which the fraud was discovered *held* harmless, since defendants were not misled thereby.

16. Equity ⟸87(2)—Failure to bring fraud action within period of limitations from perpetration of fraud on discovery within such period held not laches.

Where fraud was discovered within the period of limitations, failure to bring action within such a period where action was brought within the required three years from date of discovery did not constitute laches in absence of a showing of prejudice to adverse party.

17. Equity ⟸88—Laches must be affirmatively pleaded and proven by defendants unless it appears on face of complaint.

Laches is a defense, and not a condition of relief, and, if it does not appear on the face of the complaint, must be affirmatively pleaded and proven by the defendants.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by the Victor Oil Company against C. P. Drum, P. S. Rishel, George Holman Coffin, Jr., and George H. Coffin. Judgment for plaintiff, and the two last named defendants appeal. Affirmed.

Edwin A. Meserve and Jefferson P. Chandler, both of Los Angeles, for appellants.

Bradner W. Lee and Bordwell & Mathews, all of Los Angeles (Bradner W. Lee, Jr., Kenyon F. Lee, and C. E. Spencer, all of Los Angeles, of counsel), for respondent.

OLNEY, J. This is an action by a corporation against four men who are alleged to have been its promoters, for the recovery of secret profits made by them on the sale of certain properties to the corporation. A joint and several judgment for $32,500 was rendered against the defendants, from which two of them appeal. The facts, as disclosed either by the defendants' answer, evidence that is undisputed, or the findings of the trial court, are these:

In the early part of 1910 there was considerable excitement in the oil business in this state, and the defendants C. P. Drum and George H. Coffin formed a plan to find some oil properties and organize a corporation to take them over. They found two properties, one belonging to the Hamilton Oil & Gas Company, and the other to the California Petroleum Lands Company. On March 23, 1910, Coffin secured a written memorandum from the president and chief stockholder of the Hamilton Company which gave Drum an option to purchase that company's land. Later there was substituted for this option a formal contract of purchase and sale, with the Hamilton Company as vendor and Drum as vendee. This contract is dated March 23, 1910, the date of the option, but it certainly followed the giving of the option. Whether it followed on the same day or not does not positively appear, but there are circumstances which make it very probable that it was not executed until after the organization of the plaintiff some days later, and was then antedated to make it correspond to the date of the option. At any rate, the parties by their pleadings and counsel in their briefs all assume the fact to be that prior to the organization of the plaintiff all that Drum had in respect to the Hamilton lands was an option, and that he was not then the equitable owner of the property as vendee under a firm contract of purchase and sale.

There seems to have been only a verbal

understanding at any time in regard to the purchase of the California Petroleum lands.

Immediately upon the acquisition of the Hamilton option, Coffin and Drum, with the defendants Rishel and Coffin, Jr., a son of the other Coffin, began the organization of the plaintiff, and perfected it within a few days; the articles of incorporation being acknowledged on March 26, 1910, and filed with the county clerk two days later. Neither Coffin, Sr., nor Drum appear in the articles of incorporation as organizers of the company, but that they, with their codefendants, were the actual moving and controlling parties admits of no question. Those who appear as organizers were the defendants Rishel and Coffin, Jr., and three others. The organization meeting of the corporation was held on April 7, 1910, and the five appearing as organizers were elected directors, Rishel being made president, and Coffin, Jr., secretary and treasurer. At the same meeting an offer in writing by Drum was submitted and accepted whereby Drum proposed to sell to the company the Hamilton lands for $52,500 and the California Petroleum lands for $31,000. Of the purchase price of the Hamilton lands $40,000 was to be paid in money and $12,500 in shares of the company at 25 cents a share, or 50,000 shares in all. Of the purchase price of the California Petroleum lands $16,000 was to be paid in money and $15,000 in shares at 25 cents a share, or 60,000 shares in all.

The option and contract which Drum had for the Hamilton lands fixed the price of the lands at $35,000, so that by his sale to the company he would make a profit of $5,000 in money and $12,500 in stock of the company at 25 cents a share. By the understanding which he had for the purchase of the California Petroleum lands the price of the lands was $16,000, so that on turning over these lands to the company he would make a profit of $15,000 in stock of the company at 25 cents a share. It is these profits aggregating $32,500 which are sought to be recovered by the plaintiff in this action.

There is no evidence that the fact that Drum was making a profit on his sales to the company was disclosed to the directors of the company other than the defendants Rishel and Coffin, Jr. On the other hand, it was not represented to the directors that he was not doing so, and, of course, the transaction on its face, being a direct sale by Drum to the company for a certain price not fixed, so far as appeared, by reference to what the properties had cost him, involved directly the possibility that he might be selling for a price greater than the cost to him.

Along with the organization of the company, steps were taken to secure subscriptions to its stock. A subscription paper was circulated stating that a corporation was being formed to take over the two properties, describing them, at the figures contained in the offer of sale by Drum. The identity of the seller is not disclosed by the subscription paper, nor is there any intimation that he is one of the organizers of the company and will make a personal profit on the purchase which the company was being formed to make. It appears, in fact, that this profit was not disclosed until several years later.

When sufficient funds had been raised by the plaintiff company, the purchases by Drum from the Hamilton and California Petroleum Companies and the sales by him to the plaintiff were consummated, practically simultaneously, Drum paying for the properties out of the purchase money which he received for them. The profit which he made in money he divided equally with the other three defendants. The stock which he received he also divided with them, though apparently not equally. The division of the stock was concealed, at first by not having the stock transferred, and later by having it transferred into the names of others than the real owners. The division of the profits is denied by the defendants, but that the stock was actually divided is admitted, as is also the fact that Drum paid to or for the benefit of each of the other defendants an amount in money equal to what would have been his share on a division of the profits. The claim is that the stock and money were given for services in the way of securing subscriptions and for other considerations. The finding of the trial court is, however, that the profits were divided as we have stated, and the evidence and the circumstances are ample to sustain that conclusion, and it must be accepted as the fact.

It is also found by the court that neither the subscribers for stock of the plaintiff, other than the defendants, nor the plaintiff itself learned of the secret profits made by Drum and divided between the defendants prior to December 13, 1913, and that the action for their recovery which was commenced November 30, 1914, was brought within a reasonable time after such information was had. As we have said, judgment was given against the defendants jointly and severally for the full amount of the secret profit made by them. From the judgment the two Coffins alone appeal.

[1] The primary question upon the foregoing facts is: Is there any cause of action against the defendants because of them? It is to be noted in this connection that, as stated in Densmore Oil Co. v. Densmore, 64 Pa. 43:

"Any man or number of men, who are the owners of any kind of property, real or personal, may form a partnership or association with others, and sell that property to the association at any price which may be agreed upon between them, no matter what it may have

originally cost, provided there is no fraudulent misrepresentation made by the vendors to their associates. They are not bound to disclose the profit which they made by the transaction."

It is also to be noted that the present transaction appeared on its face to be a sale by Drum, so that the directors of the plaintiff who accepted the proposition of Drum must have understood that it was at least possible, if not probable, that he would make a profit.

It is also to be noted that, if it were legitimate for Drum to make a profit on the sale, the fact that he afterwards divided his profit with the other defendants is wholly immaterial. If the profit were legitimately his, he had a right to do with it as he pleased.

Upon these facts the defendants seek to have applied to the present case the principle just quoted from Densmore Oil Co. v. Densmore, whose soundness cannot well be controverted, claiming that by it Drum had a right to sell to the company, and the latter was not concerned with whether he made a profit or not.

[2] The answer to this contention is that the case is not one of a sale by the owner of property to an association organized to purchase it, in which the understanding and basis upon which the association is formed and the purchase consummated is that one of the associates is selling property to the association. In such a case the fact is manifest that the vendor has a personal interest in the sale adverse to the association, and any one going into the enterprise would or should realize that the vendor, even though one of the association, is selling for his own advantage. But in the present case the essence of the business was that the defendants, through the medium of a corporation, induced a number of persons to associate with them for the purchase of certain properties for prices greater than the properties could be obtained for, and without any disclosure either of that fact or of the fact that the defendants expected to harvest the difference in price, and had an interest in having the purchase made distinct from their interest in the association and adverse to the association; that, in brief, they would directly profit by the purchase, not as members of the association, but out of the moneys which their associates would contribute. The moral guilt in such a business, with its concealment of its real nature by those promoting the enterprise from those whom they are seeking to have join with them in it, is apparent.

That the law also will recognize the guilt and give relief because of it is well established. The defendants were promoters of the plaintiff corporation beyond question. The plaintiff was projected and organized by them, and they for some time after its organization managed and controlled it. The part they played was that of projecting and organizing a corporation to purchase certain properties, and inducing others to join with them in the enterprise. This is the essence of promotion. Ehrich on Promoters, §§ 3, 4, and 5; Ex-Mission L. & W. Co. v. Flash, 97 Cal. 610, 626, 32 Pac. 600; Burbank v. Dennis, 101 Cal. 90, 97, 35 Pac. 444.

The defendants being promoters, in the language of Lomita L. & W. Co. v. Robinson, 154 Cal. 36, 45, 97 Pac. 10, 13 (18 L. R. A. [N. S.] 1106), they—

"occupied a fiduciary relation to their cosubscribers, and were bound to truthfully declare to their associates any personal interest that they had in the matter of the purchase. Without such disclosure they could not legally profit at the expense of their associates. If they were guilty of any misrepresentation of facts or suppression of truth in relation to their personal interest in the proposed purchase, the corporation is entitled to set aside the transaction, or recover compensation for any loss which it has suffered."

See, also, California, etc., Co. v. Walls, 170 Cal. 285, 293, 149 Pac. 595, and authorities there cited.

The application of the general principle so stated to just such facts as those of the present case is found in Densmore Oil Co. v. Densmore, supra. There, after the statement we have already quoted that a vendor may, without disclosure of his profit, sell property which he owns to an association formed to purchase it and of which he is a member, the court goes on to say:

"The second principle is that, where persons form such an association, or begin or start the project of one, *from that time*, they do stand in a confidential relation to each other, and to all others who may subsequently become members or subscribers, and it is not competent for any of them *to purchase property for the purposes of such a company and then sell it at an advance without a full disclosure of the facts.*"

This statement was quoted with approval by this court in Burbank v. Dennis, supra, and the italics are those found in it as so quoted. It covers literally and exactly the present case. Drum and Coffin projected and had in mind the formation of a corporation in which others would be associated with them at the time they first hit upon the lands which were subsequently sold the plaintiff. They in fact were at the time looking for lands for the purpose of such a corporation. They therefore from the beginning "stood in a confidential relation to all others who might become members or subscribers" to the corporation. Standing in this relation, "it was not competent for them to purchase property for the purpose of such a company and then sell it at an advance without a full disclosure of the facts," and

yet they did so purchase and sell property without any disclosure whatever to those whom they induced to associate with them.

In Burbank v. Dennis, supra, two men, Dennis and Sanborn, associated themselves on April 20th in a project to acquire certain lands and sell them to a corporation which they would organize and induce others to become shareholders in. They did organize such a corporation and sold to it a number of tracts, and, among others, one known as the Titus tract. With regard to its purchase, the court said (101 Cal. 98, 35 Pac. 447):

"As to the Titus tract, Sanborn was in no sense the owner of it. He had not paid a dollar towards its purchase, and had no word of writing to indicate any interest therein. It was bought with the corporation's money, and all transactions pertaining to the sale of it occurred subsequent to the said 20th day of April. The profit of $25,000, charged to the corporation upon this tract, is not justified in the law, and the corporation has been injured to that extent."

We can see no possible distinction between the facts so presented and those of the one at bar. Another decision, and a very eminent one, whose facts are closely parallel is that of In re Olympia, decided by the English Court of Appeal in 2 L. R. (1898) 153, and under the name of Gluckstein v. Barnes by the House of Lords in L. R. Appeal Cases (1900) 240. For other decisions of our own involving and applying the general principle, see Ex Mission L. & W. Co. v. Flash, 97 Cal. 610, 32 Pac. 600; Lomita L. & W. Co. v. Robinson, 154 Cal. 36, 97 Pac. 10, 18 L. R. A. (N. S.) 1106; California-Calaveras M. Co. v. Walls, 170 Cal. 285, 149 Pac. 595.

[3, 4] So far we have been discussing the general question of the defendants' liability upon the facts shown. From the conclusion that they are liable we see no escape. But there are a number of particular contentions made on behalf of the defendants which should be considered. It is claimed, for example, that the profit made by Drum was a legitimate one, since the fact that Drum was selling to the corporation was not concealed from the directors, three of whom were not parties to the scheme to make a profit, and to whom the possibility, if not the probability, that Drum was making a profit must have been evident, and there was no representation that he was not making a profit. It is also claimed that there is no evidence that the fact that Drum was to make a profit was not disclosed. The answer to the latter proposition is, of course, that when once it is apparent that Drum occupied a fiduciary relation toward the corporation and his associates in it, the burden rested on him to show the full disclosure, without which the transaction was an improper one. As to the first proposition, the answer is, first, that there is no disclosure shown of the fact that Drum was not the owner of the properties, but had merely arranged to purchase them for the purpose of turning them over to the company, and, next, that until some time after the purchase from Drum was consummated the defendants controlled and directed the corporation, so that the knowledge of the directors would have been but the knowledge of defendants, and a disclosure to the directors but a disclosure to defendants. The duty of disclosure which they owed was, as stated in the quotation we have made from Lomita L. & W. Co. v. Robinson, one to those whom they were seeking to induce to join them in the enterprise. The language of the Lord Chancellor in Gluckstein v. Barnes, supra, regarding a similar contention is not amiss here. He said (page 247):

"My Lords, I decline to discuss the question of disclosure to the company. It is too absurd to suggest that a disclosure to the parties to this transaction is a disclosure to the company of which these directors were the proper guardians and trustees. They were there by the terms of the agreement to do the work of the syndicate, that is to say, to cheat the shareholders; and this, forsooth, is to be treated as a disclosure to the company, when they were really there to hoodwink the shareholders, and, so far from protecting them, were to obtain from them the money, the produce of their nefarious plans."

Now, we do not mean to infer that the three directors other than Rishel and Coffin, Jr., were there, consciously to themselves, to cheat the shareholders. But they were there for that purpose so far as the defendants were concerned, and the latter were the directing and controlling power. Any disclosure to the directors would have been futile under the circumstances, and any disclosure which, under the circumstances, would meet the requirements of the law had to be a disclosure, not to the directors, but to those who were asked to subscribe. The subscription agreement did not make such disclosure, and it is a fair inference that it was not made in any other manner. In any case, the burden of showing such disclosure rested on the defendants, and it was not shown.

[5] Another contention made on behalf of the defendants is that the complaint fails to state a cause of action. What has already been said is a sufficient answer to this, except in one particular. The complaint does not allege directly that others were induced to become subscribers to the stock of the plaintiff. This, of course, was one of the essential elements of the fraud, and should have been directly alleged. It is alleged, however, indirectly, and this is sufficient to sustain the judgment, particu-

larly in view of the circumstance that the fact is not in dispute and affirmatively appears from the answers of the defendants themselves.

[6] It is also claimed that the defendants are not liable because there is neither allegation nor proof that the lands purchased were not equal in value to what the company paid for them, and that therefore it does not appear that the plaintiff was injured by the defendants' fraud. Along the same line, it is contended that a recovery from the defendants of the secret profit made was not proper in any case; that the remedies of the plaintiff consisted in either rescinding the purchase, something that is now impossible, or in obtaining damages. The answer to both contentions is the same. It is that the wrong which the defendants committed consisted in their making a profit at the expense of their associates when they had no right to make it. It is wholly immaterial whether the property purchased was or was not worth what the association paid for it. The wrong lies, not there, but in the profit that was wrongfully made. The proper relief in such a case is to compel the return to the association of the profit so made out of it. Putting it in another way, the defendants were under the duty, if they sold to the plaintiff, of making the sale without profit, unless they disclosed that they would receive a profit. They made the sale, but they did not make the disclosure. In this situation they cannot retain the profit. It is as if made for the corporation, and must be accounted for to it. It has been repeatedly so held, and a recovery of the profit permitted, in practically every case of this character which we have previously cited. In addition to them we might also cite Western States, etc., Co. v. Lockwood, 166 Cal. 185, 135 Pac. 496.

[7] It is also claimed that a joint and several judgment against the defendants for the full amount of the profits was not proper; that, as against the defendants other than Drum at least, the judgment should have been only for the share of the profit which each received. It is sufficient to say that the finding of the court, amply sustained by the evidence, is that all four defendants were participants in the fraudulent scheme to make a profit out of the organization of the plaintiff, and the sale to it of lands in excess of their real price. Being participants in the scheme, they are each and all responsible for the full amount of the injury their scheme worked upon the plaintiff. Lomita L. & W. Co. v. Robinson, supra. We have said that the finding that all four defendants participated in the scheme to make a profit out of the plaintiff is amply sustained by the evidence. It is quite strenuously contended to the contrary on behalf of young Coffin in particular. There is no direct evidence that he actually was aware of the scheme and he testifies to the contrary. It also appears that he was ill from before the time of the first official meeting of the organizers of the plaintiff until after the purchases from Drum were completed. But the circumstances of his close association with the other parties, his becoming an organizer, director, and secretary and treasurer of the company, and above all the payment to or for him of his share of the profit and his acceptance of it, are sufficient to sustain the finding that he was a party to the scheme. If any injustice is done him in this respect, the responsibility for it, so far as it rests on others than himself, rests on those who made this young man a sharer with them in their unlawful gains and gave him in other ways as well the appearance of a participant in the scheme in which those gains were had.

[8, 9] It is claimed by the defendants that the amount of the judgment is not correct, since to the extent of $27,500 it represents, not money which the defendants received as profits, but the 110,000 shares of the plaintiff which they so received and which the court for the purposes of the judgment transmuted into money at the rate of 25 cents a share without any evidence, according to the claim of defendants, that they were in fact of that value. The original issue of the shares was a wrong upon the plaintiff by the defendants. The plaintiff therefore had the right either to reclaim the shares themselves or to recover their value as of the time of the wrong. Hayward v. Leeson, 176 Mass. 323, 57 N. E. 656, 49 L. R. A. 725. At that time the evidence shows that the stock of the company was being subscribed and paid for at the rate of 25 cents a share. It also appears that the proposal of Drum which was accepted by the company and under which the shares were issued specifies that they are to be taken in payment of the purchase price which Drum is to receive, at the rate of 25 cents a share. This was sufficient evidence to justify the finding of the court that such was the value. Lehman v. Schmidt, 87 Cal. 15, 22, 25 Pac. 169.

[10] The defendants also contend that the court erred in refusing them leave to file a supplemental answer pleading a judgment against the plaintiff and Drum in an action by the Hamilton Company, wherein a number of the questions of fact involved here were, according to defendants' contention, determined adversely to the plaintiff. The only object of the supplemental answer was to set up the judgment by way of estoppel. The refusal of the court to permit this was correct, since the judgment would not have so operated. It would not so operate because it was not between the parties to this litigation. It is true that both Drum and the plaintiff were parties defendant in

the action in which the judgment was rendered, but the judgment was not between them, but between them on the one side and the plaintiff in that action on the other. A judgment may operate as an estoppel between parties to it only when they are adverse parties, so that the judgment is a determination of issues between them. Section 1910, Code Civ. Proc.; 23 Cyc. 1237.

The final contentions of the defendants which require consideration are that the action was barred by the statute of limitations and by laches. The fraud by the defendants was consummated by May, 1910, and the action was not brought until November, 1914. The statute of limitations which applies is subdivision 4 of section 338, Code of Civil Procedure. It provides that an action for relief on the ground of fraud must be brought within three years of the accrual of the cause of action, but that "the cause of action in such a case is not deemed to have accrued until the discovery by the aggrieved party, of the facts constituting the fraud." The question therefore is: Was the fraud discovered by the plaintiff less than three years before the action was commenced? In this connection two somewhat different points are made by the defendants. The first is that the evidence shows that the fraud was in fact discovered, in the legal sense, prior to that time, and, second, that the complaint is defective in the averments necessary to make a sufficient showing that the fraud was not so discovered.

[11] Taking up the first point, the evidence amply sustains the finding that the plaintiff did not have actual knowledge of the fraud until December, 1913. The defendants claim, however, that it should have had such knowledge prior to that time and more than three years prior to the commencement of the action, and rely upon the well-established rule laid down in Lady Washington, etc., Co. v. Wood, 113 Cal. 482, 45 Pac. 809, that discovery is different from knowledge, that where a party defrauded has received information of facts which should put him upon inquiry, and the inquiry, if made, would disclose the fraud, he will be charged with a discovery as of the time the inquiry would have given him knowledge. See, also, Bancroft v. Woodward, 190 Pac. 445.

[12, 13] The circumstances which the defendants rely upon as placing the plaintiff under the duty of inquiry prior to the three-year period are that at a stockholders' meeting in April, 1911, the defendants appeared as representing by proxy the ostensible shareholders into whose names the shares received by Drum had been transferred upon their division, and that, according to the evidence for the defendants, it was stated to one or more of the directors other than the defendants that the latter were the real owners of these shares. The mere appearance of the defendants as proxies for the ostensible shareholders would, of course, mean but little. As to the information that the defendants were the real owners of the shares, it is doubtful if the plaintiff would be charged with having such information, even if it were disclosed to the then directors. The defendants were still, if not in complete control of the corporation, at least the most important factors in it, and were its managing officers. There was as yet no really free and independent board of directors. But, however this may be, information that the defendants other than Drum were then the owners of portions of the stock which Drum had originally received as a part of the purchase price of the properties sold the company certainly did not carry an implication that Drum had not improbably bought the properties for the company and then resold them to it at an advance price, and can hardly be said to carry even the implication that the other defendants had probably acquired the shares through a division by Drum. The most natural inference would be that they had purchased the shares from those whose proxies they held, but the actual transfer of the shares on the books of the company had not yet been made. Without some information which carried a direct implication or suggestion of possible fraud, the plaintiff could not be put upon inquiry. The courts will not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been actually defrauded against those who defrauded him on the ground, forsooth, that he did not discover the fact that he had been cheated as soon as he might have done. It is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with a discovery in advance of actual knowledge on his part. The present case is not of that character.

[14, 15] As to the point of pleading, the rule laid down in Lady Washington, etc., Co. v. Wood is that, where an action for relief on the ground of fraud is brought after the expiration of the statutory period of three years, the complaint must show: (1) When the fraud was discovered, which, of course, must be within the three-year period; (2) why it was not discovered sooner; and (3) the circumstances under which it was discovered, so that the court may determine whether or not it was in truth discovered only within the three-year period. The complaint in the present case did allege the date of discovery, and such date was within the three-year period. As to the reason why a discovery was not sooner had, the complaint alleged the facts which constituted the fraud and which showed the fraud to be a concealed one, and also that the defend-

ants concealed the facts from the plaintiff. This was sufficient showing as to why there was no discovery sooner. It in fact comes within the exact language of the Lady Washington Case, which is that—

"He [the pleader] must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them—as that they were done in secret or were kept concealed."

As to the third requirement, that the circumstances of the discovery be shown, the complaint contains nothing, and it may well be that it was defective in this respect. But the evidence makes it plain that the circumstances under which it was discovered, a revelation of the facts by Drum after an investigation had been set on foot by the then officers of the plaintiff, did not involve a knowledge of facts upon which the plaintiff could be charged with a discovery prior to the three-year statutory period. The defendants were not misled by the defect of the complaint, and the situation is therefore one where the pleading perhaps is technically lacking, but where there is no lack in the evidence and the opposite party was not misled. In such a situation the error, if there was one, was not prejudicial and is not ground for a reversal.

[16, 17] As to the defense of laches, the complaint, as we have stated, was not filed until nearly a year after the date at which it alleges a discovery was had. The defendants furthermore contend that as early as 1912 an investigation was started resulting in a report in April, 1913, disclosing facts sufficient to charge the plaintiff with a discovery as of that time. It is not necessary to consider the accuracy of this contention. If it be true, the discovery was still within the period of limitation. Mere delay in bringing an action for a time less than the period of limitation does not amount to laches. There must be also present the element that the delay has been to the prejudice of the opposite party. Cahill v. Superior Court, 145 Cal. 42, 46, 78 Pac. 467; Cohen v. Cohen, 150 Cal. 99, 105, 88 Pac. 267, 11 Ann. Cas. 520. Nothing of this sort of any substance appears in the present case, bearing in mind that we are speaking only of the delay in bringing the action after the discovery of the fraud. Furthermore, it is exceedingly doubtful if under our statute, which provides that the cause of action does not accrue until discovery of the fraud, the plaintiff has not the unqualified right to bring the action at any time within three years thereafter. It was held in Estudillo v. Security Loan Co., 149 Cal. 556, 565, 87 Pac. 19, that the plaintiff had such right for the statutory period after the commission of the fraud, and that the doctrine of laches had no application. If his cause of action does not accrue until discovery, it is not easy to see why he should not likewise have the full period of the statute after discovery. The distinction must be borne in mind between laches in bringing the action within the statutory period after discovery and the laches which will prevent a tolling of the statute for failure to make a discovery, when such failure is due to the laches of the plaintiff. The distinction must also be borne in mind between such a case as the present and one where relief against fraud is sought by way of rescission. There the party defrauded, as a condition of his right to rescind, must act promptly upon discovering the facts which give him the right. The present action is not one for rescission. Rather it is closely, if not completely, analogous to an action for an accounting or to recover money or property had and received by the defendants for the benefit of the plaintiff, wherein certainly no delay after the accrual of the cause of action for less than the period of limitation would bar the right to relief.

We might also add that laches is a defense, and not a condition of relief, and, if it does not appear on the face of the complaint, must be affirmatively pleaded and proven by the defendants. 16 Cyc. 176. In the present case there was neither pleading nor corresponding proof of any prejudice suffered by the defendants through the delay of the plaintiff in not commencing its action sooner after the discovery of the fraud.

There are no other points which justify discussion.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; SLOANE, J.; LENNON, J.; LAWLOR, J.

184 Cal. 252

ADKINS v. BRETT. (L. A. 5044.)

(Supreme Court of California. Oct. 26, 1920.)

1. Evidence ⊜222(2)—Statements of defendant as to enticement of plaintiff's wife held admissible.

In action for alienation of wife's affections, evidence as to statements by defendant as to his enticement of the wife *held* admissible against him.

2. Husband and wife ⊜333(9)—Evidence held to prove enticement of wife.

In action for alienation of wife's affections, evidence *held* to prove that defendant lured and enticed wife from husband.

3. Appeal and error ⊜1002—Credibility of conflicting evidence for jury.

Where the evidence was conflicting, the question of where the truth lay was for the jury, and not the appellate court.

4. Evidence ⊜220(1)—Competency of declarations by person other than party not affected by party's presence or absence.

The competency of evidence of declarations or statements by a person other than the party to the action against whom they are introduced is not affected merely by the latter's presence or absence.

5. Evidence ⊜220(1)—When statements of others in presence of party calling for denial are admissible.

When party to litigation was present at the time that a person not a party thereto made declarations or statements, and the conduct of such party in response to the declarations or statements, or his replies to them, are of such character as to amount to admissions by him, his conduct, including his silence or want of action, where an inference can fairly be drawn from them, or his replies, can be shown against him and as a part of such conduct or replies the conduct or declarations of others to which they are a response.

6. Notice ⊜14—Statement to party admissible to charge him with notice of fact stated.

Evidence of statement made to a party notifying or informing him of certain fact is admissible to charge him with knowledge or notice of such fact.

7. Evidence ⊜317(3)—Statements by wife as to her relations with defendant, sued for alienation of affections, admissible though hearsay.

In action for alienation of wife's affections, testimony as to statements by wife as to her relations with defendant, though made in absence of defendant, *held* admissible for purpose of proving wife's feelings, though hearsay.

8. Evidence ⊜317(3, 15)—Hearsay evidence admissible to prove intention, feelings, or mental or physical state of person making statements.

When the intention, feelings, or other mental state of a certain person at a particular time, including his bodily feelings, is material to the issues under trial, evidence of such person's declarations at the time, indicative of his then mental state, even though hearsay, is competent as within an exception to the hearsay rule.

9. Trial ⊜48—Admissibility of evidence competent for one purpose not affected by incompetency for other purpose.

In husband's action for alienation by defendant of wife's affections, the admissibility of testimony as to statements made by wife regarding her relations with defendant, competent for purpose of showing wife's feelings, was not affected by fact that such evidence was not competent to prove the facts stated.

10. Trial ⊜207—Refusal of requested instruction limiting testimony error.

In husband's action for alienation by defendant of wife's affections, where there was evidence of statements by wife as to her relations with defendant, refusal of instruction precluding jury from considering such testimony on issue as to facts stated *held* error; defendant being entitled to an instruction limiting consideration of such testimony to its use to show feelings of wife.

11. Appeal and error ⊜1067—Refusal of requested instructions limiting evidence held reversible error.

In husband's action for alienation by defendant of wife's affections, where there was evidence as to statements by wife concerning her relations with defendant, court's refusal to give requested instruction limiting the consideration of such testimony to its use in showing wife's feelings and prohibiting jury from considering testimony on issue as to facts stated by wife *held* reversible error in view of conflicting testimony.

In Bank.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by Charles H. Adkins against Albert H. Brett. Judgment for plaintiff, and defendant appeals. Reversed.

I. Henry Harris and Charles A. Bank, both of Los Angeles, for appellant.

Duke Stone, of Los Angeles, and H. E. Wassell, of Corsicana, Tex. (Charles A. Bank, of Los Angeles, of counsel), for respondent.

OLNEY, J. The action involved in the present appeal is one for damages for the alienation by the defendant of the plaintiff's wife. The cause was tried before a jury, a verdict was returned for the plaintiff, and from the judgment entered upon the verdict the defendant appeals.

[1-3] The first point made on behalf of the defendant is that the verdict is not supported by the evidence. No question is made but that the evidence supports the conclusion that the husband had lost the affection of his wife, as a result of which she insisted upon a separation, or, if the testimony on behalf of the plaintiff be believed, as it must be taken it was by the jury, that acts of criminal con-

versation had taken place between the plaintiff's wife and the defendant. The particular in which it is claimed the evidence is insufficient is that, according to counsel's contention, it does not show that the defendant lured and enticed the plaintiff's wife from her husband, was her seducer, so to speak. Passing by the question as to whether or not evidence of adultery by a wife not shown to have theretofore lost her affection for her husband is not sufficient of itself to justify an inference of active seduction on the part of the man involved, it is sufficient for the purposes of this case to say that there was evidence of statements by the defendant to a male companion by the name of Tucker made the day after a call by the two upon the wife as to what had taken place the night before, which, if true, justified the conclusion that the defendant was the active aggressor against the wife's resistance on the occasion when first they had criminal intercourse. It is only fair to say that the making of the statements was denied by the defendant, as was any guilty relation whatever on his part with the wife, and that the witness Tucker appears in anything but a creditable light. But evidence of the statements by the defendant was competent against him as admissions by him, and we cannot say that the jury was not justified in believing the evidence. It should also be said that there was considerable corroboration. The case is not one of a want of evidence in any particular, but of a flat conflict of evidence in nearly every particular, with gross perjury on one side or the other. Where the truth lay it was for the jury to determine.

The serious questions in the case arise in connection with the admission of evidence of conversations between the plaintiff and his wife, wherein the latter admitted or stated that she had gone automobile riding with the defendant, had dined with him, had received flowers from him, that he was able to give her a good time, and the plaintiff was not, that she intended to continue to accept the defendant's attentions and the plaintiff could do what he pleased about it, and that he was distasteful to her.

[4-6] One objection to the evidence of these conversations, which may as well be disposed of at the outset as involving the most elementary principles of evidence, is that they were had without the presence of the defendant. The answer to this objection is that it is wholly immaterial whether the defendant was present or not. The competency of evidence of declarations or statements by a person other than the party to the action against whom they are introduced is not affected merely by the latter's presence or absence. If the evidence be not competent if the party against whom it is sought to introduce it was not present when the statements or declarations were made, no more is it competent if he were present. There are apparent exceptions to this, but they are only apparent, and not real, exceptions. One instance is that, when the party to the litigation was present and his conduct in response to the declarations or statements of others or his replies to them are of such character as to amount to admissions by him, his conduct, including his silence or want of action where an inference can fairly be drawn from them, or his replies, may be shown in evidence against him, and as a part of such conduct or replies the statements or declarations of others to which they are a response. But the primary thing which is admitted in evidence in such a case is the party's own conduct or statements, and, unless these are of such a character as to be relevant evidence against him, the declarations or statements of others are not admissible simply because made in his presence. Another instance is where it is sought to charge a party with notice or knowledge, and for that purpose evidence is introduced of a statement made to him notifying or informing him.

[7, 8] The real objection to such evidence as that under consideration is that it is hearsay. The evidence was plainly relevant; that is, it tended to prove matters in issue, and was therefore admissible unless there is some rule of exclusion applicable to it. The only rule of exclusion to which it can be subject is the rule against hearsay. The evidence was, in fact, hearsay, both as to the past matters stated in the conversations and as to the wife's statements of her then feelings toward the plaintiff and the defendant. But the rule is thoroughly well settled that, when the intention, feelings, or other mental state of a certain person at a particular time, including his bodily feelings, is material to the issues under trial, evidence of such person's declarations at the time indicative of his then mental state, even though hearsay, is competent as within an exception to the hearsay rule. In the present case the state of the wife's feelings at the time of these conversations, both toward her husband and toward the defendant, was material, and the conversations were indicative of her feelings, and, this being so, evidence of them was admissible to show her then state of feelings. This much can hardly be questioned, in view of the settled character of the general rule just stated, its plain applicability to just such cases as the present, and the fact that it has very generally been so applied. See Cripe v. Cripe, 170 Cal. 91, 148 Pac. 520, and authorities there cited; 13 R. C. L. 1477; 21 Cyc. 1624.

The difficulty in regard to such declarations as those involved here lies in the fact that, while they may be competent upon the point of the wife's feelings, they go very much further. They contain statements as to matters, such as automobile rides, dinners, flowers, and attentions generally by the defendant to the wife, as proof of which the statements are not within any exception to the hearsay rule

and are wholly incompetent. The situation is intensified by the fact that those matters are themselves material to the issues, and, if true, very detrimental to the defendant, so that the admission of the evidence involves the placing before the jury of evidence tending to prove matters in issue, for proving which such evidence is not competent, and the proof of which is very prejudicial to the party against whom it is introduced.

[9] Nevertheless it is clear enough that the evidence, competent for the purpose of showing the state of the wife's feelings, is not rendered incompetent by the fact that it also tends to prove other material matters, to prove which it is not competent. The rule upon this point, which is one of well-nigh everyday application in actual trial, is thus stated by Wigmore (volume 1, p. 42):

"In other words, when an evidentiary fact is offered for one purpose, and becomes admissible by satisfying all the rules applicable to it in that capacity, it is not inadmissible because it does not satisfy the rules applicable to it in some other capacity, and because the jury might improperly consider it in the latter capacity. This doctrine, although involving certain risks, is indispensable as a practical rule."

Cripe v. Cripe, supra, is an illustration of this. A father was sued by the wife of his son for the alienation from her of the son, and at the trial the following question was asked of the father as a witness:

"After the marriage of your son and daughter, and before Dolly [the son's wife] left the ranch at Huasua in August, 1911, did your son ever tell you that Dolly drank to such an extent that he could not control her, or did he ever tell you during that time that she abused him so bad that he could not live with her?"

It is plain that as to the facts that the wife drank to excess and abused her husband, so that he could not live with her, the evidence was hearsay, was not within any exception to the hearsay rule, and was wholly incompetent, and at the same time those facts were material to the case, and, if true, very detrimental to the cause of the wife, so that the introduction of the evidence would be very prejudicial to her as to facts which the evidence was wholly incompetent to prove. Nevertheless the question was held to be proper, and the refusal of the trial court to permit it to be answered reversible error, on the ground that the testimony which it called for was competent to show the state of the son's feelings.

In holding that such evidence is admissible, we are not unaware of the fact that there are decisions to the contrary, and in particular that, so far as the testimony actually excluded by them is concerned. Humphrey v. Pope, 1 Cal. App. 374, 82 Pac. 223, and Barlow v. Barnes, 172 Cal. 98, 155 Pac. 457, are of this character. But in neither of these cases is the point discussed that declarations of the alienated spouse are admissible as competent evidence of his or her feelings at the time, and, if they are to be taken as holding that such evidence is not competent for that purpose, they are directly contrary to Cripe v. Cripe, where the point was considered and decided. If Cripe v. Cripe is not to be taken as having fixed the law of this state upon the point, from which Humphrey v. Pope, and Barlow v. Barnes inadvertently depart, the situation is at least one of conflicting decisions, where we are now at liberty to determine which is correct and should be followed. In this situation there is little question but that Cripe v. Cripe should be followed. It is in accord with the great weight of authority and is but the application in this particular class of cases of a general rule of evidence, thoroughly well settled and applied in every kind of case, civil and criminal. One of the most frequent applications of it in civil cases is the admission of declarations by a testator when his mental capacity or his feelings are material. Estate of Arnold, 147 Cal. 583, 594, 82 Pac. 252. A notable instance of its application in a criminal case is Commonwealth v. Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235, where upon a trial for murder a statement of the decedent, a young unmarried woman, made shortly before her death, that she was five months pregnant, was held admissible for the purpose of showing that she believed this to be her condition, and therefore had a motive for committing suicide. Upon the point that such evidence, admissible to prove one fact, is not rendered inadmissible because tending to prove some other fact, to prove which it is not competent, the court said (page 187 of 157 Mass., page 964 of 31 N. E.):

"The most obvious distinction between speech and conduct is that speech is often not only an indication of the existing state of mind of the speaker, but a statement of a fact external to the mind, and as evidence of that it is clearly hearsay. There is, of course, danger that a jury may not always observe this distinction, but that has not availed to exclude testimony which is admissible for one purpose, and not admissible for another to which there is danger the jury may apply it."

The rule, then, is that the admissibility of such evidence as that under discussion, admissible because competent as to one point, is not destroyed by its incompetency as to other points which it yet logically tends to prove. The danger, however, of the jury misusing such evidence and giving it weight in determining the points as to which it is incompetent is manifest. In such a situation, as Prof. Wigmore puts it immediately following the quotation already made, "the only question can be what the proper means are for avoiding the risk of misusing the evidence." Answering this question, Prof. Wigmore says:

"It is uniformly conceded that the instruction [to the jury] of the court [that the evidence

is competent only as proof of one point and must not be considered as proof of others] suffices for that purpose; and the better opinion is that the opponent of the evidence must ask for that instruction; otherwise he may be supposed to have waived it as unnecessary for his protection."

The general correctness of this statement cannot be doubted. But we doubt if the learned author intended to say more than that the opponent of such evidence is always entitled to such an instruction for his protection, if he asks for it, and that generally it will suffice. But it is not difficult to imagine cases where it would not suffice, and the opponent could justly ask for more. The matter is largely one of discretion on the part of the trial judge. If the point to prove which the evidence is competent can just as well be proven by other evidence, or if it is of but slight weight or importance upon that point, the trial judge might well be justified in excluding it entirely, because of its prejudicial and dangerous character as to other points. A number of the authorities cited by defendant's counsel are distinguishable from the present case upon this ground. This would emphatically be true where there is good reason for believing that the real object for which the evidence is offered is not to prove the point for which it is ostensibly offered and is competent, but is to get before the jury declarations as to other points, to prove which the evidence is incompetent. The same thing would be true as to the introduction of repeated declarations, when once the point for which they are competent has been amply shown. It may also be that the portions of the declaration which there is danger may be misused by the jury are not so interwoven with the balance of the declaration but that they can be disassociated from it without impairing the meaning or effect of the declaration for the purpose for which it is admissible. In such a case evidence of such portions of the declaration may be excluded on proper objection, when offered, if there is opportunity for such objection, or, if there is not, may be stricken out on motion subsequently. The point of the matter is that the opponent of such evidence, so likely to be misused against him, is entitled to such protection against its misuse as can reasonably be given him without impairing the ability of the other party to prove his case, or depriving him of the use of competent evidence reasonably necessary for that purpose.

[10] The question, then, in the present case in connection with the evidence of declarations of the wife reduces itself to a question as to whether the defendant was properly protected from the danger of this evidence being misused by the jury, and considered by them as proof of matters other than that for proving which it was admitted. We think that there can be no doubt but that the defendant was not properly protected in this respect.

When the first evidence of a conversation between the plaintiff and his wife of the character of that stated was put in, defendant's counsel requested an instruction to the jury in effect that the evidence was received only for the purpose of showing the relations between husband and wife, and should not be considered by the jury as proof of the facts narrated by the wife. In response to this request, the judge charged the jury as follows:

"Gentlemen, the court does not at this time or at any time instruct you as to what has been proven or as to what has not been proven. You are the sole judges of the value and effect of the evidence. It is well, however, to bear in mind the fact that this evidence is being admitted and is being received by the court for the purpose of throwing light and elucidating the issue as to the relations existing between the plaintiff and his wife."

When evidence of similar conversations was subsequently introduced, a similar request was made and a similar instruction given. It is apparent at once that the instruction was not responsive to the request of defendant's counsel, and did not meet the situation. The defendant was entitled to a direct, positive, and unqualified instruction that the jury must not consider the evidence as proof of the matters narrated, to prove which the evidence was wholly incompetent. Instead of this the jury was instructed that the court would not instruct them as to what had been proven or not proven, and that they were the sole judges of the value and effect of the evidence, but it was well for them to bear in mind that this evidence was admitted for the purpose of showing the relations between the plaintiff and his wife. There was but one inference which the jury could draw from this, and that was that they were at liberty to consider the evidence as proof of the matters narrated by the wife, if they so pleased, although they should bear in mind that it was not admitted for that purpose. The effect of this instruction was heightened by an instruction given upon the introduction on behalf of the defendant of evidence of other declarations by the wife. After instructing the jury substantially as in the case of similar evidence on behalf of the plaintiff, the court concluded thus:

"In other words, that the declaration of a person, of themselves, or of itself, if it be a declaration, does not necessarily establish the truth of those matters which are alleged to have been stated by the declarant. There must be other proof submitted before you would be justified in assuming it."

It is true that this instruction was given in connection with evidence on behalf of the defendant, so that in this instance the failure

properly to limit the effect which the jury could rightly give to the evidence was prejudicial to the respondent, and not to the appellant. But the instruction was in line with the instructions which had previously been given in connection with evidence for the plaintiff, and could not but confirm in the minds of the jury the idea that they had the right to consider such evidence of declarations, whether for the plaintiff or for the defendant, as proof to some extent of matters narrated by the declarations, at least if there was corroborating proof.

The effect of these instructions was not removed by anything occurring subsequently. Nothing whatever is said upon the point in the final charge to the jury. The court did at a later time in the trial instruct the jury with regard to certain evidence introduced on behalf of the defendant that—

"It is to be considered by you only in the light of the instruction which I have heretofore given you, as throwing light upon the question of her [the wife's] feeling, emotion, sentiments, affection toward her husband, and not for any other purpose."

The evidence to which this charge related was not evidence of declarations by the wife, but of conduct by her with other men subsequent to her alleged intimacy with the defendant, and this difference would tend to prevent the jury from appreciating the fact that it was inconsistent with the instructions previously given. But, more than this, it is plain that, under the circumstances of this case at least, the only charge at all adequate to remove the effect of the previous erroneous instructions would have been one expressly pointed at them, stating that they were incorrect and should not be followed, and laying down the correct rule in sharp distinction from them. No such instruction was given.

[11] Nor was the error in the respect under discussion a trivial one. The danger of the misuse by the jury of this evidence was great, so great that even the most positive instruction upon the point could hardly remove entirely the effect of the evidence from the mind of the jury. The defendant was entitled to protection against this danger, so far as it could reasonably be given. A positive instruction would at least have minimized its effect. Instead of such an instruction, one was given which practically authorized the use, or rather the misuse, by the jury of the evidence as proof of matters exceedingly detrimental to the defendant and as proof of which it was wholly incompetent. The conflict in the evidence was so sharp and the evidence which the jury was authorized to use wrongly was so prejudicial to the defendant that it may well have had a determining influence with the jury. This being the situation, a new trial should be had.

There are other points made on behalf of the defendant, but they are not of such a character that anything would be gained by their discussion. It is sufficient to say for the purposes of a new trial that we have looked into them and find nothing in them.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; SLOANE, J.; WILBUR, J.

184 Cal. 209

SPENCE et al. v. FISHER. (L. A. 5582.)

(Supreme Court of California. Oct. 22, 1920.)

Master and servant ⊂=301(1)—Adult child's negligent driving of family automobile not imputable to father.

A father who is not guilty of personal negligence is not liable for damages sustained by third party by reason of negligent driving of an automobile by an adult member of his family using the same for his own purposes, the automobile being owned and maintained by the father for the general convenience, use, and the pleasure of his family, and the particular member of the family operating the same having permission to use it for his or her pleasure, notwithstanding Motor Vehicle Act 1919, § 24, relating to liability of parents where licenses are granted minors.

In Bank.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Actions by Emma Jones Spence and Philip T. Spence, respectively, against Henry Fisher. Judgments for plaintiffs, and defendant appeals. Reversed.

Duke Stone and Barnhill & Pratt, both of Los Angeles, for appellant.

Allison & Dickson, of San Bernardino, for respondents.

ANGELLOTTI, C. J. This is an appeal from a judgment in favor of the plaintiffs in two actions which, by stipulation of the parties, were treated and tried as one action in the superior court. The plaintiffs are husband and wife, and the actions were for the recovery of damages for personal injuries occasioned by a collision between a horse-drawn vehicle in which the plaintiffs were proceeding along a public street in the city of Redlands, and an automobile owned by defendant, which was being driven along said street by one Natalia Fisher, an adult daughter of defendant.

It was alleged and found that the collision and consequent injuries were due to the negligence of Miss Fisher in the operation of

the automobile. Assuming the finding in this regard to be sufficiently supported by evidence, the remaining question is as to the liability of defendant for the result of his daughter's negligence.

On this branch of the case there is no dispute as to the material facts. Defendant was the owner of the automobile and kept and maintained the same for "the use, convenience, and pleasure of his family." His daughter, then 19 years of age, resided at the family home in Redlands with her father and mother. She was accustomed to drive the car, and had defendant's permission to use the same whenever she saw fit to do so. At the time of the accident she was driving the automobile on her way to a concert for her own pleasure, which she was attending without direction or suggestion from her father or mother, having as her guest in the car the governess of defendant's younger daughter, who was a member of defendant's household, but not a member of his family. In this respect the finding of the trial court is that the automobile was being operated by Miss Fisher, accompanied by Miss Peisch, the governess, "for the convenience, use, and pleasure of the said Natalia Fisher and the said Mae Peisch." No other member of the family was in the car. Defendant was absent from Redlands that day, and knew nothing of this particular use of the car until after the accident.

Upon these facts the question is presented as to the liability of a father who is not guilty of personal negligence in the matter for damages sustained by third parties by reason of the negligent driving of an automobile by an adult member of his family, when such member of the family is using the same for his or her own purposes, the automobile being owned and maintained by the father for the general convenience, use, and pleasure of his family, and the particular member of the family operating the same having his permission to use the same at his or her pleasure.

This question has never been decided by this court. The father was held liable under such circumstances by the District Court of Appeal of the First Appellate District in Crittenden v. Murphy et al., 36 Cal. App. 803, 173 Pac. 595. No petition for a hearing of that case was presented to this court, and the decision became final without any consideration of the matter by us. In the earlier case of McWhirter v. Fuller, 35 Cal. App. 288, 170 Pac. 417, the same doctrine was enunciated by the same court, but there it was manifestly dictum, and in denying a petition for a nearing in this court we withheld approval of that portion of the opinion. (35 Cal. App. 292, 170 Pac. 419.)

The question is one in regard to which there is an irreconcilable conflict in the decisions of the courts of last resort of the various states in which it has been presented for consideration. It may safely be said, however, that it is now generally conceded that, in the absence of statutory provision for such a liability, the liability of the father must be based upon the conclusion that the negligence of the driver is imputed to him on the theory that such driver was acting as the agent or servant of the father in driving the car. No authority sustaining the doctrine of liability under such circumstances that we have seen puts the decision on any other ground, even when the driver was a minor child, in the absence of a statute creating it; it being recognized that there is nothing in the nature of the automobile itself or in the relationship of parent and child, aside from the fact that the latter is a member of the family of the parent, to create such a liability. Of course, all the courts recognize the general rule that the parent is not liable for the torts of his child.

As we said in Bryant v. Pacific Electric Ry. Co., 174 Cal. 737, 164 Pac. 385:

> "In order that the negligence of one person may be properly imputed to another, they must stand in such relation of privity that the maxim, 'Qui facit per alium facit per se,' directly applies."

On principle it seems difficult to conceive of any such relationship under the circumstances we have stated. It is true that the law of agency is not confined to business transactions, and we can readily conceive of the automobile so provided and maintained being used at a particular time by a member of the family under such circumstances as to make such member of the family the agent or servant of the father in such use. A plain case of such a use would appear in the event that the member of the family was using the machine on some special mission of the father, doing something that he had been directed by the father to do for him. The negligence of the driver would then be imputed to the father, not because the former was a member of the family, but because he was the agent or servant of the father, engaged in the father's business, precisely as if he were the hired chauffeur of the father. And we can conceive of many situations with relation to the use by a member of the family of a machine so kept and maintained as to which it might fairly be held that the driver was engaged at the particular time on the business of the father, and acting within the scope of his employment as agent or servant of the father. As was said by the Court of Appeals of New York in Van Blaricom v. Dodgson, 220 N. Y. 111, 115 N. E. 443, L. R. A. 1917F, 363: "The question whether one person is the agent of another in respect of some transaction is to be determined by the fact

that he represents and is acting for him," and wherever the situation is such that the driver may fairly be said to be acting for the father in his use of the automobile, the doctrine of imputed negligence may be held applicable. But it seems to us that it cannot reasonably be held that a member of the family using a car so provided, kept and maintained by the father for the pleasure and convenience of his family, solely on his own mission for his own personal pleasure or convenience, is acting for his father or is engaged on the father's business, notwithstanding that such use was one of the purposes for which the car was provided and maintained. In such a situation we would have simply a permissive use of the father's car by another, solely on that other's business, practically the same use of the owner's automobile that is had by one not a member of his family to whom he loans it for such third party's own use or enjoyment, the only difference being that in the latter case the car is not provided, kept, and maintained by the owner for the purpose of allowing others to use it. It seems to us that this is an immaterial factor. For the purposes of argument we may conceive of some kind-hearted individual who keeps a car for the avowed purpose of not only using it himself, but also of allowing his less opulent friend and neighbor to use it whenever he desires to do so. Certainly in such a case no one would claim that when the neighbor is using it solely on his own mission he was acting as the agent of the owner.

Some of the courts appear to hold that, where a car is so provided and maintained by a father for the use of the members of his family for their pleasure and convenience, he makes that pleasure and convenience his own "business," and that any member of the family using the car exclusively for his or her own purposes is doing so in carrying on the business of the father as the father's agent. As the New York Court of Appeals said in Van Blaricom v. Dodgson, supra, this is certainly "an advanced proposition in the law of principal and agent," presenting "a case of such theoretical and attenuated agency, if any, as would be beyond the recognition of sound principles of law as they are ordinarily applied to that relationship." The idea that a capable child in using for his own pleasure some article that a kind father has provided for the enjoyment of the members of his family is carrying on, as his father's agent, his father's business, in thus entertaining himself, is somewhat unique. As one of the courts in criticism of this view suggested, it would have to be held thereunder that an adult son, a member of his father's family, using a car so provided and maintained for the use of any member of the family, for the sole purpose of taking his own "best girl" riding, would in so doing be carrying on his father's business, acting as his father's agent. Walkins v. Clark, 103 Kan. 629, 631, 176 Pac. 131. Such a case would be no different, in so far as the principles applicable to the relations of principal and agent or that of master and servant are concerned, from any case of the permissive use of the car by a member of the family solely for his own pleasure or convenience. Of course, it is true that every good father makes it his "business," in a certain sense of that word, to furnish so far as he can, for use by the members of his family, all those things that will contribute to their convenience and pleasure. But to our minds his doing this cannot, by any sound reasoning, warrant a conclusion that, in the subsequent use of the thing by a member of the family solely for his own convenience or pleasure, while engaged exclusively on a mission of his own, such member of the family is engaged on the father's business or in any way acting as his agent or servant.

We conclude that upon the facts stated at the outset there is no liability on the part of the father for the negligence of his daughter. Our conclusion finds ample support in what appears to us to be the weight of authority. See Doran v. Thomsen, 76 N. J. Law, 754, 71 Atl. 296, 19 L. R. A. (N. S.) 335, 131 Am. St. Rep. 677; Parker v. Wilson, 179 Ala. 361, 60 South. 150, 43 L. R. A. (N. S.) 87; Van Blaricom v. Dodgson, 220 N. Y. 111, 115 N. E. 443, L. R. A. 1915F, 363; Loehr v. Abell, 174 Mich. 590, 140 N. W. 926; Bolman v. Bullene (Supreme Court of Missouri) 200 S. W. 1068; Hays v. Hogan, 273 Mo. 1, 200 S. W. 286, L. R. A. 1918C, 715, Ann. Cas. 1918E, 1127; Blair v. Broadwater, 121 Va. 301, 93 S. E. 632, L. R. A. 1918A, 1011; Zeeb v. Bahnmaier, 103 Kan. 599, 176 Pac. 326, 2 A. L. R. 883; Watkins v. Clark, 103 Kan. 629, 176 Pac. 131; Elms v. Flick (Ohio) 126 N. E. 66; Arkin v. Page, 287 Ill. 420, 123 N. E. 30, 5 A. L. R. 216.

Many of the cases cited by learned counsel for respondent fail to sustain any claim of liability on the part of the father in such a case as the one before us. In McNeal v. McKain, 33 Okl. 449, 126 Pac. 742, 41 L. R. A. (N. S.) 775, a minor son was operating a car, so kept, in which at the time were his sister and a guest of the family, who were being carried for their pleasure. The court took occasion to say that the father would not be liable if the son were driving on his own business exclusively. The Missouri cases cited, Daily v. Maxwell, 152 Mo. App. 415, 133 S. W. 351, and Hays v. Hogan, 180 Mo. App. 237, 165 S. W. 1125, both from inferior courts, were overruled by later Supreme Court decisions. In Smith v. Jordan, 211 Mass. 269, 97 N. E. 761, the father was held liable, but the decision was based upon the fact that the minor son was driving his mother, in accord with general instructions expressly or im-

pliedly given by the father, and the court took occasion to say that, if the son had been operating the car in the performance of some independent design of his own, there would have been no liability on the part of the father. In Lemke v. Ady (Iowa) 159 N. W. 1011, the minor child was driving his mother and two visiting guests, and it was said that to sustain a claim of liability on the part of the father it must appear that the minor was engaged in some act for the benefit of the father or some member of the family. In Stowe v. Morris, 147 Ky. 386, 144 S. W. 52, 39 L. R. A. (N. S.) 224, the minor son was driving his sister and her friends. In Farnham v. Clifford, 116 Me. 299, 101 Atl. 468, the question is not decided, the court putting stress on an admission of liability on the part of the defendant as making the evidence sufficient to support the verdict. Hiroux v. Baum, 137 Wis. 197, 118 N. W. 533, 19 L. R. A. (N. S.) 332, is not in point. The father had purchased the car and arranged to have his son learn to drive it for the further use of the car, and the son was driving it under the instructor's guidance at the time of the accident. This was held sufficient to support the conclusion that he was then engaged in his father's business. The contention of respondent is, however, upheld by the opinions in Kayser v. Van Nest, 125 Minn. 277, 146 N. W. 1091, 51 L. R. A. (N. S.) 970; Uphoff v. McCormick, 139 Minn. 392, 166 N. W. 788; Birch v. Abercrombie, 74 Wash. 486, 133 Pac. 1020, 50 L. R. A. (N. S.) 59; Hutchins v. Haffner, 63 Colo. 365, 167 Pac. 966, L. R. A. 1918A, 1008; Griffin v. Russell, 144 Ga. 275, 87 S. E. 10, L. R. A. 1916F, 216, Ann. Cas. 1917D, 994; Lewis v. Steele, 52 Mont. 300, 157 Pac. 575; Boes v. Howell, 24 N. Mex. 142, 173 Pac. 966, L. R. A. 1918F, 288; Davis v. Littlefield, 97 S. Car. 171, 81 S. E. 487; King v. Smythe, 104 Tenn. 217, 204 S. W. 296, L. R. A. 1918F, 293; Allen v. Bland (Tex. Civ. App.) 168 S. W. 35; and our own District Court of Appeal Case of Crittenden v. Murphy, 36 Cal. App. 803, 173 Pac. 595.

As we have said, there is a hopeless conflict in the decisions, but we are of the opinion that the weight of authority is in accord with our conclusion. The only statutory enactment in any way touching such a matter that we have thus far is the provision of the Motor Vehicle Act of 1919 (St. 1919, p. 191), which requires the parents of a minor child to join in the minor's application for a license to operate a car, and provides that any negligence of such minor in operating the car shall be imputed to the persons signing such application. Section 24, Motor Vehicle Act.

The judgment in each case is reversed.

We concur: OLNEY, J.; SHAW, J.; WILBUR, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.

49 Cal. App. 350

McKEEVER v. LOCKE-PADDON CO.
(Civ. 3511.)

(District Court of Appeal, First District, Division 1, California. Sept. 21, 1920.)

Trial ⟸387(1), 388(2)—After trial to jury in advisory capacity under stipulation, court must make written decision, findings, and conclusions.

Where the parties stipulated that the jury should sit in an advisory capacity, and might return a general verdict, which the court should accept as the basis of its judgment, the verdict of the jury was still advisory only, so that it was error for the court to render judgment thereon without a written decision, findings of fact, and conclusions of law, as required by Code Civ. Proc. §§ 632, 633.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Frank M. McKeever against the Locke-Paddon Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

J. L. Smith, of San Francisco, for appellant.
Reisner & Honey, of San Francisco, for respondent.

KINSELL, Judge pro tem. Action was brought for damages alleged to have been sustained by plaintiff in connection with a real estate trade through fraudulent representations of the defendant.

The case was tried before a jury upon the express stipulation of counsel that the jury sit in an advisory capacity, and that the issues to be determined need not be specialized, but that the form of the verdict might be general; that the court should accept such verdict, in the event that it had substantial support, as the basis of the court's judgment. The verdict was for the plaintiff, and judgment was entered on the verdict.

Defendant appeals, and specifies a number of alleged errors, among which is the specification that, notwithstanding the fact that the jury acted solely in an advisory capacity, the trial judge failed to file any written decision, findings of fact, conclusions of law, or order adopting the verdict of the jury, as required by the code. If this point be well taken, all other matters in the voluminous record become immaterial.

It would seem that the appellant's contention is correct. The calling of the jury in an advisory capacity made it a trial by the court, and necessitated a written decision by the court (Code Civ. Proc. § 632), as well as findings of fact and conclusions of law (Code Civ. Proc. § 633; Vallejo, etc., R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238; Holland v. Kelly, 177 Cal. 43, 169 Pac. 1000).

The case of Johnson v. Mina Rica, etc., Co., 128 Cal. 521, 61 Pac. 76; cited by respondent, is not in point, since in that case it was stipulated "that the jury should try the 'legal issues' tendered by the answer, and that these issues should be determined by a general verdict 'in favor of the plaintiff or in favor of the defendant.'" The stipulation in this case was not to the effect that the jury in giving a general verdict should try or determine the cause. On the contrary, the stipulation expressly provided that the jury should sit in an advisory capacity, and that its verdict might be the basis of the court's judgment. The mere fact that it was agreed that the verdict might be in "general form" does not, as respondent contends, bring this case within the rule of the Johnson Case so as to obviate the necessity of findings.

Judgment reversed, and cause remanded to the trial court, with directions to give its decision in writing as provided in section 633, Code of Civil Procedure, and enter judgment accordingly.

We concur: WASTE, P. J.; RICHARDS, J.

49 Cal. App. 342

COFFMAN v. SINGH. (Civ. 2196.)

(District Court of Appeal, Third District, California. Sept. 20, 1920.)

1. Negligence ⟸117 — Answer held not to plead contributory negligence.

An answer, alleging that the accident and its consequences were due wholly and entirely to the negligence of the plaintiff, and that defendant was not negligent, *held* not to plead contributory negligence, because such allegations were provable under the specific denials of the answer.

2. Negligence ⟸117 — Plea of contributory negligence held insufficient.

A plea, alleging that plaintiff was injured by his own negligence, and not by any negligence of the defendant, is not a sufficient plea of contributory negligence, since contributory negligence presupposes the negligence of the defendant, which such a plea denies.

3. Appeal and error ⟸197(2)—Failure to plead issue tried in lower court cannot be urged on appeal.

Where an issue not made by the pleadings is without objection made by the evidence, the cause being tried in the court below by both parties on the theory that such issue is properly in the case, an objection for the first time on appeal that no such issue was made by the pleadings will not be of any avail to the objecting party.

4. Negligence ⟸122(1) — Burden of proving contributory negligence is on defendant.

Contributory negligence is a special defense, the support of which by a preponderance of the evidence always rests upon the defendant or the party setting it up, while under the general issue or the mere specific denials of the averments of the complaint all the defendant is required to do is to overcome the effect of the evidence introduced in support of the complaint.

5. Highways ⟸184(3) — Contributory negligence of truck driver, standing near truck in road, held for jury.

In action for injuries to a truck driver, struck by defendant's automobile while standing in road near truck, which he had stopped for purpose of adjusting carbureter, question of contributory negligence *held* for jury.

6. Highways ⟸183—Automobile driver held contributorily negligent in passing standing truck on narrow road.

Driver of automobile truck on road, which was so narrow that there was scarcely room for two cars to pass each other, and who passed truck standing in the road at the rate of 15 miles an hour without giving the truck driver, who stood near the truck, warning of his approach, and without stopping to consider how he could pass the truck without endangering the life of the truck driver, *held* contributorily negligent.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by J. M. Coffman against Booja Singh. Judgment for plaintiff, and defendant appeals. Affirmed.

Brown & Albery, of Colusa, for appellant.
Charles B. Harris and Ralph H. Lewis, both of Sacramento, for respondent.

HART, J. This is an action for personal injuries. The plaintiff was given a verdict, and from the judgment thereupon entered the defendant appeals.

The point for which a reversal of the judgment is demanded is that the proximate cause of the accident by which the plaintiff received the injuries of which he complains was his contributory negligence. In this connection, we may with propriety consider the respondent's contention that the defendant's answer does not set up contributory negligence as a defense to the action, and that the question of the plaintiff's contributory negligence is raised for the first time on this appeal. In reply to the contention, the defendant insists that the answer does sufficiently plead contributory negligence on the part of the plaintiff, and that, in any event, the case having been without objection tried upon the theory that such defense was pleaded and relied upon by the defendant, the respondent will not now for the first time be permitted to urge the objection that the defense of contributory negligence was not properly or at all set up in the answer.

[1, 2] We think the position of the plaintiff upon the proposition is sound. The "further and separate defense" set up in the answer does no more than to charge that the accident and its consequences were due wholly and entirely to the negligence of the plaintiff, it being therein further alleged that the defendant, at the time the collision occurred, was driving his machine in a careful and prudent manner, and that the injuries to plaintiff were not caused by any negligence on his part in the operation of his machine. These allegations could have been proved under the specific denials of the answer, and it is therefore clear that they do not involve or set up the plea of contributory negligence. "A plea alleging that plaintiff was injured by his own negligence, or by his own negligence and not by any negligence of defendant, is not a sufficient plea of contributory negligence. Indeed, it is not a plea of contributory negligence at all, for the law, where contributory negligence exists, presupposes the negligence of defendant, and a plea of this nature denies it." 29 Cyc. and footnote cases; Ramp v. S. R. Co., 133 Mo. App. 700, 114 S. W. 59, 61. But, it seems, the case was tried below upon the hypothesis that the defense of contributory negligence was sufficiently set up by the defendant, or at least an issue in the case. Indeed, the plaintiff himself at the trial appeared to have taken that view of the defendant's pleading, for the court read to the jury, at his request, the following instruction:

"In this case, the defendant has set up the defense of contributory negligence. You are instructed that the burden of proving contributory negligence is on the defendant, and that he must show by a preponderance of evidence that the plaintiff failed to use such care as a person of common prudence usually exercises under like circumstances."

[3-5] Moreover, evidence was received without objection upon the theory that the element of contributory negligence was in the case. It is well settled that, where an issue, not made by the pleadings, is, without objection, made by the evidence, the cause being tried in the court below by both parties upon the theory that such issue is properly in the case, an objection for the first time on appeal that no such issue was made by the pleadings will not be of any avail to the objecting party. This rule is elementary in California, for which reason cases need not be cited in confirmation of its restatement herein. But the proposition is of little, if any, consequence now, in view of the verdict arrived at and the conclusion we have reached upon the question whether it is supported by the evidence. The defendant was permitted to introduce evidence in support of all of the allegations of his answer, and if he did so upon the theory that he had pleaded contributory negligence, the result merely was that thus he not only conceded his own negligence, but took upon himself a greater burden than his answer required of him, since contributory negligence is a special defense, the support of which by a preponderance of the evidence always rests upon the defendant or the party setting it up, while under the general issue or the mere specific denials of the averments of the complaint all that the defendant is required to do is to overcome the effect of the evidence introduced in support of the complaint, so that the preponderance of the evidence will not be on the side of plaintiff. At all events, the important question presented here is whether there is disclosed by the record sufficient evidential support to the verdict, and the judgment, and upon this proposition we have reached the conclusion, after a careful review thereof, that the evidence is such as that the question whether it afforded justification for the result arrived at below was one for the sole determination of the jury; or, stating the proposition in a different form, we find the evidence as it is presented to us to be such as to preclude this court from holding, as a matter of law, that the verdict does not derive sufficient support therefrom.

The accident resulting in the injuries to plaintiff occurred between the hours of 12 and 1 o'clock p. m., on the 21st day of November, 1918, on a road running between the city of Colusa and the town of Maxwell, in Colusa county, at a point on said road about nine miles from the first-named place. The defendant was at the time of the accident returning to his farm from Colusa, where he had gone to employ an engineer to run a tractor engine. He secured the services of a man by the name of E. W. Clement, who was an automobile driver of considerable experience, and who was operating the machine when the accident happened. A Hindoo by the name of Khan was sitting in the front seat by the side of Clement, and the defendant in the back seat. The plaintiff was driving a motortruck, and was going west, or in the same direction in which the defendant was traveling. The plaintiff, previously to the appearance of the defendant's machine at the point where the accident occurred, had stopped his truck to adjust the carbureter, which had on the way been giving him trouble. At the place where the plaintiff stopped to adjust his carbureter, the road was graded above the surface of the ground from 2 to 4 feet. In the construction of this grade, a pit was left on each side of the road, the same being filled with water. The road was considerably cut up, and thus put in bad condition by the use thereon of heavy trucks with which rice had been hauled from place to place. The north half of the road at the point where the plaintiff stopped his

truck was wet and soft, and so seriously cut up that it was regarded as unsafe for a vehicle of any kind, particularly an automobile or a heavy truck, to pass over it. That portion of the road south of the center thereof was in fairly good condition, and it was in that portion of the highway that the plaintiff stopped his truck for the purpose above explained. To adjust his carbureter, the plaintiff removed the portion of the hood on the left-hand side of the engine of the truck, which, as seen, was on the south side of the road, pointing west. The hood of the truck is made up of three pieces, a top piece and one on each of the sides. Plaintiff had placed the piece of the hood which he had removed from the truck on the ground south of the truck and between the truck and the pit on the south side of the road. While the plaintiff was engaged in working on his carbureter, the defendant approached in his automobile, accompanied by the two men above named, traveling towards the west. They kept the machine in which they were riding in the good portion of the road down to the time they approached the spot where the plaintiff was working on his truck, and as they came near the truck they drove to the left-hand, or south, side thereof; that being, as seen, the only good or safe place in the road where they could pass the truck. In thus passing the truck, the defendant's machine struck the plaintiff's right leg, breaking it in such manner as to have seriously and permanently crippled him.

The plaintiff, who was at the time of the accident accompanied by a young man named Tennant, testified that he stopped his truck on the south side of the road, because he could not have pulled over to the north side without getting "stuck," that portion of the road being wet and soft and the soil there of the adobe quality; that the south side had straw on it; and that there was more room on that side for him to work in on his carbureter than there was on the north side.

"Naturally," he continued, "I went down there (south side), as my trouble was on the south side of the car—the carbureter on the left side of the car—and that left me on the south side to work. * * * I was working on the car, and I saw a machine right in behind the truck, and I reached over to pick up the hood to get it out of the way, and I was hit by the machine. * * * The hood was right by the side of me—a little behind me. * * * When I first noticed the machine coming it was 4 or 6 feet in behind the truck. * * * It did just miss the hind end (of the truck) about 6 inches, I guess, and the front end, why I suppose about 2 feet, something like that. * * * I did not hear any warning given. * * * There was none given."

On cross-examination, the plaintiff stated that at the time the machine reached him his body was "right up against the truck," and that he was facing north when he was working on the carbureter. Young Tennant, he said, had just left the seat of the truck, and was standing near the seat when the defendant's machine approached near the truck. Tennant, on seeing the approaching machine, jumped up on the running board of the truck at about the same instant of time that the plaintiff reached for the hood, and this act of Tennant was done as the defendant's machine "just started to come around the hind end of the truck." Further cross-examination of plaintiff:

"Q. How long was the truck? A. Oh, about 20 feet, the whole thing. Q. So that he was something like 20 feet away when you first saw— A. (Int.) Oh, about 24 or 26 feet. That is hardly exactly. Q. Just making an estimate, you are giving an estimate, are you? A. Yes, sir. Q. And what did you first do when you saw the car coming? A. Reached down to get this tin hood, and I got it out of the way and straightened up. Q. You straightened up, and then what happened? A. I was hit. * * * Q. And at the time that this, or that you were hit, which way were you facing? A. Well, I got straightened up—I was practically facing the east, the northeast, or something like that, right at the time of the accident."

E. W. Clement, who was driving the machine of the defendant when the accident occurred, testified that the latter had requested him to operate the automobile, and he thereupon took the place of the driver and started out on the Maxwell road; that, as he approached the place in the road where the plaintiff's truck was standing, he diminished the speed of his machine to 12 miles per hour; that he observed back of the truck "some grass and boards along there where some one had been stuck there, and I gave the machine a little gas so as not to get stuck"; that as he hit and passed the plaintiff he was going at the rate of 15 miles an hour. Clement said that there was on the defendant's machine an electric horn, and in one instance in his examination he stated that he gave no signal warning of his approach as he neared the truck, and in another instance declared that he did not remember whether he did or not.

Ernest Tennant, the young man mentioned above as having been with the plaintiff at the time of the mishap, testified that he was on the ground standing close to the truck, and on the south side thereof when he first observed the defendant's machine, then about 10 or 12 feet from the truck, turning to pass on the side he was standing on; that the defendant's car was then traveling at about the rate of 10 or 12 miles an hour; that, upon seeing said car, he jumped on the running board of the truck; that defendant's car would have struck him had he not jumped on the running board of the truck, as said car was only 2 feet from the truck's running board when it passed the truck. He saw the plaintiff struck and knocked to the

ground by defendant's car. The witness said he did not know, but merely thought that the plaintiff stepped away from the truck into the road to pick up the tin hood.

The above statement of the testimony presented by the plaintiff is sufficient to confirm our previous declaration that the case as made by the evidence, was one entirely for decision by the jury, or, in other words, that the evidence is of such a character as to forbid the conclusion, as a matter of law, that the verdict is without enough evidential backing to support it.

In their brief counsel for the defendant claim that the evidence without conflict shows that, even if the defendant was negligent in the manner in which his car passed the truck, the plaintiff, having, so it is asserted, stepped out into the road in front of the car, was thereby himself guilty of negligence without the existence or commission of which the accident and consequent injuries to him would and could not have occurred. But it is only necessary to read the testimony of plaintiff to convince the candid mind that counsel are mistaken in their hypothesis. The plaintiff, as will be noted, plainly testified that he merely stooped down and picked up the hood without moving from his position near the truck—so near that his body was against the truck—and that he had picked up the hood, and himself had straightened up before the defendant's car struck him. There is nothing in that statement or testimony which is inherently wanting in verity, and the jury had the right to believe it to be a correct account of how the accident happened. Indeed, the plaintiff's testimony would seem to be borne out by the obvious proposition that if he had stepped out into the road and in front of the defendant's car, and was in that position when it passed the truck, he would have been struck in other parts of his body, and in all probability have sustained fatal injuries.

[6] That the driver of the defendant's car was very careless in the act of passing the truck seems to be quite manifest. There was, even under ordinary or normal conditions according to the evidence hardly enough room for two cars to pass each other at the point on the road where the accident happened, and, with the plaintiff standing on the ground near his truck on the side thereof on which the defendant's car passed it, it should have occurred to the driver of the defendant's car that the utmost care should be exercised in the attempt to pass the truck. But the driver of said car, in passing the truck, as stated, did not appear to exercise the care which the situation would seem to have suggested to a reasonably prudent person, having regard for the rights and the protection of others, for, in the place of stopping as he approached the truck at the rate of 12 miles an hour, and considering how he could pass the truck without endangering the limbs or perhaps the life of plaintiff, he failed to give the usual warning of his approach as he neared the truck, and gave his car more gas as he neared the hind end of the truck, and thus speeded it up to a rate of 15 miles an hour as he passed the plaintiff. This is, at any rate, what the jury could well and justly have concluded from the evidence, as undoubtedly it did so conclude.

But we may go further and declare that, under the circumstances of this case, the jury would have found support for finding that, if they had been required to find that the plaintiff was in the act of picking up the hood when he was struck, having for that purpose stepped away from his position at or near the truck upon observing the near and sudden and unheralded approach of the defendant's car, he was not legally culpable under the doctrine laid down in Shearman and Redfield on Negligence, section 89, and approved and applied in such cases as Schneider v. Market St. Ry. Co., 134 Cal. 482, 490, 66 Pac. 734, and Stapp v. Madera Canal & Irr. Co., 34 Cal. App. 41, 51, 52, 166 Pac. 823, 827, as follows:

"In cases where a party is suddenly put in a position of peril by the negligent act of another, without sufficient time to consider all the circumstances, he is excusable for omitting some precautions, or making an unwise choice, under this disturbing influence, although if his mind had been clear, he ought to have done otherwise. This is especially true if the peril is caused by the defendant's fault."

We are, however, firmly of the opinion that the jury could justly have found, as we may assume that they did find, that the accident occurred as the plaintiff described it, hence further consideration of the rule last referred to may be waived.

It may be added that the amount awarded the plaintiff as damages does not appear to be out of proportion to the injuries and the damage sustained by him. Several different bones in his right leg were severely fractured, and the physicians testified, as above suggested, that he would suffer permanent handicap by reason thereof.

The judgment is affirmed.

We concur: NICOL, Presiding Judge pro tem.; BURNETT, J.

49 Cal. App. 322

THROOP v. WESTERN INDEMNITY CO.
(Civ. 3338.)

(District Court of Appeal, Second District, Division 1, California. Sept. 20, 1920. Hearing Denied by Supreme Court Nov. 18, 1920.)

1. Insurance ⊂=455 — Finding insured was killed by negligence of beneficiary shows accidental death.

In an action on an accident insurance policy, a finding that death did not result solely from accidental means must yield to the specific probative finding that it resulted from discharge of gun in hands of beneficiary, because of the gross negligence of beneficiary, which establishes that killing was not intentional, and was therefore accidental, within the policy.

2. Insurance ⊂=455—Involuntary manslaughter of insured by beneficiary does not bar recovery.

Even though death of insured was caused by gross negligence of beneficiary, so that latter was guilty of felony of involuntary manslaughter, under Pen. Code, § 192, that fact does not defeat recovery by beneficiary on accident insurance policy.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by Charles B. Throop against the Western Indemnity Company. Judgment for defendant, and plaintiff appeals. Reversed.

Swanwick & Donnelly and J. W. Swanwick, all of Los Angeles, for appellant.

Duke Stone, of Los Angeles, for respondent.

CONREY, P. J. On the 17th day of August, 1916, the defendant executed and delivered to Hilda E. Throop two policies of insurance against loss resulting from bodily injuries to her, effected directly and independently of all other causes through accidental means (suicide or any attempt thereat, whether sane or insane, not covered); the beneficiary of said policies in the event of death thereunder being the plaintiff, Charles B. Throop. This action is brought upon those policies to recover the compensation therein named on account of the death of Hilda E. Throop on the 13th day of September, 1916, occurring by reason of bodily injuries sustained in a manner within the terms of said policies. Upon issues properly framed the court found:

That "on September 13, 1916, said Hilda E. Throop was killed in the county of Riverside, state of California, by means of the discharge of a loaded shotgun in the hands of the plaintiff, and actually discharged by the plaintiff herein, but that said Hilda E. Throop did not thereby sustain bodily injuries, or bodily injury, which were effected directly and independently, or directly or independently of all other causes, through accidental means; that the discharge of said gun as aforesaid was occasioned by the gross negligence of said plaintiff, and because and by reason of the fact that said plaintiff failed to use and did not use due or ordinary or any care or caution in handling the same; that said Hilda E. Throop died on the same day, to wit, September 13, 1916; and that her said bodily injuries, or injury, were not caused by suicide or any attempt thereat on her part."

Judgment was entered in favor of the defendant, and the plaintiff appeals therefrom.

Appellant contends that the judgment should be reversed: (1) Because the findings show that the death was caused by accidental means; (2) because the findings are inconsistent and conflicting. The other points relied upon for reversal relate to alleged insufficiency of the evidence, and need not be considered on this appeal, if either of the foregoing stated contentions of appellant is sustained.

[1] The finding that the said Hilda E. Throop "did not thereby sustain bodily injuries, or bodily injury, which were effected directly and independently, or directly or independently of all other causes, through accidental means," considered separately and apart from the remainder of the finding, is sufficient to support the judgment. The real question presented is whether or not the finding as last above quoted is necessarily inconsistent with the probative fact thereinafter stated. That the two propositions cannot both be true is to our minds very clear. The fact found, that the discharge of the gun was occasioned by the gross negligence of the plaintiff, and because and by reason of the fact that the plaintiff failed to use and did not use due or ordinary or any care or caution in handling the same, excludes the possibility of any intentional discharge of the gun, and compels the conclusion that the injuries were effected solely by accidental means. "If the probative facts found were such as to necessarily overcome the finding of the ultimate fact, the latter could not prevail." Estate of Hill, 167 Cal. 59, at page 63, 138 Pac. 690, at page 692.

[2] To meet the contingency that the court might decide as above indicated, respondent contends that under the finding hereinabove quoted the plaintiff was guilty of involuntary manslaughter, in that the discharge of the gun by the plaintiff, even if the same was a lawful act, was the commission of an act which might produce death, "in an unlawful manner, or without due caution and circumspection" (Penal Code, § 192); that this conduct of the plaintiff was subject to punishment by imprisonment in the state prison and constituted a felony; and that a party cannot in any case recover insurance money payable on the death of a party whose life he has feloniously taken. In support of the

claim that, under these circumstances, the plaintiff will not be permitted to recover, we are referred to Drown v. New Amsterdam Casualty Co., 175 Cal. 21, 165 Pac. 5, and N. Y. Mutual Life Ins. Co. v. Armstrong, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997. The decision in the Drown Case is not directly in point. The court was considering the sufficiency of the complaint, and held that under the allegations thereof there was no foundation in the complaint for the argument that Amelia C. Drown was guilty of the murder or of the unlawful killing of Archer Cullen Drown.

"There are no allegations in the complaint to the effect that the killing of Archer Cullen Drown was done with that malice, either express or implied, which is necessary to make the act a murder. In order to constitute voluntary manslaughter there must be an intent to kill, though it is not that deliberate and malicious intent which is an essential element in the crime of murder. People v. Freel, 48 Cal. 436, 437. There is no allegation that the killing, though without malice, was done upon the sudden quarrel or heat of passion, which is necessary to reduce an unlawful and intentional killing to manslaughter. It is not averred, either directly or indirectly, that the killing was done in the commission of an unlawful act, or in the commission of a lawful act in an unlawful manner, or without due caution or circumspection. There is, therefore, no basis for the claim that the complaint shows an involuntary manslaughter. It is not alleged that it was unlawful or that it was intentional."

From the language quoted an inference is attempted to be drawn that the court was of the opinion that a recovery could not be had by or for the benefit of Amelia C. Drown, or by an assignee of her claim, if the killing was the result of her unintentional act amounting to involuntary manslaughter. Our reading of the opinion fails to convince us that the court intended to so decide. In the case of Mutual Life Ins. Co. of New York v. Armstrong the court was dealing with evidence of facts tending to show an intentional murder of the assured by one beneficially interested in the policy, and the language of the court must be considered in the light of the case thus presented.

The rule which, in our opinion, should prevail in this case, is clearly stated in Schreiner v. High Court of Illinois Catholic Order of Foresters, 35 Ill. App. 576, and was there stated as follows:

"No homicide which is the result of carelessness, or which is not an intentional killing, should bar plaintiff's rights to the money on her certificate. A contract of insurance, or a certificate like the one in suit, impliedly assumes the risk of all carelessness by every person, whether a possible beneficiary under the contract or not, from which the death of the insured may result, unless such acts of carelessness are especially excepted; therefore a death which is unintentional, though caused by some neglect or unlawful act of the beneficiary, is within the contract, and ought not to defeat the policy. But it would be unjust and unreasonable to hold that the intentional taking of the life of insured, by the person who is to receive the insurance on the death, is a risk assumed and insured against by the company or the society which issues the policy or certificate."

Being of the opinion that the judgment herein is based upon a finding which is inconsistent and conflicting on the principal issue upon which the rights of the parties herein are dependent, we conclude that the judgment is not supported by the findings.

For that reason the judgment is reversed.

We concur: SHAW, J.; JAMES, J.

49 Cal. App. 239

PEOPLE ex rel. BRADFORD, Dist. Atty., v. ARCEGA. (Civ. 2148.)

(District Court of Appeal, Third District, California. Sept. 10, 1920.)

1. Pleading ⊜8(3)—Complaint held to state cause of action under Redlight Abatement Act without specifically describing acts.

In a proceeding under the Redlight Abatement Act to abate a nuisance, a general allegation that lewdness, prostitution, and assignation were habitually carried on and practiced on the premises or in the building complained of is sufficient, without stating a specific description of the acts constituting lewdness, prostitution, or assignation, without even alleging that the acts complained of consisted of acts which the statute was designed to suppress.

2. Nuisance ⊜84—"Lewdness," "prostitution," and "assignation," used in complaint under Redlight Abatement Act not ambiguous.

The words "lewdness," "prostitution," and "assignation," when used in a complaint under the Redlight Abatement Act, are not ambiguous, but bear a well-understood meaning, and mean precisely what those terms were intended to signify when they were inserted in the statute, viz. illicit sexual acts or conduct amounting to or involving lewdness; and the word "lewdness" has but on meaning in whatsoever connection it may be used, and is more comprehensive than either the word "prostitution" or the word "assignation," and may or may not consist of acts of prostitution and assignation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Lewdness; Second Series, Prostitution.]

3. Nuisance ⊜84—Violation of Redlight Abatement Act proved.

In a proceeding under the Redlight Abatement Act, a finding that the premises com-

plained of were used for the purpose of lewdness, assignation, and prostitution *held* sustained by the evidence.

4. Nuisance ⊂=84 — Violation of Redlight Abatement Act provable by circumstantial evidence.

A case, founded upon the Redlight Abatement Act, may, like any other case or any other ultimate fact, be established by circumstantial, as well as by direct, evidence.

5. Nuisance ⊂=79 — Violation of Redlight Abatement Act may consist of acts of lewdness.

A nuisance upon which the Redlight Abatement Act places its ban may consist alone of acts of lewdness.

6. Evidence ⊂=317(2) — Nuisance ⊂=84 — Statements of inmate competent to prove violation of Redlight Abatement Act.

Statements made by the "landlady" to a detective offered in a proceeding under the Redlight Abatement Act to abate a nuisance are competent, and not objectionable as hearsay.

7. Appeal and error ⊂=994(1)—Rule as to effect of testimony of interested persons not applicable on appeal.

If to be accepted at all, the rule that the testimony of detectives and police officers or persons having a personal interest in the outcome of the issue before the court must be viewed with caution, and that a judgment should not be predicated alone on a testimony of such witnesses, has no application to reviewing courts.

8. Witnesses ⊂=80 — Parties and interested persons competent.

Under the old common law, a party to an action, or any party directly interested in the event of the trial, was not competent to testify in his own behalf, but such is not now the rule.

9. Evidence ⊂=588—Testimony of police officers and detectives to be measured as testimony of other witnesses.

The testimony of detectives and police officers must be considered, and its evidentiary value measured by the jury or trier of facts by the same common tests that constitute the established and accepted criterion by which the evidentiary value of the testimony of all other witnesses is determined.

Appeal from Superior Court, Sacramento County; Chas. O. Busick, Judge.

Proceeding under the Redlight Abatement Act by the People of the State of California, on the relation of Hugh B. Bradford, District Attorney of Sacramento County, against Vincent Lambert Arcega. From a judgment abating the nuisance, the defendant appeals. Affirmed.

See, also, 193 Pac. 268.

Wm. A. Gett, of Sacramento, for appellant.

Hugh B. Bradford, of Sacramento, for respondent.

HART, J. The action is prosecuted under what is known as the "Redlight Abatement Act" (St. 1913, p. 20). The complaint alleges that the premises and building known as "No. 222 L Street," in the city of Sacramento, and described as the "east one-half of lot No. 3, in the block or square bounded by and between L and M and Second and Third streets of said city of Sacramento," were, and for some time prior to the 3d day of January, 1918, "and ever since that date, and now are, used for the purposes of lewdness, assignation, and prostitution, and upon said premises acts of lewdness, assignation, and prostitution were held and did occur, and said premises were and now are a nuisance under the laws of the state of California." It is further alleged that the appellant, Arcega, is the owner of said property and premises, and that the respondents, George W. Locke & Son, a corporation, and certain fictitiously named parties, "have and claim some interest in and lien upon said real property, and that the respondents, George W. Locke & Son, Jane Coe, and Susan Hoe et al. (fictitiously designated), are the owners of the furniture, fixtures, musical instruments, and other movable property situated in said building, as the relator is informed and believes, and so alleges." The prayer is for a decree perpetually enjoining said alleged nuisance, for the removal from said premises of the furniture, fixtures, etc., and the sale thereof in the manner provided by the Abatement Act and the closing of the premises and the building and the interdiction of their use for any purpose for the period of one year. The findings were in accordance with the averments of the complaint, and the decree follows the prayer of the complaint. The appeal is by Arcega from the judgment.

[1] The court below overruled a demurrer interposed by the appellant to the complaint and denied a motion, likewise interposed to strike out certain specified portions of that pleading. Both the demurrer and said motion raised the question whether the complaint stated a cause of action under the terms of the Abatement Act against the respondents in the court below. The specific point thus made is that the mere statement in the complaint that the premises in question were and had been used for the purposes of lewdness, assignation, and prostitution involves a legal conclusion, and that it is therefore deficient in the setting forth of a cause of action for the relief demanded, the position of the appellant being that, to state a case under the Abatement Act, the complaint must contain a specific description of the acts constituting all or any one of the alleged general acts of lewdness and prostitution and assignation. This precise point has been repeatedly decided adversely to the

position taken by the appellant. See People v. Laine, 182 Pac. 986; House v. Meyer, 100 Cal. 592, 35 Pac. 308; Talbot v. Ginocchio, 18 Cal. App. 391, 123 Pac. 223; Ellis v. Central Traction Co., 37 Cal. App. 390, 395, 174 Pac. 407; Doolittle v. McConnell, 178 Cal. 697, 705, 174 Pac. 305.

In the Laine Case, which was an action under the Abatement Act, we expressly held that a general allegation that lewdness, prostitution, and assignation were habitually carried on and practiced on the premises or in the building complained of was sufficient. And it may here be added that the present case is no different, so far as the complaint is concerned, from the following cases arising under the Abatement Act: People v. Barbiere, 33 Cal. App. 770, 166 Pac. 812; People v. Dillman, 37 Cal. App. 415, 174 Pac. 951; In re Selowsky, 38 Cal. App. 569, 177 Pac. 301; Chown v. Alexandre, 35 Cal. App. 194, 169 Pac. 454.

In House v. Meyer, supra, an action for damages resulting from the alleged negligence of the defendant, the complaint charged the negligence in general language, and the complaint on appeal was that a general allegation of negligence was insufficient to state such a cause of action. The court held that such an allegation was all that was required to state a cause of action for the recovery of damages for injury produced by the defendant, and, quoting Bliss on Code Pleading, § 211, said: "The negligence is the ultimate fact to be pleaded, and is not a legal conclusion."

So, in the present case, the ultimate fact alleged is that the premises involved herein were, at the times mentioned in the complaint, used for the purposes either of lewdness or prostitution or assignation, or for all those purposes.

[2] The argument that the words "lewdness," "prostitution" and "assignation" may be used in different connections or in different senses, according to the connection in which they are employed, and are therefore ambiguous and indefinite as to their meaning or signification when used in a complaint prepared under the Abatement Act, without specifically showing or alleging that they consisted of acts which the statute was designed to suppress, is substantially answered by what is above said, to which, however, may be added the suggestion that, as used in the Abatement Act, those terms bear a well-defined and well-understood meaning, and that a complaint charging in the general language of the act the nuisance at the suppression of which said act is directly aimed must of necessity be considered and construed, and may readily be understood to mean precisely what those terms were obviously intended to signify when they were inserted in the statute, viz. illicit sexual acts or conduct amounting to or involving lewdness. The latter word, it may be further added, has but one meaning in whatsoever connection it may be used, and it is more comprehensive than either the word "prostitution" or the word "assignation," and may or may not include acts of prostitution and assignation.

[3] The next point urged for a reversal is that the findings are not supported by the evidence. An examination of the evidence has readily convinced us that the point is not well taken. A brief reference to the testimony will confirm this conclusion.

It appears from the evidence that a party (a female) employed as a detective by the State Law Enforcement League, early in the evening of January 3, 1918, called at the house complained of here and asked to see the "landlady." The witness was shown to the room of the "landlady," the latter then lying on a bed with a man having no clothing but his undergarments upon him, and the woman being clothed only with a kimono, which was "pulled up to her knees." The man was of large frame, and appeared to the witness to be either a Greek or an Italian. The witness then proceeded:

"The landlady asked me what my name was and who sent me. I told her my name was Maud Morris, and that a lady had sent me over from 216½ L street. I asked her if I could get work there. She said no, at the present time she didn't need a girl, but she would take my name and address and would let me know. I said: 'You think you will have an opening very soon?' 'Well,' she said, 'I don't know.' The man on the bed said: 'Put that girl to work to-morrow.' So she said—the landlady said—'One of my girls will be sick to-morrow, and she will be off for a few days, so you can come to work at 1 o'clock.' I asked her if the girls lived at this place and she said yes, they did, and for me to bring my things. She asked me where I lived, and I told her, Hotel Trow. I asked her what price house it was. She said, '$1.50.' I asked her out of that what did I have to give to the landlady, and she said 50 cents each per act of prostitution. I asked her how much the girls got for a man staying all night. She says, 'Ten dollars, or all you can get,' or, 'as much as you can get. Give me two dollars out of every ten—or,' she said, 'I get two dollars out of every ten.' I told her I would be back at 1 o'clock the next day. As I was going out I saw another girl in the hall, rouged and powdered up. Q. How many girls did you see in the place? A. Three girls, not including the landlady. Q. Three girls and the landlady? A. Yes."

The witness further testified that the female who responded to the door alarm and admitted her (witness) into the house was heavily "rouged and powdered," and at the time wore a kimono or loose wrapper.

A police officer, connected as such with the police department of the city of Sacramento for many years, testified that the gen-

eral reputation of the house in question was, at the time of the filing of the complaint, and had been for many years prior thereto, that it was a place where sexual prostitution was habitually carried on.

[4, 5] That the above testimony abundantly supports the findings there can be no manner of doubt. It is true that it is in its nature circumstantial, but the circumstances thus adduced before the trial court, it must be admitted, are of singular potency in probative force as in proof that the nuisance as charged in the complaint existed and was maintained in the building as described in the complaint. Of course, it will not be denied that a case founded upon the Abatement Act may, like any other case or any other ultimate fact, be established by circumstantial as well as by direct evidence. Even if prostitution or assignation was not thus sufficiently shown to have been practiced in the place, it is clear that lewdness was so shown, and obviously the nuisance upon which the statute places its ban may consist alone of acts of lewdness.

[6] It is lastly contended that the testimony of the statements made by the "landlady" of the house to the female detective was hearsay, and therefore incompetent. The contention is meritless. In proving the nuisance denounced by the Abatement Act it is proper to show the acts, conduct, and words or language of the inmates of the place or building against which, as being conducted as such a nuisance, the action is instituted. As has often been declared in the cases, a building may become a nuisance under the act in question by being used for the purpose either of lewdness or of assignation or of prostitution, or by being used for the purposes of all those general acts. The testimony of the female detective as to the conversations of the "landlady" and the manner in which she and other female inmates of the house were attired not only strongly tended to show that prostitution was habitually practiced therein, but quite clearly established the fact that acts or conduct amounting to lewdness within the purview of the statute were indulged in in said place.

[7-9] The rule cited by counsel and as declared by some of the cases and text-writers, to the effect that the testimony of detectives and police officers or persons having a personal interest in the outcome of the issue before the court must be viewed with caution, and that a judgment should not be predicated alone on the testimony of such witnesses, has no application to reviewing courts, if, indeed, the rule is to be accepted under any circumstances under our present system of trials. Under the old common law, a party to an action or any party directly interested in the event of the trial, was not competent to testify in the action in his own behalf. Such is not the rule under our system, however. The rules of evidence in this state are to be found in our Code of Civil Procedure, and while they are based generally on the common-law rules, they, save perhaps in a very few instances, measure and limit the power of our courts upon the question of the admissibility or nonadmissibility and of the weight of testimony. We can conceive of no theory or sound reason upon which it may be declared as an abstract proposition that the testimony of a detective or a police officer or a person directly interested in the outcome of a trial of an action in the courts should be given less weight than that which may be given to the testimony of any other witness. There is, in other words, no reason why the weight of the testimony of such witnesses or the question of their credibility should be prejudged by the trial court, or the jury told by the trial court that their testimony should be viewed with caution or considered in a light different from that in which the testimony of any other witness must be considered; and there is nowhere in our Codes any such rule laid down. The testimony of such witnesses must therefore be considered and its evidentiary value measured by the jury or other trier of facts by the same common tests as constitute the established and accepted criterion by which the evidentiary value of the testimony of all other witnesses is, and, indeed, can only be, determined. At all events, as before declared, the rule sought to be invoked by counsel, if at all sound as a rule to be put in actual practice, has application solely to the trial of cases at nisi prius, and not to the review of cases on appeal.

Counsel, however, strangely suggest the novel and rather remarkable proposition that the testimony of police officers and detectives should be regarded as analogous to the testimony of accomplices in criminal cases. The proposition is obviously absurd. There is no analogy between the two classes of witnesses referred to. The rule as to accomplices in crime is founded upon a rational theory, and is a wise and just rule, the theory being that where an accomplice testifies against one with whom he was jointly engaged in the commission of a public crime the temptation to commit perjury may be great, since there is always hope in the breast of the accomplice so testifying, even though not justified by any express promise by the representatives of the people that he will be rewarded for his testimony by leniency in the matter of punishment in a degree commensurate with the strength or value of his testimony in favor of the people and against his companion in the crime charged, and thus he may be led to bear false witness against his confederate in crime. As above declared in a different

form of language, this case does not present an instance to which the rule as to the testimony of accomplices in crime applies.

No legal or other reason has been shown for a disturbance of the judgment appealed from, and it is therefore affirmed.

We concur: NICOL, Presiding Judge pro tem.; BURNETT, J.

49 Cal. App. 233

PEOPLE ex rel. BRADFORD, Dist. Atty., v. ARCEGA. (Civ. 1988.)

(District Court of Appeal, Third District, California. Sept. 10, 1920.)

1. Appeal and error ⇐907(3)—Nuisance ⇐77—Proceeding under Redlight Abatement Act, civil action, and all presumptions are indulged in support of judgment.

A proceeding to abate a nuisance under the Redlight Abatement Act is a civil case, and, in considering an appeal on the judgment roll alone, all presumptions and intendments will be indulged in support of the judgment; and it will be presumed that the evidence supported the findings, and injury is no longer presumed from error, but must be affirmatively made to appear, under Const. art. 6, § 4½.

2. Nuisance ⇐84—Finding sufficient for judgment under Redlight Abatement Act.

In a proceeding under the Redlight Abatement Act, a finding or conclusion that the building complained of "was and now is a nuisance under the laws of the state," immediately following and connected with a direct finding of illegal use down to a specified date, prior to the filing of the complaint, is a finding of an ultimate fact, and defendant cannot say that court failed to find that the alleged nuisance existed at the time of the commencement of the action.

Appeal from Superior Court, Sacramento County; C. O. Busick, Judge.

Proceeding under the Redlight Abatement Act by the People of the State of California, on the relation of Hugh B. Bradford, District Attorney of Sacramento County, against Vincent Lambert Arcega. From a judgment abating the nuisance, the defendant appeals. Affirmed.

See, also, 193 Pac. 264.

Wm. A. Gett, of Sacramento, for appellant.

Hugh B. Bradford, of Sacramento, for respondent.

HART, J. The appeal is from the judgment on the judgment roll alone. The object of the action is to abate a nuisance alleged to have existed and been maintained in and on certain premises described as the west one-half of the east one-half of lot No. 3, in the block, between Second and Third and L and M streets, in the city of Sacramento, "and particularly the building known as No. 220 L street."

The complaint alleges that the appellant, Arcega, was at all the times referred to in the complaint, and is, the owner of said premises and building; that certain fictitiously named females have and claim some interest in and upon said real property, and are the owners of the furniture, fixtures, musical instruments, and other movable property situated in said building, "as relator is informed, believes, and alleges"; that "on or for some time prior to the 13th day of September, 1917, and ever since that date, said premises were and now are used for the purposes of lewdness, assignation, and prostitution, and upon said premises acts of lewdness, assignation, and prostitution were held and did occur, and said premises were and now are a nuisance under the laws of the state of California."

The relief asked for is that the alleged nuisance be perpetually enjoined, that the furniture, etc., be removed from said premises and building and be sold as provided by law, and that the premises and building be closed against their use for any purpose for a period of one year.

The court, among other things, found:

"That on and for some time prior to the 13th day of September, 1917, the building and property herein described was, during all of said time, used for the purposes of lewdness, assignation and prostitution, and the said building was and now is a nuisance under the laws of the state of California."

It will readily be observed that the action is founded on the "Redlight Abatement" Act (St. 1913, p. 20).

There are two points advanced by the appellant for a reversal, viz.: (1) That the complaint does not state a cause of action under the abatement act, and is ambiguous and uncertain in certain specified particulars; (2) that the court failed to find upon the question whether the alleged nuisance existed at the time of the commencement of the action, and that such failure renders the decree abortive.

1. As to the proposition first above stated, the appellant makes the identical points which are made against the complaint in action No. 2148, 193 Pac. 264, wherein we this day filed an opinion holding that the assault upon that pleading possessed no legal force. The complaint in the present action being, mutatis mutandis, precisely the same as the complaint in said action No. 2148, it is only necessary to refer to the opinion in the latter case as a justification for the conclusion that the complaint herein assailed is not obnoxious to the objections raised

against it by the appellant's demurrer thereto and his motion to strike out certain of the allegations thereof.

2. The contention of the appellant with regard to the second point is that, while the court directly finds that the building complained of herein was, on and for some time prior to the 13th day of September, 1917, "used for the purposes of lewdness, assignation, and prostitution," there is no finding that the same was used for like purposes down to the time of the filing of the complaint, which was September 28, 1917, since, so the contention proceeds, the language immediately following that finding, to wit, "and the said building was and now is a nuisance under the laws of the state of California," is the only reference in the findings to the fact, if it was a fact, of the continuance of the nuisance to the time of the filing of the complaint, and involves a conclusion of law, and not a finding of fact. In support of that contention, appellant cites a number of cases, among which is the recent case of People v. Goddard, 191 Pac. 1012. In that case, the complaint in which was filed on the 28th day of September, 1917, the trial court, after finding that on and prior to the 13th day of September, 1917, the buiding there complained of was used for the purposes of prostitution, lewdness, and assignation, and that "the said upper story of said building was and now is a nuisance under the laws of the state of California," further found that, before the filing of the complaint in said action the owner of the building caused the female inmates thereof to be evicted therefrom, and closed said building to said females, and that "at the time of the filing of said complaint there was no tenant or other person whatever occupying said premises," but also found that "the removal of the tenant from said premises was not made in good faith by said respondent for the purpose of abating said nuisance." We reversed the judgment upon the ground that it was not supported by the findings, holding also that there was no evidence to support the finding that the removal of the female inmates of the building by the owner, as found by the court, was not made in good faith or for the purpose of abating the nuisance. We further held that, if the finding that "the building was and now is a nuisance under the laws of the state of California" was to be treated and accepted as a finding of fact, said finding was in irreconcilable conflict with the finding that the female inmates of the building had been by the owner thereof, prior to the filing of the complaint in the action, removed therefrom, and that no persons whatsoever were then occupying the building. Among other things, we said in the opinion in that case:

"It is very clear that the finding that 'the said upper story of said building was and now is a nuisance under the laws of the state of California,' taken alone or by itself, is a conclusion of law, and does not involve a finding of fact; but, if it were deemed necessary to concede that, in the connection in which it is employed, it might justly be held to constitute a finding of an ultimate fact, it is nevertheless plainly manifest that it is wholly inconsistent with finding No. 5"

—which found that the women had been removed from the building. Thus far there is nothing in the opinion in the Goddard Case from which it is to be inferred that it is therein held, or that there was any intention of holding, that the finding referred to, although, taken by itself, a conclusion of law, may not be used in such a connection as that it may properly be treated and considered as a finding of an ultimate fact. But, further on in the opinion, we also declared:

"But we are still of the opinion that the alleged finding that the building 'now is a nuisance' is a conclusion of law, notwithstanding the connection in which it is used."

It is this language of the opinion upon which counsel for the appellant lay special emphasis as supporting their position that such a finding or conclusion can under no circumstances be treated as a finding of fact. But it will be noted, on a careful reading of that language of the opinion, that we do not thereby say that such a conclusion may not, under some conceivable conditions, be considered as a finding of an ultimate fact. We were merely pointing out that the purported finding that the building "'is now a nuisance," etc., added nothing to and was in no manner aided by the initial portion of the finding of which it was a part to the effect that—

"On, and for a long time prior to the 13th day of September, 1917, the upper story of said building was used for the purposes of lewdness, assignation, and prostitution," etc.

Moreover, we showed in the opinion that there was no evidence in the record showing, or tending to show, that the nuisance denounced by the Abatement Act existed after the 13th day of September, 1917, other than any inference that might reasonably be afforded by the evidence that such a nuisance had been therein maintained prior and down to that date.

In the present case, the complaint alleges, as we have above shown, that the building in question was, "on or some time prior to the 13th day of September, 1917, and ever since that date, said premises were and now are used," etc.

[1, 2] This is a civil case, and the rule as to this case is therefore the same as that which applies to other civil actions, namely,

that, in considering an appeal on the judgment roll alone, all presumptions and intendments will be indulged in support of the judgment; that the evidence supported the findings; that injury is no longer presumed from error, but must be affirmatively made to appear. Myers v. Canepa, 37 Cal. App. 556, 174 Pac. 903, 906; Ransome-Crummey Co. v. Bennett, 177 Cal. 560, 171 Pac. 304; section 4½, art. 6, Const. In support of the judgment, it must be presumed, therefore, that there was evidence showing that the nuisance complained of remained unabated down to and at the time of the filing of the complaint. In other words, we must view the record upon this appeal as though it contained such evidence, and view and construe the findings in the light of that evidence; and, thus viewing the record, it is clear that the conclusion we are considering and the decree were justified by the evidence, and therefore the finding or conclusion that the building complained of "was and now is a nuisance under the laws of the state of California" may properly and should be considered as involving a finding of an ultimate fact. We should have so held in the Goddard Case had the evidence disclosed, as presumptively it does in this case, that the nuisance was maintained and existed down to the filing of the complaint, particularly in view of the fact that the finding or conclusion referred to in the Goddard Case, as it does in the present case, immediately followed and was connected with a direct finding that the building was used for the immoral purposes, prohibited by the Abatement Act down to a certain specified date prior to the filing of the complaint. Such a holding in that case, though, would not have affected the result arrived at therein, since such a finding, as we pointed out in the opinion, would have been inconsistent with the finding that the nuisance had been abated by the owner prior to the filing of the complaint. As to the present case, we may add that, since we must presume that the evidence was amply sufficient to support the conclusion in question and to warrant the decree, no injury could or can result to the appellant from the ultimate conclusion arrived at in the court below as crystallized in the decree.

It is not to be understood that we approve the form of the finding under consideration. As in all other civil cases, there should be a direct finding upon every fact vital to the judgment, and legal conclusions in the findings, where direct findings can be made, should be avoided, although it is often true that certain findings essential to the support of a judgment may, in a sense, involve conclusions of law. This is frequently justifiably the case in pleadings. Ellis v. Central Cal. Traction Co., 37 Cal. App. 390, 395, 174 Pac. 407; People v. Laine, 182 Pac. 986. However, the conclusion herein is that the court made a sufficient finding upon the fact of the continuance of the nuisance down to the date of the filing of the complaint.

The judgment is affirmed.

We concur: NICOL, Presiding Judge, pro tem.; BURNETT, J.

49 Cal. App. 285

DE SOTO et ux. v. PACIFIC ELECTRIC RY. CO. (Civ. 3349.)

(District Court of Appeal, Second District, Division 1, California. Sept. 14, 1920.)

1. Railroads ⊂=401(4)—Instruction held erroneous as authorizing recovery without negligence alleged being contributing cause.

In an action for injuries to an occupant of an automobile which overturned when the wheels entered a gutter along defendant's railroad track, instructions that if plaintiff was riding as a guest without any control over the driver, and was injured by the negligence of the defendant alone, or from the negligence of the driver, then the plaintiff could recover unless guilty of contributory negligence, were erroneous in leading the jury to believe that plaintiff could recover if the driver was negligent even though defendant's negligence may not have contributed to produce the injury.

2. Trial ⊂=243 — Contradictory instructions cause for reversal.

In action for injuries to occupant of automobile overturning when striking gutter along street car tracks, instructions combining correct rules of law with erroneous ones are contradictory and cause for reversal.

3. Trial ⊂=194(17)—Instruction in action for personal injuries held on weight of evidence.

In action for injuries to occupant of automobile in which it was claimed that negligence of automobile driver was imputable to occupant, instruction that "the case, however, is different between this plaintiff and the defendant from what it would be if it were a case between the driver of the automobile and the defendant, because she was not the one responsible for managing and driving the automobile," *held* on weight of evidence as to issue of whether occupant was responsible for the acts of the automobile driver.

4. Appeal and error ⊂=1064(2)—Instruction on weight of evidence held harmless in view of undisputed facts.

In action for injuries to occupant of automobile, instruction in which court invaded jury's province by stating that occupant was not responsible for managing and driving the automobile *held* harmless in view of undisputed facts showing that occupant was not responsible.

5. Negligence ⊂93(1) — Automobile driver's negligence not imputable to guest.

Where an automobile owner on the request of his sister-in-law conveyed her, as a matter of friendly accommodation, to a store, but she exercised no control over him other than to indicate the place to which she desired to go, his negligence was not imputable to her.

6. Trial ⊂252(9) — Refusal of instructions held proper in view of lack of evidence as to facts assumed.

In action for injuries to occupant of automobile, refusal of instruction assuming that occupant continued to ride in automobile without protest while it was being driven at a reckless rate of speed *held* properly refused in view of lack of evidence that driver had been traveling at a reckless rate of speed prior to accident and that occupant had time and opportunity to protest or get out of the automobile.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Chris De Soto and wife against the Pacific Electric Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Frank Karr, R. C. Gortner, and E. E. Morris, all of Los Angeles, for appellant.

George P. Cary and Frank C. Dunham, both of Pasadena, for respondents.

JAMES, J. In this action for damages, alleged to have been caused through the negligence of the defendant, plaintiffs had judgment. Defendant appeals, assigning as prejudicial errors committed by the trial judge the giving of certain instructions to the jury as to the law and the refusal to give certain offered instructions on the part of the defendant.

Marie De Soto suffered the injuries complained of, the second party plaintiff being her husband and being joined only because of his relationship to her. For convenience we will refer to Marie De Soto as though she were the sole plaintiff. The negligence complained of consisted in leaving unattended and without repair a ragged gutter or depression on the outside of a railroad track. This track curved at the point mentioned, and the gutter or depression was for a number of yards along the outside of the outermost rail on said curve. Plaintiff was being conveyed in an automobile along the street upon which defendant's tracks were so laid and said depression existed. The wheels of the automobile entered the gutter along the rail and in some manner were so held there that the automobile was overturned and plaintiff suffered injuries. That these injuries were of a serious character, no question is made by the evidence. No question was made at the trial as to the fact that the defendant, by allowing the gutter to exist beside its tracks, was guilty of negligence. There were two questions which the jury had to resolve in order to reach a conclusion favorable to the plaintiff's claim: (1) Whether the negligence of the defendant was the proximate cause of plaintiff's injuries. (2) Whether the plaintiff was herself guilty of such negligence as contributed proximately to produce her injuries. These further facts may be stated: That plaintiff on the night of the accident was riding in an automobile belonging to her brother-in-law whom she had requested to convey her, as a matter of friendly accommodation, to a nearby store. She exercised no control over the driver of the machine other than to indicate the place to which she desired to be transported. Under these conditions the journey was made to the store, and it was upon the return therefrom that the accident happened. There was no testimony indicating that the brother-in-law was an incompetent driver, or that prior to the time of the accident he had been driving at an unusual or dangerous rate of speed. There was the testimony of one witness who observed the marks made by the wheels of the automobile upon the ground and about the tracks at the point where it was overturned, and this testimony is made the basis for the argument that at the time of the accident the machine in which the plaintiff was riding must have been traveling at a high rate of speed. We will advert to that matter at a later point in the opinion. It may be added further that the defendant by its answer did allege in proper terms that the relationship between the plaintiff and the brother-in-law was such as to make her responsible for the negligent act of the driver; that is, that the driver was the agent of the plaintiff, and that if he were not her agent he was negligent in his handling of the machine, and that she, knowing of this negligence, continued to ride with him.

It is first insisted that the instructions given by the court were of a contradictory nature, so much so as to have been confusing and unintelligible to the jury. The instructions were contradictory, some of them correctly stating the law and others not. For instance, we find that the court instructed the jury as follows:

"If you find from the evidence that the plaintiff was riding as a guest in the automobile at the time of the accident, neither exercising nor assuming any control over it, or the person driving it, and if you further find from all the evidence in the case the plaintiff was injured by the negligence of the defendant alone, or from the negligence of the driver of the automobile in which she was riding, then your verdict must be for the plaintiff, unless you find the plaintiiff herself was guilty of contributory negligence."

[1] The error in this instruction consists in the advice to the jury, reasonably deduced from the language used by the court, that, if the plaintiff's injuries were caused by the negligence of the driver of the automobile, she could recover, notwithstanding that the negligence of the defendant may not have contributed to produce the damaging result.

[2] In an instruction immediately following, the court did conclude with the advice that, if the accident was caused solely by the negligence of the driver of the automobile, the defendant would not be liable; but the vice of this instruction consists in its being coupled with the introductory phrase that "in case you should determine that she had any control whatever of the machine." Plainly, if the negligent act of the driver was the sole cause of the accident, defendant would not be liable, regardless of whether the plaintiff had any control of the machine. As we have already stated, while the court in some of the instructions correctly informed the jury of the law applicable to the case, the particular instruction first referred to contained statements diametrically at variance with those propositions which were correctly stated, and it cannot here be told as to which had preponderating weight in the minds of the jurymen.

[3-5] It is claimed further that the court invaded the province of the jury in instructing directly as to a material fact in dispute when it gave this instruction:

"The case, however, is different between this plaintiff and the defendant from what it would be if it were a case between the driver of the automobile and the defendant, because she was not the one responsible for managing and driving the automobile."

This instruction, as insisted by the appellant, contains the direct advice that the plaintiff was not responsible for the acts of the driver, and this after the court had already assumed by other instructions given that that particular matter was in issue and one which the jury had to decide. This instruction may be relieved from its vice only by such a construction of the evidence as may warrant the assertion that, under the relationship shown to exist between the plaintiff and the driver of the automobile and her acts and conduct therewith connected, the facts were undisputed and a conclusion irresistibly indicated that no responsibility was fixed upon the appellant for any act of negligence committed by the driver, and we think that the evidence fairly shows those necessary conditions to have existed.

[6] Under the head of errors of the court in refusing to give instructions offered by the defendant, we are referred to certain instructions which deal with the contributory negligence of the plaintiff, assuming that she continued to ride in the automobile without protest while it was being driven at a high and reckless rate of speed. We have particularly called attention to the evidence offered by the defendant referring to that matter. The driver of the automobile had testified that he was traveling at a moderate rate of speed; the plaintiff had testified that the machine was traveling at an "ordinary" rate of speed. The witness for the defendant, judging from the marks on the street made by the wheels of the automobile at the time of the accident, indicated that the machine was traveling very fast at the time it was caught in the gutter. In order to make pertinent the offered instructions there should have been some evidence (and there was none) showing that prior to the time the wheels of the machine were caught in the gutter the driver had been traveling at a reckless rate of speed and that the plaintiff had time and opportunity to protest or get out of the vehicle. The offered instructions, therefore, were without proper evidence upon which to predicate them, and the court's refusal to so advise the jury was not error.

For the reasons first given, the judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

49 Cal. App. 303

DANFORD v. SUPERIOR COURT OF CALIFORNIA IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 3560.)

(District Court of Appeal, First District, Division 2, California. Sept. 16, 1920. Hearing Denied by Supreme Court Nov. 15, 1920.)

1. Attorney and client ⟸56—Judgment in disbarment need not state grounds.

Under Code Civ. Proc. § 299, which prescribes the form of judgment in disbarment proceedings, the judgment need not contain a statement of the grounds of disbarment.

2. Attorney and client ⟸36(1) — Superior court has jurisdiction to disbar.

Under Code Civ. Proc. § 287, the superior court has jurisdiction to enter an order of disbarment.

3. Attorney and client ⟸36(1)—Statute giving superior court jurisdiction to disbar, constitutional.

The power to disbar an attorney is purely statutory, and Code Civ. Proc. § 287, giving the superior court jurisdiction to do so, is not subject to any constitutiona objection.

4. Attorney and client ⟸61—Superior court cannot consider application for reinstatement of disbarred attorney.

An application for reinstatement of an attorney disbarred by a judgment of the superior court, made after the order of disbarment has become final, must be treated as an application

for admission to practice and not as an application to vacate the order of disbarment, and as such it must be addressed to the court having jurisdiction to admit an attorney to practice, and cannot be addressed to the superior court.

5. Attorney and client ⟸3 — Superior court without jurisdiction to admit attorney to practice.

Since the amendment in 1895 of Code Civ. Proc. § 276, the superior court is without jurisdiction to admit an attorney to practice in any court of the state, and hence cannot entertain an application for restoration after disbarment by it.

6. Contempt ⟸34—Superior court has jurisdiction to entertain contempt proceedings against attorney.

Where an attorney was disbarred, and, after the order had become final, a judge of the superior court had attempted to reinstate him, another judge of the superior court had power to entertain contempt proceedings against such attorney, who was holding himself out as qualified to practice.

Application by William J. Danford for writ of prohibition prayed to be directed to the Superior Court, City and County of San Francisco, and Honorable George E. Crothers, Judge thereof, to restrain action in a proceeding for contempt of court. Writ denied.

W. J. Danford, of San Francisco, in pro. per.

Douglas Brookman and W. M. Simmons, both of San Francisco, for respondents.

NOURSE, J. Petitioner seeks a writ of prohibition to restrain the superior court from entertaining proceedings instituted against petitioner charging him with contempt of court. The affidavit upon which the contempt proceedings are based alleges that on March 1, 1909, petitioner, who theretofore had been an attorney licensed to practice law, was disbarred from practice in all courts of the state by an order of the superior court in Los Angeles county in accord with proceedings duly instituted for that purpose. About 3½ years thereafter the judge who had made the order of disbarment, acting upon his own motion, ordered the petitioner reinstated to the practice of the law in the superior court and recommended full reinstatement to practice in all courts of the state by the District Court of Appeal. In accord with this order, petitioner took the oath to support the Constitution of the United States and of this state, and to faithfully discharge the duties of attorney and counselor at law. On March 24, 1913, another judge sitting in the superior court in Los Angeles county set aside the order of reinstatement on motion of an attorney representing the Bar Association of Los Angeles county upon the grounds, as recited in the later order:

"That said order was made without notice to the accuser in said disbarment proceedings or any of the attorneys who prosecuted said proceedings, that said order was inadvertently and improvidently made; that at the time of the making of said order said Danford had been convicted in said superior court of a felony and had been sentenced to a term in the penitentiary of three years, and which sentence at the time of making said order had not expired, and that said court had no jurisdiction or power to reinstate or admit said Danford as an attorney at law to said superior or any other court in the state of California."

The affidavit then alleges that "at the present time, and for a considerable period of time, * * * said Wm. J. Danford has advertised and held himself out as practicing and entitled to practice law in the courts of this state;" that he maintains an office for that purpose in the city and county of San Francisco; that, on September 5, 1919, he filed an appearance in a certain action then pending in the superior court in San Francisco; that, thereafter, and until the 5th day of March, 1920, he frequently appeared in said superior court as attorney for the defendant in said action. The orders of the superior court in Los Angeles county which are made the basis of the claim that petitioner was not entitled to practice in the superior court in San Francisco are incorporated in the accusatory affidavit.

In his application for a writ of prohibition petitioner assigns numerous grounds upon which it is claimed that respondent is without jurisdiction to entertain the contempt proceedings. It is not necessary to discuss all the grounds urged because if it appears from the accusatory affidavit that petitioner was legally disbarred from practice and has not been restored by a court of competent jurisdiction, the respondent is not exceeding its jurisdiction.

[1-3] Petitioner attacks the original order of disbarment because it fails to show the grounds upon which he was disbarred, in that it recites merely that he "has violated the oath taken by him upon his admission as an attorney and counselor and that he has violated his duties as such attorney and counselor." But section 299, Code of Civil Procedure, which prescribes the form of judgment in disbarment proceedings, does not require a statement of the grounds of disbarment. These proceedings are peculiar to themselves and are governed by the statutes relating to them. It was so held by the Supreme Court in Matter of Danford, 157 Cal. 425, 430, 108 Pac. 322, in affirming the judgment of disbarment here under attack. It is also argued that the superior court was without jurisdiction to make the order, but such jurisdiction is specially conferred upon the superior court by section 287, Code of Civil Procedure. This power is purely stat-

utory and is not subject to any constitutional objection.

[4] Assuming the power to disbar, the order of disbarment became final upon its affirmance by the supreme court. Thereafter no court had power to modify or set aside the order either upon motion or otherwise. An application for reinstatement of an attorney disbarred by a judgment of a court of competent jurisdiction, made after the order of disbarment has become final, must be treated as an application for admission to practice and not as an application to vacate the order of disbarment. As such it must be addressed to the court having jurisdiction to admit an attorney to practice. In re Mash, 179 Pac. 898.

[5] Since the amendment to section 276, Code of Civil Procedure, in 1895, the superior court is without jurisdiction to admit an attorney to practice in any court of the state. That power, at the time the order purporting to reinstate the petitioner was made, was, and now is, conferred exclusively upon the District Courts of Appeal. Hence the superior court in Los Angeles, being without jurisdiction to admit petitioner to practice, could not entertain an application for restoration after disbarment. That the court acted upon the assumption that it had such power is apparent from the order, which reads:

"That the above-named Wm. J. Danford is hereby reinstated and hereby admitted to the bar of the superior court."

In the case of In re Wharton, 130 Cal. 486, 62 Pac. 741, there is language intimating that where the disbarment took place in the superior court the motion for reinstatement should be made in that court, but the error of the ruling in that case is that the court treated the motion for reinstatement as a motion to modify the judgment of disbarment rather than a motion for admission to the bar. In view of the decision of the Supreme Court in Re Mash, supra, the Wharton Case is not controlling. Treating the motion for reinstatement as a motion for admission to the bar, as it must be treated, it necessarily follows that such motion must be addressed to a court which has jurisdiction to admit to the bar. As the superior court had no power to admit petitioner to practice in any court, there can be no doubt that the order in question is void on its face for want of jurisdiction in the court.

[6] Such being the case, the respondent is not exceeding its jurisdiction in entertaining the contempt proceedings, and the application for prohibition should be denied.

So ordered.

We concur: WASTE, Presiding Judge pro tem.; BRITTAIN, J.

49 Cal. App. 336

PEOPLE v. ZENTGRAF. (Cr. 522.)

(District Court of Appeal, Third District, California. Sept. 20, 1920.)

1. Criminal law ⟸683(3)—Evidence of proceedings on arraignment admissible to rebut defense of insanity.

In a prosecution for burglary, defended on the ground of insanity, evidence that defendant had pleaded guilty with the expectation that he would be granted probation, but, it being refused, withdrew the plea by consent of court, and entered plea of not guilty, was admissible to rebut the defense of insanity.

2. Witnesses ⟸277(4)—Testimony of defendant, on cross-examination, that he had left bank because short in his collections, admissible on question of sanity.

In prosecution for burglary, defended on the ground of insanity, though defendant had not been interrogated specifically about his previous employment at a bank, his direct examination having taken a wide range to show his mental condition, it opened the door to inquiry as to other circumstances included within the same period, as the fact that he had left the bank, and that he had been discovered short in his collections.

3. Criminal law ⟸825(4) — Defendant must request more explicit instruction to limit evidence.

Where defendant did not request a more direct and explicit instruction to consider certain evidence only as bearing on defendant's sanity, he cannot complain that such instruction was not given.

4. Criminal law ⟸859—Court not required to read testimony, in absence of disagreement of jurors.

Where there was no disagreement among jurors as to the testimony of certain experts on insanity, but they were merely not clear as to the difference between medical and legal insanity, the trial court was not required by statute to read to them the testimony involved.

5. Criminal law ⟸1174(1)—Failure to read testimony on request of jury harmless to defendant.

In a prosecution for burglary, defended on the ground of insanity, any error in failing to comply with the jury's request to have certain expert testimony on insanity read *held* harmless to defendant.

6. Criminal law ⟸1169(1)—Testimony harmless to defendant, charged with burglary.

In a prosecution for burglary, testimony that at the time the witness heard a voice, coming from the direction of the burglarized store, saying, "Here, take this," *held* harmless to defendant.

7. Criminal law ⟸730(1)—Error in argument cured by direction to disregard.

Any possible injury to defendant in the argument of the district attorney was cured by the trial court's direction to the jury to disregard the argument.

8. Criminal law ⊂=1037(2)—Defendant cannot complain of argument, in absence of request for direction to disregard.

Where there was no request that the trial court direct the jury to disregard criticized statements in the district attorney's argument, defendant cannot complain of such statements on appeal.

9. Criminal law ⊂=570(2)—Insanity must be established by preponderance of evidence.

If the jury, trying a charge of burglary, entertained a reasonable doubt concerning the proof of any material issue, it was under duty to give defendant the benefit of the doubt and acquit him, unless the issue was that of his insanity; as to such issue a reasonable doubt is not sufficient to justify acquittal, but the jury must be convinced that the defense is established by a preponderance of the evidence.

10. Criminal law ⊂=810—Instructions on proof as to insanity not inconsistent.

In a prosecution for burglary, instruction that the defense of insanity need not be proved beyond a reasonable doubt, to entitle defendant to an acquittal, *held* not in conflict with an instruction that a reasonable doubt on the issue of insanity was not sufficient to justify acquittal, but must be established by a preponderance of evidence.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

George M. Zentgraf was convicted of burglary of the first degree, and from the judgment, and an order denying his motion for new trial he appeals. Affirmed.

E. Fitzgerald, of Placerville, and Eugene S. Wachhorst and Donald E. Wachhorst, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendant was convicted of burglary in the first degree, and the appeal is from the judgment and order denying his motion for a new trial.

That defendant at night entered the store of Heusner Bros. at Shingle Springs, El Dorado county, and took therefrom a large quantity of personal property, is not disputed. He was apprehended therein about midnight with some of the property in his hands; many articles of various kinds having been loaded into his machine, which he had driven and left near the store. Thereupon defendant admitted that he had unlocked the door and gone inside; he stated why he had stolen the property, implying that his motive was that of revenge; and he promised his captors a large sum of money if they would release and not prosecute him. The facts as thus detailed by the witnesses for the people are not controverted, but the defense of insanity was interposed by appellant, and it was upon that ground an acquittal was sought. There is some support for that theory; the principal element thereof consisting of the testimony of two physician experts based upon hypothetical questions. No doubt, the jury might legally have concluded from the showing made that defendant was irresponsible; but a careful reading of the whole record can hardly fail to produce the conviction that the verdict is entirely just and should be upheld. Indeed, it is not disputed that the evidence warrants the verdict; but appellant claims that certain grave errors of sufficient moment to demand a reversal were committed at the trial.

[1] Of these the first relates to the action of the court in permitting evidence of the proceedings at the arraignment of the defendant. It thus appeared that the defendant had pleaded guilty with the expectation that he would be granted probation; but, it being refused, he withdrew the plea by consent of the court and entered a plea of not guilty. This evidence was admissible to rebut the theory of appellant that he was insane at the time the goods were taken by him. The showing for the defense extended over a long period of time, including said date, and according to the familiar rule, it was proper for the people to meet this evidence by showing that his conduct and declarations were those that characterize the normal mind. That he pleaded guilty and asked for probation, and upon its denial concluded that he would stand trial, would seem to be some evidence that he understood the nature and probable consequences of the charge against him. We think there is a distinction between such case and the one wherein the defendant does not claim to be insane. An instance of the latter is found in People v. Ryan, 82 Cal. 617, 23 Pac. 121, wherein it was held to be error for the court to allow the plea of guilty to be put in evidence, where it had been withdrawn and the plea of not guilty substituted. A peculiar feature, also, of that case, was that without said evidence the defendant could not have been legally convicted. In view of that fact the Supreme Court said:

"We do not think that the Legislature, in passing the law under which the defendant was allowed to nullify and render functus officio his plea of guilty, by substituting or putting in place of it a plea of not guilty, intended to say that, notwithstanding such substitution and doing away with the first plea, it may be given in evidence and sometimes serve as the only conclusive proof of a man's guilt under the plea of not guilty."

Herein, of course, the important part of the evidence was that relative to the change of plea after probation was refused. It was proper to have this considered as the act of a mind subject to the ordinary motives that influence human conduct.

[2, 3] Appellant claims that—

"The next serious error is the ruling of the court in permitting the prosecution to intro-

duce testimony of an incident occurring some four or five years prior to the alleged commission of the offense for which defendant was now on trial."

The objection is based upon this part of the record:

"Q. Then you quit the bank, did you? A. Yes. Q. Why did you quit? A. I had been short a few times in my collections, small amounts, and he called my attention to it, and that was not satisfactory, of course; so that was the end of my working there."

The only objection to the question was the general one and that it was not cross-examination. The court based its ruling upon the proposition that the only defense was insanity, and since the defendant had testified to matters covering a long period of time that had a tendency to show a defective memory and impaired reasoning power, this was proper cross-examination, and also pertinent to the inquiry as to the mental status of the defendant. It is true that he had not been interrogated specifically about his employment at the bank, but the direct examination had taken a wide range for the purpose of showing his mental condition, and it opened the door for an inquiry as to other circumstances included within the same period. People v. Mammilato, 168 Cal. 207, 142 Pac. 58. We may add that from the remarks of the court the jury must have understood that the evidence was to be considered as only bearing upon the sanity of the defendant. Since defendant did not request it, he cannot complain that a more direct and explicit instruction to that effect was not given.

[4, 5] The next point is that the court erred in failing to comply with the request of the jury to have certain testimony read. After having been out for a long time they came into court and one of the jurors said:

"The jury would like to know—would like to hear the testimony of those two specialists, Hoisholt and Matthews; we got kind of mixed up on that question."

Then Juror Frost said: "We would like to know whether he was legally sane or insane at the time of the act." Then Juror Mrs. Eskew: "Or medically insane." It seems that the court understood that the jurors desired to have the instructions on the subject re-read and stated: "In answer to the question, the instructions heretofore given will be read in these particulars." After reading them the court said: "Does that answer the question?" And Juror Frost replied: "Yes sir." It is true that thereafter one of the jurors said, "I believe the information wanted is the testimony of those two doctors, if I may make clear the information we want;" and in reply to the court's inquiry, "On what point?" he answered, "As to his sanity, legal or medical, at the time of the commission of the act." The court thereupon stated: "I will again read the instructions I have read." This was done, and the jury was again sent out. Section 1138 of the Penal Code provides:

"After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desired to be informed on any point of law arising in the cause, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to the district attorney, and the defendant or his counsel, or after they have been called."

The court and the attorneys seem to have understood that it was a question of law about which the confusion existed, and, taking the whole colloquy into consideration, that is probably not an unreasonable inference, notwithstanding one of the jurors did say that they would like to hear the testimony of the two specialists. At any rate, the attorney who was representing the defendant, if he desired to have such testimony read, should have made the matter plain to the court. We must assume, of course, that the trial judge was acting in good faith and had no disposition to withhold from the jury anything that they were entitled to. Moreover, the statute provides that only when there is a disagreement among the jurors as to the testimony must it be read to them. It does not appear that there was such disagreement, but only that they were not clear as to the difference between medical and legal insanity. This called particularly for the reading of the instructions, rather than the testimony of the specialists. Indeed, the testimony of the experts threw no light upon this subject, and its repetition would not have aided the jury. While they were subjected to a long and searching examination, the testimony amounted simply to an opinion that, assuming the facts to be as stated by defendant's counsel, appellant was insane, and incapable of distinguishing between right and wrong; whereas the question was left in doubt by reason of other facts detailed in the cross-examination. It is quite apparent that no prejudice was suffered by defendant, conceding for the sake of the point that such testimony should have been read.

[6] Mrs. Roxy Burke, a witness for the people, testified in rebuttal that about the time of the burglary she heard a voice, coming from the direction of the store, saying, "Here, take this." She could not identify the voice, but the contention of the prosecution was that, since the defendant's only plea was that "he was there in a dream and didn't know what he was doing," the voice would indicate the presence of another person and thus eliminate the theory of a dream. The argument is rather fanciful, we think; but the matter is of too little consequence to justify serious consideration. Whether the rul-

ing was right or wrong, it could hardly have influenced the verdict.

[7, 8] Some objection is made to certain portions of the argument of the district attorney; but we find no error therein. Speaking generally, it may be said that he did not transcend the bounds of legitimate discussion. Furthermore, one statement, to which objection was made, the court directed the jury to disregard, and hence any possible injury was cured. People v. Amer, 8 Cal. App. 137, 96 Pac. 401; People v. Ward, 134 Cal. 301, 66 Pac. 372. As to the other criticized statements there was no request that the court direct the jury to disregard them, and hence appellant cannot now complain. People v. Shears, 133 Cal. 154, 65 Pac. 295; People v. Yee Foo, 4 Cal. App. 730, 89 Pac. 450.

[9, 10] The only other complaint is that two instructions given by the court are inconsistent and misleading. The first of these is:

"The jury are instructed that the law of the state of California is this: 'If the jury entertain a reasonable doubt concerning the proof of any material issue in a criminal case, it must give the defendant the benefit of that doubt and acquit him, unless the particular issue is that of the insanity of the defendant; and as to such issue of the insanity of the defendant a reasonable doubt is not sufficient to justify an acquittal at the hands of the jury, but they must be convinced that the said defense of insanity is established by a preponderance of the evidence.'"

That this instruction stated the law correctly cannot be doubted. People v. Miller, 171 Cal. 649, 154 Pac. 468. Nor can we see anything inconsistent therewith in the following instruction:

"The defense of insanity need not be proved beyond a reasonable doubt, to entitle the defendant to an acquittal; it is sufficient for the defense to be proved by a preponderance of evidence, to entitle the defendant to a verdict of not guilty. If therefore, you believe that the preponderance of the evidence introduced in this case shows that Mr. Zentgraf, the defendant, was either insane, or deprived of reason, or unconscious of what he was doing at the time of the commission of the act charged, you must acquit him."

The difficulty in the Miller Case, supra, was that the trial court went further, and gave an erroneous and misleading definition of "preponderance of evidence." No such criticism can be made here.

Finally, it may be said, the record contains such persuasive and convincing evidence that the defendant understood the nature of the act which he perpetrated, and was therefore responsible for his conduct, that, notwithstanding the supposititious opinion of said experts, it should be held that any other verdict would be unjust, and that, if any error was committed, it should be disregarded.

The judgment and order denying the motion for a new trial are affirmed.

We concur: NICOL, Presiding Judge pro tem. HART, J.

(49 Cal. App. 186)

McGEHEE et al. v. CURRAN et al.
(Civ. No. 3398, S. F. 9192.)

(District Court of Appeal, First District, Division 1, California. Sept. 1, 1920. Opinion of Supreme Court in Bank Denying Hearing, Oct. 30, 1920.)

1. Judgment ⊂⊃441—Fraud, warranting setting aside, must be extrinsic.

A former judgment or decree may be set aside and annulled for fraud, but it must be a fraud extrinsic or collateral to the questions examined and determined in the action.

2. Appeal and error ⊂⊃909(1)—Assumed that controversy was fairly submitted in action to set aside judgment.

In an action to set aside a judgment, in the absence of any showing to the contrary, it will be assumed that the former controversy was fairly submitted.

3. Judgment ⊂⊃460(6)—Facts to be alleged to set aside former judgment for fraud.

In an action to set aside a former judgment as being procured by fraud, it is incumbent upon the plaintiffs, not only to show by their complaints the facts constituting the fraud, but also that they have a defense to the original action upon the merits, and that they are able to present to the court the evidence constituting that defense, and such matters must be alleged, not as ultimate facts, but the facts themselves constituting the defense must appear.

4. Trusts ⊂⊃43(3)—No express trust raised by proof of parol agreement by grantee in absolute deed.

Under Code Civ. Proc. § 1971 (Civ. Code, § 852), where land was conveyed by an absolute deed, no express trust in favor of the grantor can be raised by proof of a parol agreement by the grantee to hold the property in trust or reconvey it.

5. Trusts ⊂⊃44(3)—Oral testimony to show absolute deed created trust must be clear.

To justify a court in determining from oral testimony that a deed absolute on its face was intended to be a trust, the testimony must be clear, convincing, and conclusive.

6. Trusts ⊂⊃89(1)—Resulting trust held not sufficiently shown.

In an action to have a resulting trust declared in land conveyed by a deed absolute on its face, evidence relied upon by plaintiffs *held* not of sufficient compelling force to establish a resulting trust.

7. Trusts ⟸43(3)—Declaration of grantor not admissible to show trust.

A declaration of a grantor, made long after the execution of a deed absolute on its face, is not admissible in evidence to show that the land was conveyed in trust for the grantor.

8. Trusts ⟸43(3)—Declarations of grantees not admissible to prove trust.

The declarations of grantees, in a deed absolute on its face, occurring after the death of the grantor, are not competent for the purpose of proving that the land was to be held by the grantees in trust, and would be admissible only in corroboration of other evidence.

9. Adverse possession ⟸63(2) — Possession and payment of taxes by grantor did not divest grantees of title.

The fact that a grantor remained in possession of the premises up to the time of his death and used the same and paid taxes and insurance thereon did not have the effect of divesting his grantees of the title by him conveyed.

10. Judgment ⟸461(5)—Settlement by guardian ad litem of litigation held not in fraud of wards.

In an action to set aside a judgment, *held* that it was not established that plaintiffs' guardian ad litem, or their attorneys, corruptly or at all entered into a collusive agreement with adverse parties for an unconscionable abandonment of the defense of the plaintiffs in an action to quiet title when a motion for new trial was pending, having compromised the case.

11. Infants ⟸84—Guardian ad litem may compromise in interest of ward.

After an adverse judgment, when a motion for a new trial was pending, and no newly discovered evidence or other facts were at the command of a guardian ad litem, or the ward's attorney, it was incumbent upon the guardian and the attorney to use their best endeavors in the interests of the ward, and, if in the exercise of their honest and best judgment a compromise was the best that they could do, they were justified in compromising, and the compromise could not constitute fraud which would entitle the minors to set aside the judgment.

On Hearing in the Supreme Court.

12. Judgment ⟸423, 444 — Not vacated because of perjured testimony.

Judgment after a trial of controverted issues of fact will not be vacated on a claim that the issues were erroneously determined because of false or even perjured testimony.

13. Judgment ⟸414—Not vacated by reason of fraud not affecting judgment.

If a judgment against minors could not have been reversed or set aside on appeal or by motion for a new trial, any fraudulent settlement between the ward of the minors, by which they were prevented from appealing or moving for a new trial, did not injure them, and did not touch the judgment itself, and is not ground for vacating the judgment.

Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge.

Action by Irene M. McGehee and others against John J. Curran and others. Judgment for defendants, and plaintiffs appealed. Affirmed in the District Court of Appeal, and hearing denied in Supreme Court.

W. H. Tully, of San Francisco, and D. T. Jenkins, of San Jose, for appellants.

Leib & Leib, L. B. Archer, and C. M. Cassin, all of San Jose, for respondents.

WASTE, P. J. This is an action brought by the plaintiffs, after a lapse of over 12 years, to set aside, and vacate a judgment, rendered in 1905 in an action to quiet title, wherein the defendants here were the plaintiffs, and these plaintiffs were the defendants. Plaintiffs also seek to establish a constructive trust in the land in their favor. It is the contention of the appellants that they did not have a just and fair trial in that action, because of the suppression of facts, and because of fraud and collusion on the part of the defendants here and the attorneys for and guardian ad litem of four of these plaintiffs, who were then minors. Demurrer to the second amended complaint was sustained, and, the plaintiffs declining to amend, judgment was entered in favor of the defendants, from which the appeal is taken.

As the litigation of which this action is but a part, had its inception 35 years ago, it is necessary for us to indulge in a somewhat extended narration of the facts, which are set out in the amended complaint. In 1884 Sarah G. Tully, who is the mother of the other plaintiffs, married John Tully, a widower now deceased and the father of defendants Mary E. Wineland, Isabella Higgins, Dorinda Tully Curran, Eleanor Tully, Joseph Tully, and Edward O. Tully. Defendant J. W. Wineland is the husband of Mary E. Wineland, defendant Maurice Higgins is the husband of Isabella Higgins, and defendant J. J. Curran is the surviving husband of Dorinda Tully Curran, now deceased, and the executor of her estate. In speaking of "the defendants" hereafter, we will refer to the said children of John Tully. On July 29, 1885, the said Sarah G. Tully instituted an action for divorce against her husband. A few days later he conveyed all his property, consisting of several tracts of land, and some of his personal property to his children, these defendants. Thereupon Sarah G. Tully amended her complaint, and made the grantees in said conveyances, parties defendant in the divorce action. Upon the trial being had, the court granted Mrs. Tully a decree of divorce and awarded her the custody of an infant child. The court also decreed that the conveyances from Tully to the children of his former marriage were

fraudulent, inoperative, and void as to any interest or claim of his wife, therein or thereto. He was ordered to pay to her the sum of $50 per month for the support and maintenance of herself and the child, and the payment thereof, and of any other sum which might thereafter be awarded instead, was secured by, and declared to be a lien upon a part of the land covered by the deeds.

The parties to the divorce action settled their differences, and immediately after the filing and entry of the decree of divorce, Tully and his wife entered into an agreement, whereby Tully promised and agreed with Mrs. Tully that if she would remarry him, and would forego and release him and the lands he had conveyed to his children, from the lien, and the payment of permanent alimony for the support of herself and the child, he would convey to her an undivided one-third interest in all of the land theretofore deeded to these defendants. The parties thereupon remarried and lived together until John Tully died, November 26, 1894. Three more children were born to them. It was not until September 20, 1894, however, and just before his death, that John Tully, in part fulfillment of his marriage contract, executed and delivered to Mrs. Tully a grant, bargain and sale deed for one undivided third interest in the land. A few days later, on October 12, 1894, Tully made and delivered to his children by the former marriage another deed of the same property he had conveyed to them in 1885, excepting a portion sold. This conveyance was executed in consideration of love and affection, and for the better maintenance, support, and protection of the grantees, and granted and confirmed the land to them. From and after the death of John Tully the plaintiffs and defendants remained in joint possession of the property until August, 1905. The defendants assumed management and control thereof, and provided and cared for Mrs. Tully and her four minor children for about two years. During these years, so it is alleged, the defendants and Sarah G. Tully negotiated and consulted with a view to ascertaining what she would consider to be a fair share for herself and the minors, in a division of the property. On December 5, 1896, Mrs. Tully instituted an action in ejectment, in her own behalf, against the grantees of John Tully, to recover her one-third interest in the lands. The grantees filed their answer, in which they asserted themselves to be the owners of the land, and denied any ownership in Mrs. Tully. The trial court held that the plaintiff therein could not prove the invalidity of the deeds from John Tully to the defendants, or that said defendants held said land in trust for plaintiff. It admitted the deeds in evidence, and gave its judgment against Sarah G. Tully, and in favor of the defendants. Claiming that the defendants were threatening to dispossess her under that judgment, Mrs. Tully immediately instituted another action against the same defendants, and in which the minor children were plaintiffs, by their guardian ad litem, H. V. Morehouse. The third amended complaint in that action is attached to, and made a part of the amended complaint in this present suit. In addition to specific allegations of the facts we have narrated, it is therein averred that John Tully remained in possession and control of the land, set forth in the deeds of conveyance to the defendants, up to the time of his death, claiming the same as his own, cultivating said land and paying the taxes thereon. As the gravamen of the action it is alleged that the deed, made by John Tully to the defendants in 1884, was executed for the purpose of defeating Mrs. Tully in the divorce action, and in the assertion of her rights to maintenance for herself and offspring, and was not made in good faith, and was in fraud of creditors, of whom Mrs. Tully was one by reason of her alimony allowance. It was further alleged in that action that the second deed from John Tully to the defendants, executed in 1894, was procured by the defendants by false and fraudulent representations, at a time when said Tully was feeble in body and mind from physical disease, and for the purpose of defeating all rights and claims of the plaintiffs, and the effect of the deed of the one-third interest made by John Tully to Mrs. Tully, and also to defeat the claims which the minor children would have in the estate of John Tully, in case he should die intestate. The prayer of the complaint was that it be adjudged that the defendants, who are the defendants herein, had since the 1st day of August, 1884, held the land in trust for Sarah G. Tully and her minor children, who are the plaintiffs here, that Sarah G. Tully be adjudged to be the owner of an undivided one-third part, and the minor children of the plaintiff and John Tully, the other plaintiffs here, be adjudged to be the owner of an undivided four-tenths of the remaining two-thirds.

Demurrer to the third amended complaint in that action was sustained, the plaintiffs declined to further amend, and judgment was entered in favor of the defendants. While it does not so appear from the averments of the amended complaint in the present action, it is a matter of record to which both appellants and respondents have referred in their briefs and arguments, that on appeal the judgment was affirmed upon two grounds: (1) That the facts stated in the complaint did not state a cause of action; and (2) that the action was barred by the statute of limitations. The court held on the facts pleaded, which were those we have here set out, that John Tully had neither legal nor equitable title after his conveyance to his chil-

dren in 1884, and that there was no trust relation to save the operation of the statute of limitations. Tully v. Tully, 137 Cal. 60, 68, 69 Pac. 700.

Matters appear to have remained in status quo until January 2, 1904, when these defendants instituted an action against these plaintiffs, Sarah G. Tully and her children, who were still minors, to quiet title to all of the property conveyed by the John Tully deeds, excepting the portion theretofore sold. The plaintiffs appeared in the action, the minors being at all times represented by F. J. Hambly, their duly appointed guardian ad litem. Judgment was rendered in favor of the plaintiffs in that action, the defendants here. It is that judgment that the plaintiffs, all of them being now of legal age, are seeking to have vacated and set aside. They also seek to have a trust in favor of plaintiffs impressed upon the property conveyed by John Tully to the defendants, and pray for interest upon the rental value of the shares to which they claim to be entitled under the trust.

As the basis of the present action begun 12 years after the entry of the judgment, the plaintiffs allege that they did not have a just, or fair trial, in the suit to quiet title, because of the fraud of the defendants in suppressing facts which would have established the rights of the plaintiffs, and because of collusion on the part of the defendants and the guardian ad litem of the plaintiffs who were minors at the time. In support of their position the plaintiffs now allege that on August 1, 1885, the defendants induced John Tully to convey his property to themselves, by a deed absolute in form, "upon the express oral agreement with the said John Tully that they and each of them would hold the said property in trust for the use and benefit of him, the said John Tully, and would permit him to remain in possession and take the rent, issues, and profits of said property as he had always done theretofore, and would reconvey to said John Tully or to whomsoever he might direct, the whole or any portion of the same." It is alleged that the second, or confirmation deed of John Tully to the defendants, made on October 12, 1894, was executed without consideration, and was executed by John Tully, and accepted by the defendants, upon the express oral agreement that the defendants would convey to Sarah G. Tully the legal title to an undivided one-third equitable interest in said property, and that they would hold the remainder of said property in trust for the use and benefit of themselves, the said defendants, and for the use and benefit of the then four minor children.

It is these alleged facts which the plaintiffs now charge were suppressed by the defendants in the trial of the quiet title suit, the averment being that in that action:

"The said plaintiffs endeavored to defend themselves against said suit to quiet title upon every available ground then known to them; that the defense that said property was held in trust as heretofore set forth was rendered unavailable to said plaintiffs, and no fair submission of said defense was had, for the reason that the defendants fraudulently suppressed the facts of the existence of said trusts and agreements by remaining silent and refusing to disclose to the plaintiffs, their cestui, either the rights of the plaintiffs in said property or the facts to prove the existence of said rights; that the said Sarah G. Tulley, for the purpose of discovering the true manner in which said defendants held the said property, caused the depositions to be taken of Joseph Tully, Edward O. Tully, and Isabella Higgins, defendants hereto, and said defendants asserted in said depositions that they were the absolute owners of said property, and refused to disclose anything with reference to the rights of said plaintiffs; that at the trial of said suit to quiet title, the said defendants asserted that they were the absolute owners of said property, and refused to disclose the rights of the plaintiffs, their cestui; that said plaintiffs exhausted every available means to ascertain the facts and secure the evidence in regard to the manner in which the said defendants held the said property * * * that said facts of the existence of said trusts and of the evidence to prove them lay peculiarly within the minds of said defendants, for the reason that said defendants were the only parties present from whom the plaintiffs could obtain the information, except John Tully, who was at that time dead; that the plaintiffs did not have a just or fair trial in said suit to quiet title because of the said suppression of the facts of the existence of their rights by said defendants, their trustees and because of the fraud of said defendants and the guardian ad litem of said minor plaintiffs as hereinafter set forth."

As the basis of the fraud and collusion on the part of the defendants, and the guardian ad litem, and attorneys for the minors, it is alleged that before the judgment in the said suit to quiet title had become final, and while the motion for a new trial in said suit was still pending and the time for appeal still available, the said defendants, aided and assisted by their attorneys, conspired with the said guardian ad litem and the attorneys of said minor plaintiffs, J. E. Alexander and H. V. Moorehouse, to defraud the plaintiffs and to deprive them of their right to their motion for a new trial and their right to appeal; that said guardian ad litem and the attorneys of said minors entered into an agreement with said defendants, acting through their attorneys, wherein the said guardian ad litem and the attorneys of said minors, in consideration of the sum of $750, to be paid to said guardian ad litem and the attorneys of said minors by said defendants, agreed to abandon the defense of said then minor plaintiffs, and to procure a written agreement, providing for the removal of the plaintiffs from the property, and a release

of all the rights of Sarah G. Tully in said property, upon a payment to said then minor plaintiffs, John J. Tully, Jennie G. Tully, Irene M. Tully, and Wilford H. Tully, of the sum of $15,000, either in the form of a portion of said property or in money, and also providing for the dismissal of a suit between the administrator of the estate of John Tully and said defendants, then pending, involving certain personal property. This agreement, duly executed by all parties, was carried out. The $750 was paid to the guardian ad litem and their attorneys. The motion for a new trial was dismissed by stipulation, and the defendants turned over to the minors $15,000 worth of property. No part of it was received by Sarah G. Tully, and she received no property or money as a consideration for her release. The terms of the agreement of settlement, which the plaintiffs now claim to be unjust and unfair to them, as securing to them only a part of what they would be entitled to if the trust in their favor had been established, were not communicated to the minors; neither did they have personal knowledge of the settlement, which they always supposed was made in good faith. The compromise on their behalf was not submitted to or approved by the court.

Three principal questions at once address themselves to our consideration upon the foregoing facts: (1) Was the judgment here attacked obtained by fraud, in such manner as to entitle these plaintiffs to the intervention of a court of equity to set it aside? (2) Was the compromise agreement, entered into by the parties after the rendition of the judgment, fraudulently procured? (3) Would the plaintiffs be in a more favorable position had it not been executed? Upon the answers to these questions depends the correct solution of this case.

[1, 2] That a former judgment, or decree, may be set aside, and annulled for some frauds there can be no question; but it must be a fraud extrinsic, or collateral to the questions examined and determined in the action. When parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party has prevented a fair submission of the controversy. Pico v. Cohn, 91 Cal. 129, 133, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; Steen v. March, 132 Cal. 616, 618, 64 Pac. 994; Bacon v. Bacon, 150 Cal. 477, 490–491, 89 Pac. 317. According to the averments of plaintiffs, the fraud which prevented a fair submission of their controversy lay in the fact that at the trial of the suit to quiet title the defendants "asserted that they were the absolute owners of said property, and refused to disclose the rights of the plaintiffs." The plaintiffs were not prevented by any fraudulent contrivance of the defendants from having a trial. That was their opportunity for presenting the whole matter of their alleged interest in the lands to the court for determination. In the absence of any showing to the contrary, it will be assumed that the controversy was fairly submitted. The plaintiffs did not make the judgment roll, or any part of the evidence taken and received in the court below, a part of their complaint. We do not know what transpired there, beyond the fact that a judgment was rendered in favor of these defendants. In what manner or form the defendants asserted that they were the absolute owners of the property, and under what circumstances they refused to disclose the rights of the plaintiffs, is not made to appear. Consequently, there is nothing in the record, so far as it relates to the trial, from which it may be inferred that the judgment was procured by means of any extrinsic fraud, or that it would have been different or more favorable to the plaintiffs but for the conduct of the defendants. Even though it should appear that the defendants went so far as to give perjured testimony in establishing their title to the property, and in defeating the claims of the plaintiffs, the fraud was intrinsic, and would not avail the plaintiffs to set aside the judgment. "In this state it is the settled law that a judgment cannot be set aside because it is predicated upon perjured testimony, or because material evidence is concealed or suppressed." People v. Mooney, 178 Cal. 525, 530, 174 Pac. 325; Allen v. Currey, 41 Cal. 321; Pico v. Cohn, supra.

[3] If, as alleged, but not so clearly as to be established, the guardian ad litem, and the attorneys for the minors, corruptly sold out their clients' interests, and through fraud and collusion with the defendants conspired to defraud the plaintiffs, and did deprive them of their right to a new trial, and to an appeal in the quiet title action, to their prejudice, such conduct amounted to extrinsic fraud. Pico v. Cohn, supra; Rountree v. Montague, 30 Cal. App. 170, 181, 157 Pac. 623 But even in that case, before a court of equity can set aside the judgment, it must be made to appear with reasonable certainty that the judgment was wrong, or that the result would have been different upon another trial. Davis v. Chalfant, 81 Cal. 627, 630, 22 Pac. 972; Painter v. J. B. Painter Co., 133 Cal. 129, 131, 65 Pac. 311. In the instant case it does not appear that the result would have been different, had the plaintiffs pressed their motion for a new trial, or, in the event of its being denied, had appealed to the higher court. It was incumbent upon the plaintiffs, not only to show by their complaint the facts constituting the fraud which they contend gives them the right to set aside this judg-

ment, but they were required also to show that they have a defense to the original action upon the merits, and that they are able to present to the court the evidence constituting that defense. They were required to not merely allege these matters as ultimate facts, but the facts themselves—those constituting the fraud, those constituting the defense, and those constituting their ability to present them to the court—should appear in the complaint, in order that the court may determine that if the allegations had been admitted by the other parties the plaintiffs would have been entitled to a judgment in their favor in the original action. Bell v. Thompson, 147 Cal. 689, 693, 694, 82 Pac. 327, and cases cited. In the absence of the judgment roll and evidence in the action to quiet title, we have no means of ascertaining if there was any error in the trial of the case that might have availed the plaintiffs on their motion for a new trial or on appeal. It is not alleged in the complaint that the plaintiffs could or would have presented any newly discovered evidence to the court upon that occasion. On the contrary, it very definitely appears that they would not and could not have done so. The allegation is that "the plaintiffs endeavored to defend themselves against said suit to quiet title upon every ground then known to them." The facts constituting the defense now suggested "that the property was held in trust," were not known to the plaintiffs until many years after the rendition of the judgment. Consequently, those facts could not have been available in support of their motion.

Even if the plaintiffs had possessed the knowledge of the facts they now assert, we are of the opinion that the result of a new trial, if one had been granted, would not have been different any more than if the action were to be now tried anew. As tending to show that they have a defense to the original action upon the merits, and that they are able to present to the court the evidence constituting that defense, the plaintiffs allege the facts constituting the discovery of the purported fraud and the evidentiary matters relied upon to establish it. In 1917, 12 years after the date of the judgment, one of them, since arrived at maturity, had a conversation with the attorney, who, back in 1894, drafted the deed from John Tully to Sarah G. Tully, and was by him informed that shortly after said deed had been executed, one of the defendants, Isabella Higgins, called at his office, and in conversation had approved of the making of the deed, and during no time in said conversation regarding the deeding of said property did she lay claim to said property, either on behalf of herself or the other defendants, nor did she assert or declare that her father was not the owner of said property, and entitled to convey the same, but she stated that she was an heir of said John Tully, and so interested in his estate. Plaintiffs also learned in 1916, that a purchaser of part of the land paid the money in said transaction to John Tully, and that he and his four adult children signed the deed, but while due returns of sale of the interest of his two minor children were made to the court, "no pretense appears in said record to have been made to account to said two defendants by said guardian or otherwise." In 1917 the same plaintiff learned from one William Wehner that said Wehner was present at a family council shortly before John Tully died, at which the latter, the plaintiff Sarah G. Tully, and the defendants were present. Wehner informed this plaintiff that during the conference he asked John Tully, in the presence of the defendants, if he did not understand at the time the deed of August 1, 1884, was made, the property set out in the deed was to be deeded back to him at any time he saw fit to demand it; that John Tully said he so understood it, and none of the defendants questioned or denied the truth of the statement. As Mrs. Sarah G. Tully was present at that time, all of that information was in the possession of that plaintiff at least at all times after the occurrence, and could have been, and we think it safe to assume was, no doubt, used whenever it was considered of value, or material, in this long drawn out litigation. There is no allegation that John Tully ever demanded a reconveyance of the property. In 1917, Mrs. Nettie Shaafe, one of the former employés of the Tully property, informed the same plaintiff that John Tully, shortly before his death, informed her that he had deeded one-third of his property to Sarah G. Tully, and had given the balance, share and share alike, to his children. Other facts relied upon by the plaintiffs are that Sarah G. Tully, one of the plaintiffs, has informed her coplaintiffs that after the death of John Tully, Isabella Higgins, one of the defendants, said she hoped the said Sarah G. Tully would get "her share," presumably of Tully's property, and that upon another occasion Joseph Tully, another of the defendants, "asked her what portions of the property she would take for herself and children, and she informed him what she wanted." What that portion was, however, is not made to appear. Many evidentiary facts are pleaded to support the allegation that John Tully remained in possession of the lands, paying all charges, collecting all the revenues, and generally exercising rights of ownership over the property until he died.

[4] The foregoing allegations, if admitted or proved, would not establish an express trust in the defendants in favor of either John Tully, or the plaintiffs. That precise point was, in effect, decided upon the appeal in the former action between the same parties. There is no pretense that there was any writing creating such trust, and without it none could exist. Tully v. Tully, supra, 137

Cal. 67, 69 Pac. 700; Smith v. Mason, 122 Cal. 426, 427, 55 Pac. 143; Sheehan v. Sullivan, 126 Cal. 189, 192, 58 Pac. 543; Civ. Code, § 852; Code Civ. Proc. § 1971. As the land was conveyed by an absolute deed, no express trust in favor of the grantor can be raised by proof of a parol agreement by the grantee to hold the property in trust, or reconvey it. Barr v. O'Donnell, 76 Cal. 469, 471, 18 Pac. 429, 9 Am. St. Rep. 242.

[5-9] If the evidence pleaded be relied upon by the plaintiffs as proof of a parol promise which is unenforceable because of the statute of frauds, and which the defendants decline to recognize—in other words to show a resulting trust—it does not have that effect. It is attempted to be pleaded, and parenthetically appears, that certain oral agreements were entered into between John Tully and these defendants, which formed the consideration for the deeds, and the repudiation of which constitutes the constructive fraud upon which the alleged trust arises. Lauricella v. Lauricella, 161 Cal. 61, 65, 118 Pac. 430; Cooney v. Glynn, 157 Cal. 583, 587, 108 Pac. 506. The evidence disclosed by the averments of the complaint is not sufficient to warrant the court in finding that the deeds, which on their face are absolute conveyances of the lands in fee simple, were intended to be something else, namely, conveyances in trust. The authorities are uniform to the point that, to justify a court in determining from oral testimony that such a deed was intended to be something different, as for instance a trust, the testimony must be clear, convincing, and conclusive. The rule is so well stated in Sheehan v. Sullivan, 126 Cal. 189, 192–196, 58 Pac. 543, that we refer to that decision for a full discussion of the point, and its application to the facts of the case at bar. The evidence relied upon by the appellants does not have sufficient compelling force to establish a resulting trust in the defendants in the present action. No evidence is pleaded from which it can even be inferred that at the time the conveyances from John Tully to the defendants were executed there was any declaration or expression of any kind by the grantor or the grantees that the deeds were intended to be anything else than what they purport on their face to be. The only evidence pleaded, even tending to have that effect, that of Wehner, was a declaration of the grantor, made long after the execution of the deeds, which was not admissible in evidence. Whatever John Tully might say, or do, after the conveyance to his children, these defendants, could not affect their title as grantees. It was so held on the first appeal. Tully v. Tully, supra, 137 Cal. 67, 69 Pac. 700; Smith v. Mason, 122 Cal. 426, 55 Pac. 143; Bollinger v. Bollinger, 154 Cal. 695, 705, 99 Pac. 196. The declarations of some of the grantees, the evidence of which is supplied by one of the plaintiffs, occurring after the execution of the deeds and the death of John Tully, are not competent for the purpose of proving the trust, and would be admissible only in corroboration of other evidence. Under any view, they would seem to be of little consequence. Sheehan v. Sullivan, supra. The fact that John Tully remained in possession of the premises up to the time of his death, and used the same, and paid taxes and insurance thereon, did not have the effect of divesting his grantees of the title by him conveyed. Tully v. Tully, supra, 137 Cal. 66, 69 Pac. 700; Emmons v. Barton, 109 Cal. 662, 42 Pac. 303; Brown v. McKay, 125 Cal. 291, 57 Pac. 1001; Reed v. Smith, 125 Cal. 491, 58 Pac. 139.

From this review of the law and the facts we are of the opinion that the demurrer to the second amended complaint was properly sustained. In one of the concluding allegations of their complaint, the appellants say they "have other evidence of the said trusts and fraud that they will offer at the trial of the case." But such averment does not assist the court in arriving at a correct determination of the matter. Bell v. Thompson, supra. Appellants argue that this is not a suit to set aside a judgment upon the ground that it was secured by perjured testimony, but is an action for relief upon the ground of fraud for breach of duty by trustees. Even so, the effect of a recovery would be the same, and, as we have attempted to show, they were not entitled to relief upon either theory. No trust has been proved, the repudiation of which raised a cause of action in the plaintiffs' favor. The purported fraud in procuring the judgment was intrinsic. The alleged unfair and unjust compromise agreement resulted in no prejudice to the appellants.

[10, 11] Before leaving that subject we pause to say that, in our opinion, it has not been established that the guardian ad litem of certain of the minors, or their attorneys, corruptly, or at all, entered into a collusive agreement with the defendants, through their attorneys, for an unrighteous or unconscionable, abandonment of the defense of those plaintiffs in the quiet title action. The litigation was at that time already stale. Upon two separate occasions, following the death of John Tully, the codefendant of the minors, their mother, had unsuccessfully assailed the title by which the grantees of John Tully claimed to be the absolute owners of the land. In one of the actions, in which the minors were parties plaintiff, with their mother, an effort had been made to have it determined that such plaintiffs were part owners of the property. After what would appear to be ample opportunity for the proper presentation of every claim they might have (for the demurrer sustained was to the third amended complaint), the plaintiffs had allowed judgment to be taken against them, and affirmed upon appeal to the Supreme Court. Tully v. Tully, supra. It had there been held, on the facts presented, that the first deed of John Tully

to his children, the defendants there and here, passed title to them, and that such title had continued to remain in the grantees. We have not before us the record of that case, other than the complaint, but three points appear to have been urged by the plaintiffs in support of their claim, the invalidity of the conveyance to the defendants, title by adverse possession in John Tully, and a resulting trust in these defendants. We may safely assume such facts, for the Supreme Court passed upon those questions and decided each against the contentions of the plaintiffs. After elaborate preparations for presenting their defense to the quiet title action, brought against them by these defendants, judgment had again been given against the plaintiffs, and confirming the title of these defendants. When the motion for a new trial was pending, no newly discovered evidence, or other facts, were at the command of the guardian ad litem, or the attorneys for the plaintiffs. Under such circumstances, it was incumbent upon them to use their best endeavors in the interests of their wards and clients. If in the exercise of their honest and best judgment the compromise effected was the best they could do, they were justified in entering into the agreement. Under such circumstances, the efforts of the guardian ad litem and the attorneys, did not constitute fraud, and would not entitle the minors to set aside the judgment. Collins v. Scott, 100 Cal. 446, 452, 34 Pac. 1085. The other plaintiff, Sarah G. Tully, was sui juris, and was represented by counsel. She had full knowledge of all the facts, and signed the agreement. She cannot now be heard to complain. The payment by the defendants of the sum of $750 to the guardian ad litem and the attorneys for the plaintiffs appears from the allegations of the complaint to have been a part of the settlement, and was well understood by all the parties. Aside from certain conclusions of the pleader, there is nothing in the record to establish fraud on the part of those so directly assailed. The action was apparently settled in good faith.

We think it unnecessary to devote further consideration to the many points raised by the parties on the submission of this case. For the reason, which we deem readily apparent from what we have already said, the litigation should have an end. No sufficient ground has been suggested in the second amended complaint why it should be prolonged. Further discussion would involve questions which are merely corrollary to the main issue, many of which become of material importance only when considered from a viewpoint differing from that which we have reached.

The judgment is affirmed.

We concur: RICHARDS, J.; WELCH, Judge pro tem.

Opinion of Supreme Court in bank denying hearing.

PER CURIAM. [12] We agree with the conclusion reached by the District Court of Appeal, but there are matters stated in its opinion as to which we have some doubt, and from which we prefer to withhold approval. With the general line of reasoning of the opinion we agree. The essential point of the case is that in 1905 the defendants in the present action secured a judgment against plaintiffs, quieting their title to the property involved, and this judgment is conclusive upon the plaintiffs unless their complaint alleges such fraud in obtaining the judgment as will warrant setting it aside. The only fraud in the obtaining of that judgment which the complaint alleges is that the plaintiffs there, defendants here, falsely claimed and testified that the deeds from their father, under which they claim, were intended as absolute conveyances, and were not given or received upon any trust. There is no allegation that the plaintiffs in that action prevented the defendants, or those acting for them, from controverting in every way available to them the claim and testimony of the plaintiffs that the property had been conveyed to them as absolute owners. The allegation of the complaint is, indeed, that every effort was made on behalf of the then defendants to secure evidence of the trust upon which it is now claimed the deeds were executed, but that such endeavors failed. The new matter which it is alleged the now plaintiffs have since discovered is but evidence which they claim is sufficient to show that the testimony of their adversaries given in the former action was false. This is nothing more than an allegation that the former judgment was obtained by false testimony. But the rule is thoroughly established that a judgment had after a trial of controverted issues of fact will not be reopened on a claim that the issues were erroneously determined because of false or even perjured testimony. The false or genuine character of the testimony was intrinsic to the trial in the course of which it was presented, and a judgment based upon the conclusion then made that it was genuine is final, and cannot be reopened to permit of a retrial of the same issues simply because of a claim that it can now be shown that such testimony was false. If the rule were otherwise, there could be no end to litigation.

[13] The complaint also attacks as fraudulent a settlement made between the parties after the rendition of the former judgment, but before the expiration of the time for appeal or for motion for a new trial, whereby the plaintiffs were prevented from appealing or moving for a new trial. We may assume that this settlement, according to the allegations of the complaint, was fraudulent and subject to be set aside, although even that is hardly certain, giving full value to the allegations. But even assuming this, such fraud does not touch the judgment, and, un-

less the judgment can be overthrown, the plaintiffs have no cause of action. The only effect which the alleged fraudulent settlement is claimed to have had upon the former litigation is that it prevented an appeal or a motion for a new trial. But there is nothing whatever alleged in the complaint showing that an appeal or motion for a new trial could or would have been successful. In fact, it is a fair inference from the complaint that they would not have been, since the only ground on which the judgment is now attacked is that it was given on false testimony, and the evidence which it is now claimed shows the testimony to have been false was not known at the time, and could not have been produced. If the judgment could not have been reversed or set aside on appeal or by motion for a new trial, it is evident that any fraudulent settlement by which the present plaintiffs were prevented from appealing or moving for a new trial did not injure them, did not touch the judgment itself, and is wholly immaterial.

What we have said is substantially said in the opinion of the District Court of Appeal, and sufficiently disposes of the case. As to all other matters discussed in the opinion we withhold approval.

Rehearing denied.

All concur, except SHAW, J., and SLOANE, J., absent.

49 Cal. App. 327

STREETER & RIDDELL, Inc., v. BACON et al. (Civ. 3322.)

(District Court of Appeal, Second District, Division 1, California. Sept. 20, 1920.)

Partnership ⊂=32—Father held partner with third person, though nominally represented by son.

Despite provisions of a contract between a father, his son, and a third person that the parties were not forming a partnership, and did not intend to conduct the business as partners, etc., *held* that the father was in fact a member of a partnership as defined by Civ. Code, § 2395, being the real partner with the third person, though nominally represented by his son.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Streeter & Riddell, Incorporated, against William S. Bacon and others. From judgment for plaintiff, a defendant, Frank P. Bacon, appeals. Affirmed.

A. L. Abrahams and P. B. D'Orr, both of Los Angeles, for appellant.

Robert M. Fulton, of Los Angeles, for respondent.

CONREY, P. J. The plaintiff brought this action against William S. Bacon, W. F. James, and Frank P. Bacon, individually and as partners doing business under the firm name of Bacon & James, to recover a balance due of merchandise sold and delivered to the defendants. From a judgment rendered in favor of the plaintiff, the defendant Frank P. Bacon appeals.

On the 28th day of August, 1918, and prior to the time when the account with plaintiff was opened, the defendants entered into an agreement which reads as follows:

"This agreement made and entered into this 28th day of August, 1918, by and between William S. Bacon and W. F. James, parties of the first part, and Frank P. Bacon, party of the second part, witnesseth that:

"Whereas, the parties of the first part are about to engage in the business of threshing beans and the operating of an outfit for the threshing of beans for hire; and

"Whereas, the above-named W. F. James is now the owner of and in possession of a Yuba tractor and horses, harness, and other equipment useful and usable in said business; and

"Whereas, the party of the second part has agreed to and is about to purchase one complete thresher, eight wagons, one derrick outfit, nets, etc., one cookhouse, one set forks and tools, all at a cost to him not to exceed the sum of three thousand ($3,000) dollars; and

"Whereas, the parties of the first part are unable to furnish the necessary capital to pay the operating expenses, wages, etc., of carrying on said business, and the party of the second part is willing and has agreed to furnish such working capital:

"Now, therefore, in consideration of the premises, it is hereby mutually agreed by and between the parties hereto as follows:

"First. The parties of the first part agree to enter upon and engage in the business of threshing beans for hire, each of said parties to devote his time and best energies to the promotion of said business, and each to do that part of the work for which he may be best fitted, and to receive the daily wage for such work usually and customarily paid to employés therefor.

"Second. The party of the second part agrees to furnish the capital necessary to pay the pay rolls and operating expenses.

"Third. The equipment belonging to said W. F. James, as aforesaid, and that to be purchased by Frank P. Bacon, shall be used in said business and furnished by the owner thereof as his contribution toward the business; it being expressly understood and agreed that at the end of the present threshing season all equipment furnished by said Frank P. Bacon shall be and remain his sole and separate property, and all of the equipment furnished by said W. F. James shall be and remain his sole and separate property.

"Fourth. All moneys received or earned by the parties hereto in the operation of said business, either as hire for said outfit or in payment for threshing beans, or from the sale of bean straw or beans, shall be deposited in the First National Bank of Van Nuys, Cal., to the credit of W. N. Hamaker, trustee. From said moneys the party of the second part shall

be paid all moneys advanced by him as capital for payment of pay rolls, or the carrying on of said business, together with interest thereon at the rate of 8 per cent. per annum. After the party of the second part has been paid said moneys, with interest, as aforesaid, then all moneys remaining in said account shall be divided equally, one-half to W. F. James, and one-half to Frank P. Bacon; it being understood and agreed that William S. Bacon, one of the parties of the first part, shall look to said party to the second part for his compensation, and shall be entitled to no part of the proceeds, profits, or revenues from the carrying on of said business, except by express agreement and understanding with the party of the second part.

"Fifth. The parties hereto further agree that the bean crop belonging to the party of the second part and that belonging to said W. F. James shall be threshed without charge, with the express reservation and condition that each of said parties shall pay the actual cost of such threshing operation.

"Sixth. This agreement shall remain in force and effect during the bean-threshing season of 1918.

"Seventh. It is expressly declared that the parties hereto are not by this agreement forming a partnership, nor do they intend to conduct said business under the terms of this agreement as partners, and neither of the parties hereto shall be liable for the acts or obligations of the other, except as herein expressly provided.

"Eighth. The party of the second part is hereby given a lien and charge upon all moneys, accounts, or other things of value had or to be had by the parties hereto by reason of any business done or contracts procured, to secure to him the repayment of the moneys advanced hereunder.

"Ninth. The parties of the first part shall at all times carry an insurance policy with the state compensation insurance fund or some other reliable insurance company, to the party of the second part, covering their liability, under the laws of California, commonly known as the Workmen's Compensation Law, the premium upon which shall be considered operating expense, and be deductible as such from the receipts.

"In witness whereof the parties hereto have signed these presents in duplicate this the day and year first above written.

"[Signed] William S. Bacon,
"W. F. James,
"Parties of the First Part.
"Frank P. Bacon,
"Party of the Second Part."

Immediately before the plaintiff began to furnish the goods which it claims to have sold to the defendants, the defendant W. S. Bacon applied to the plaintiff for merchandise to be furnished in carrying out the contract above set forth, and exhibited said contract, which then and there was read by the president of the plaintiff corporation. Shortly thereafter W. S. Bacon came to the plaintiff's store with his father, the defendant Frank P. Bacon. Frank P. Bacon stated that the boys, referring to W. S. Bacon and W. F. James, were starting a threshing machine, and that he had entered into an agreement with them to finance them on this enterprise, and that all bills would be paid; that the boys were starting a threshing machine, and he was backing or financing them on this enterprise; that accounts opened in the name of Bacon & James were backed by him and would be paid. Thereafter the goods were sold and delivered "to Mr. William S. Bacon and W. F. James for the firm of Bacon & James."

The defense of appellant is that he was not a member of the partnership, that he did not in writing agree to pay any debt of his codefendants and that therefore he is not liable in this action.

We are of the opinion that, notwithstanding the provisions of paragraph 7 of the contract, appellant was in fact a member of the partnership. "Partnership is the association of two or more persons, for the purpose of carrying on business together, and dividing its profits between them." Civ. Code, § 2395. Relying upon the law as stated in Coward v. Clanton, 122 Cal. 451, 55 Pac. 147, appellant claims that profit sharing is not a test of partnership, and that he was not associated with his codefendants for the purpose of carrying on business, and therefore was not a partner with them. If this be true, it is equally true that W. S. Bacon was not a partner in the business; for it clearly appears by the contract that W. S. Bacon made no investment of capital in the business, that he was to receive a daily wage for his work, and that he had no share in the profits. All of the essential facts necessary to make Frank P. Bacon a member of the partnership, if any partnership existed, are found in this contract. Frank P. Bacon was to make an initial investment in the business and to make continuing investments therein to cover operating expenses as the business progressed, and was to have all of the profits other than the share belonging to W. F. James. Although nominally W. S. Bacon was engaging with James in the described business, the real partner was Frank P. Bacon.

The decision above indicated on the question stated is sufficient to dispose of the case, and the other questions presented need not be considered further than to suggest that, if there was no partnership between the parties in the strict sense of that word, then the evidence is sufficient to sustain the court's finding that the goods were sold and delivered "to the said three defendants and each of them," and to warrant the court in holding all of them liable as principals by whom the account was incurred.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

49 Cal. App. 271

LEWIS v. TANNER et al. (Civ. 3348.)

(District Court of Appeal, Second District, Division 1, California. Sept. 14, 1920.)

1. Municipal corporations ⊂706(3)—Burden on defendant automobilist to establish defense of contributory negligence.

In an action by a pedestrian for personal injuries received in a collision with defendant's automobile, the burden of establishing contributory negligence rests upon the defendant.

2. Municipal corporations ⊂706(7) — Contributory negligence of pedestrian, run down by automobile, held for jury.

In an action by a pedestrian for personal injuries received when he was run down by defendant's automobile, which the evidence tended to show was running at an unlawful rate of speed on the wrong side of the street, whether plaintiff was guilty of contributory negligence in not seeing or hearing defendant's automobile *held* for the jury.

3. Negligence ⊂136(8)—Question for jury.

Even though the facts are undisputed, if reasonable minds might draw different conclusions on the question of negligence, the question is one of fact for the jury.

4. Municipal corporations ⊂705(10)—Pedestrian has right to assume that no automobiles are on wrong side of street.

A pedestrian, crossing a street after passing its center, has the right to assume a zone free from automobiles coming from the left.

5. Trial ⊂260(1) — No prejudice resulting from refusal to give instruction covered.

No prejudice could result from the failure of the court to give requested instructions, the substance of which was elsewhere given.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Burbank E. Lewis against Charles C. Tanner and others. Judgment for plaintiff, and defendants appeal. Affirmed.

W. I. Gilbert and Stannard A. McNeil, both of Los Angeles, for appellants.

Charles E. Williams and Robertson Abbot, both of Los Angeles, for respondent.

SHAW, J. In this action plaintiff sought recovery of damages for personal injuries alleged to have been sustained by colliding with an automobile, which defendant negligently operated upon a street at a point where the former was crossing. Judgment went for plaintiff, from which defendant appeals.

[1-4] While conceding his own negligence, appellant insists that his plea of contributory negligence, of which he alleged plaintiff guilty, was clearly established by the evidence to the effect, as claimed, that plaintiff, while crossing the street, neglected to use proper precautions for his own safety, in that, conceding the automobile was running on the wrong side of the street and at an unlawful speed, plaintiff might have heard the same and could have seen it, had he looked in the direction from which it was approaching. As we gather from the record, and in the absence of any statement as to the existing conditions made by counsel for either party, it appears that the accident occurred on Colorado boulevard, which extends east and west and, measured between curb lines, is 80 feet in width. At the time in question, about 6:10 p. m., November 21st, plaintiff, after looking in both directions and finding the street free from travel, stepped from the curb on the southerly side and proceeded to cross the street diagonally, going in a northeasterly direction. Before he reached the opposite side he was struck by defendant's car, which at the time was being operated at a speed of some 38 miles per hour. Not only was the speed thus unlawful, but there is testimony and circumstantial evidence tending strongly to show that the car was running on the left side of the street near the curb line, and struck plaintiff after he had passed the center of the street, as a result of which he had little recollection of the occurrence, other than that, immediately upon his sensing a bright light, which was that upon a car some 500 feet back of that which caused the injury, and a dim light, with which latter it appears defendant's car was equipped, he was rendered unconscious. Indeed, the occurrence was so sudden that plaintiff from his personal knowledge could not say he was struck by an automobile. This evidence, together with testimony not spoken, but indicated by designations upon a map of the street and vicinity used at the trial, which, in so far as not inconsistent with the record, must, since the burden of establishing the defense rested upon defendant, and in the absence of such map not brought up or presented, be considered favorable to the plaintiff, amply justified the implied finding of the jury that the automobile, when it collided with plaintiff, was not only being run at an unlawful speed, but operated on the left side of the street, without any reason therefor, which act was likewise unlawful. Section 20 (a) of Motor Vehicle Act (St. 1919, p. 215).

Notwithstanding such facts being established, appellant insists that plaintiff must be deemed chargeable with negligence because, although he did look for cars proceeding west on the right side of the center of the street, he failed to keep a watchful eye to his rear and left for the approach of cars which might thus unlawfully be operated on that side of the center of the street, and, had he done so, the accident might not

have happened. In other words, he should have anticipated defendant's unlawful act. In support of this contention he cites several authorities, in all of which the circumstances were different from those here involved and were in affirmance of judgments by the trial court. Thus, in Moss v. Boynton Co., 186 Pac. 631, the plaintiff was injured immediately upon stepping off of the curb and colliding with an automobile which was traveling at a lawful speed upon the side of the street to which it was entitled. And in Sheldon v. James, 175 Cal. 474, 166 Pac. 8, 2 A. L. R. 1493, the automobile was on the side of the street to which it was entitled, and, while backing into a parking position at the curb, as it was entitled to do, collided with plaintiff and injured him. In both of these cases the circumstances were such that the plaintiff should, as a reasonably prudent man, have anticipated the peril of his position. Not so in the instant case, where, when struck, plaintiff had reached what he had a right to assume, and was, except for defendant's unlawful act, a zone of safety and free from automobiles on that side of the street coming from the direction defendant was traveling, and hence, under all the circumstances, he may be said to have acted with ordinary prudence and with such regard for his safety as a reasonably prudent man would act, and the application of this rule to the instant case is unaffected by the uncontradicted testimony of the driver of the car that, when operated, it made a whistling sound that was plainly audible. The jury might well have discredited such testimony, in view of the fact that, notwithstanding his car was badly battered and broken by the impact due to the collision, so that it had to be towed into a garage, the witness testified that he did not know a collision had occurred until thereafter made aware of it by the acts of others. As often said, even though the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury, and its determination of the question will not be disturbed by an appellate court.

[5] What we have said is sufficient answer to appellant's complaint that the court erred in refusing to give certain instructions to the jury. One of these was to the effect that, notwithstanding plaintiff had crossed the center of the street and reached a point therein upon which automobiles had no right to travel in the direction in which defendant was operating his car, nevertheless the duty devolved upon plaintiff, not only to look in the direction from which the car approached, but to continue to look for cars coming from that direction until he completed the crossing of the street, which instruction, for the reasons hereinbefore given, we hold inapplicable to the facts herein. As to the other requested instructions, the substance thereof was elsewhere given, and hence, conceding they embodied correct principle of law applicable to the case, no prejudice could result from the failure of the court to repeat them.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

49 Cal. App. 172

MORGAN et al. v. ASHER. (Civ. 3430, L. A. 6158.)

(District Court of Appeal, First District, Division 1. California. Sept. 1, 1920. Rehearing Denied Oct. 1, 1920. Opinion of Supreme Court in Bank Denying Hearing Oct. 28, 1920.)

1. Trusts ⟸30½(2) — Executrix, handling estate prior to death of deceased, trustee for heirs and legatees.

Where executrix, by reason of deceased husband's sickness, had control of his entire personal estate prior to his death, she occupied a more vital relation to heirs and legatees than merely that of the executrix of his estate, since, as she was trustee for her husband during his life and at the time of his death, immediately upon his death she became the trustee of all heirs or beneficiaries under the will, and it became the duty of such executrix to exercise the utmost good faith toward each and all of such persons, and, through the course of the probate of the estate, to make full disclosure as to the estate, and as to their rights.

2. Executors and administrators ⟸315(4)— Fraud of executrix held to entitle heirs and legatees to relief from the decree of distribution.

Where executrix, prior to death of husband, had control of his entire personal estate, and acted as his agent, and after his death concealed the personal property from the court, and thereby caused the whole of the estate to be distributed to her, she was guilty of extrinsic fraud, entitling heirs and legatees to relief from the decree of distribution.

On Hearing in Supreme Court.

3. Executors and administrators ⟸516(2)— Reopening of account after settlement of estate same as for trustees in general.

Executrix holds property in a trust capacity for those entitled to it, and she must account for such property in such trust capacity, and to such accounting, to its settlement, and to the opening of the account after settlement, in order to charge her with additional property not accounted for by her, the principles apply which are applicable in the case of accounts of trustees in general.

4. Executors and administrators ⟸516(1)— Opening of decree of distribution held only incident to reopening of account of executrix.

In an action against an executrix to have it adjudged that she holds money and other

property which was the property of her deceased husband as the trustee of the plaintiff, and that the same be applied to the payment of certain legacies, *held* really an action to reopen the settlement of the defendant's account and charge her with property, which she was alleged to have fraudulently failed to return, and that the reopening of the decree of distribution was but an incident.

5. Executors and administrators ⟸513(10)—Decree of distribution conclusive as to property properly chargeable against executrix.

The question as to what property was properly chargeable against executrix was concluded by a settlement of the accounts of the executrix, so far as heirs and legatees had information upon which they could make the issue, subject to the qualification that the heirs and legatees were not fraudulently prevented in some manner from raising the issue.

6. Appeal and error ⟸856(2)—Reversal for sustaining demurrer on erroneous ground, though demurrable on another ground.

Where trial court erroneously sustained a demurrer to a complaint on a certain specified ground, the order sustaining the demurrer will be reversed, although the complaint was open to demurrer in a particular to which attention was not called, either in the trial court or the appellate court.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by Martha Morgan and others against Lizzie Asher. Judgment for defendant, and plaintiffs appealed. Reversed in the District Court of Appeal, and hearing denied in the Supreme Court.

Davis & Rush and Earle & McLaughlin, all of Los Angeles, for appellants.

Nathan Newby, of Los Angeles, for respondent.

RICHARDS, J. This is an appeal from a judgment rendered in the defendant's favor after her demurrer to the fourth amended complaint of the plaintiffs had been sustained.

The defendant is the widow of one G. M. Asher, deceased, and the executrix of his last will. She is also the sole distributee of his estate under the decree of distribution made in the course of the probate of the decedent's said will and estate. The plaintiffs are relations of the said deceased in various degrees, the plaintiffs, Mrs. Martha Morgan and Mrs. T. S. Gibson, being his sisters, Mrs. Cynthia Hall and Mrs. Sarah Wilsey his nieces, Tyons Howard his nephew, and Mrs. Nancy Asher the wife of his brother, A. B. Asher. This action was instituted by these plaintiffs to have it adjudged that the said defendant holds certain money and other personal property, which was the separate property of her deceased husband, as the trustee of the plaintiffs, and that the same be applied to the payment of certain legacies to said plaintiffs and to certain other of his heirs and devisees under the terms of his said will.

The averments of the plaintiffs' fourth amended complaint set forth the facts upon which the plaintiffs predicate their demand for said relief, and these facts may be briefly summarized as follows: G. M. Asher at the time of and for several years prior to his death resided in the city of Los Angeles with his wife, Lizzie Asher, and he was then the owner of certain real and personal property, all of which the plaintiffs allege to have been the separate property and estate of said G. M. Asher prior to and at the time of his death, which occurred on or about March 4, 1915. For some time previous to his death G. M. Asher was in a feeble state of health, on account of which he was unable to look after and attend to his business as he had previously done, and that, owing to his sickness and ailments, his said wife had been given the care and management of all of his said property as his agent or employé, and that as such she had in her personal possession and control the whole of said property, and particularly the said personal property and estate of said G. M. Asher, which consisted chiefly of notes and bonds of a value in excess of $100,000. That said G. M. Asher left a last will and testament, by the terms of which he bequeathed to his said wife, Lizzie Asher, the sum of $80,000, to be first paid out of the funds and properties in his estate, and further bequeathed the sum of about $20,000 in the form of specific legacies directly or in trust to a number of his said relatives, including the plaintiffs herein, and also those several persons who are joined as parties defendant with the defendant herein. Certain of these legatees were his brothers and sisters, and were thus his heirs under the law of succession, as well as his legatees under the will. Certain others were nephews and nieces, among the latter of which was Hannah Asher, in trust for whom the said G. M. Asher bequeathed the sum of $1,000 to his said wife, Lizzie Asher, to be held by the latter in such trust until said Hannah Asher reached the age of 21 years, the said Lizzie Asher being in the meantime nominated in said will to act as her guardian without bond, The will provided that these legacies should abate in the event that his estate was found to be worth less than $80,000, in which event the whole of his said estate was to be devoted to the payment of the bequest of $80,000 to his said wife.

The plaintiffs further allege that, upon the death of said G. M. Asher, and while said Lizzie Asher was in possession and control of the whole of his property and estate as aforesaid, and was also possessed of full knowl-

edge that the same and the whole thereof was the separate property and estate of her said husband, and was of a value in excess of $100,000, and that these plaintiffs and also those other persons who were named in said will as legatees and who are joined with the defendant herein as defendants were and each of them was entitled to the several legacies to be paid to them and each of them according to the terms of said will, she formed the purpose of fraudulently deceiving the court within which the said last will and testament was to be offered for probate, and within which the said estate of said decedent was to be probated, and that in pursuance of said fraudulent intent she concealed from said court during the entire course of the probate of said will and of said estate the fact that said decedent had or left at the time of his death any property whatever other than the said piece of real property, which was of the value of about $6,000, and that in returning her inventory of said estate and also in her account and petition for distribution therein, she falsely and fraudulently represented to said court that the said piece of real estate was community property of the value aforesaid, and that her deceased husband had no property or interest in any property other than said real estate, and that she purposely and falsely and fraudulently, and with intent to deceive said court and to defraud the aforesaid legatees of said decedent out of their portion of said estate, failed to set forth or disclose in any of said proceedings, and particularly in the final account and petition for distribution therein, the existence of the said personal property of said decedent, or the fact that the same was a portion of his estate, and that the said court in the course of the probate of said estate, and being deceived and misled by the said defendant's fraudulent acts and practices, distributed the entire estate of said decedent to said defendant, Lizzie Asher, to the exclusion of all the aforesaid heirs and legatees of said deceased; that at and during the whole period of the probate of said estate each and all of the said plaintiffs and legatees, other than said Lizzie Asher, were nonresidents of the state of California and were absent therefrom, and were residents of various other states of the United States, and that none of them had any notice or knowledge of the aforesaid false and fraudulent acts of said defendant, Lizzie Asher, and particularly of her filing of said false and fraudulent account and petition for distribution or of the contents thereof, or of the hearing thereon; and that in consequence thereof said plaintiffs were not present or represented at said hearing nor in the making or filing of said decree of distribution whereby the said defendant, Lizzie Asher, was given the whole of her deceased husband's property and estate. The plaintiffs further allege that after said decree of distribution had become final they became advised of the true state of facts and of the fraud practiced by the said defendant, Lizzie Asher, upon said legatees of her deceased husband, and that upon coming into possession of such knowledge they instituted the present action, seeking the relief set forth in the prayer to their said fourth amended complaint, or such other or further relief in equity as should be meet in the premises.

The demurrer of said defendant, Lizzie Asher, to said fourth amended complaint was sustained by the trial court, and from the judgment thereon the said plaintiffs have prosecuted this appeal.

The sole question presented for determination upon this appeal is as to whether or not the aforesaid acts and conduct of the respondent herein—which for the purposes of the demurrer were conceded to be fraudulent throughout—constituted such extrinsic fraud as would be sufficient to entitle the plaintiffs herein to relief in a court of equity. The position of the respondent herein is that her said fraud, conceived prior to and persisted in during the course of probate of her husband's estate, was intrinsic fraud; and that being so, and the appellants herein having been admittedly given constructive notice of every step in the course of the probate of said estate through the publication and posting of the several notices required by law to be published or posted during the course of the administration of estates, and the court having thereby acquired jurisdiction, not only over the probate of said estate, but over the plaintiffs and all other persons having or claiming, either as heirs or legatees of said decedent, an interest therein, the said plaintiffs are now precluded by the finality of the decree of distribution in said estate from seeking or obtaining relief in a court of equity.

In making this contention the respondent strongly relies upon the cases of Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; Fealey v. Fealey, 104 Cal. 354, 38 Pac. 49, 43 Am. St. Rep. 111; The William Hill Co. v. Lawler, 116 Cal. 359, 48 Pac. 323; Crew v. Pratt, 119 Cal. 139, 51 Pac. 38; Mulcahey v. Dow, 131 Cal. 73, 63 Pac. 158.

We have carefully examined the foregoing line of authorities and many others to which our attention has been directed in the course of this inquiry; but these have not satisfied us that the fraudulent designs and actions of the respondent herein, conceived and carried into effect prior to and during the course of probate of the estate of her deceased husband, were such as to constitute merely intrinsic fraud, from the effect of which these appellants were not entitled to relief in a court of equity.

[1] It is to be noted herein that the respondent is not shown to have occupied, with reference to the heirs and devisees of her de-

ceased husband, merely the position and attitude of an executrix of his estate. As such executrix she probably, under some of the authorities relied upon by the respondent, owed to the said heirs and legatees of said deceased no other or further duty than that of giving them such notices of the various steps in the course of the probate of the estate of said decedent as are required to be given by law. But the said respondent, according to the averments of the plaintiffs' fourth amended complaint, is shown to have occupied another and more vital relation to these heirs and legatees of her husband than merely that of the executrix of his estate. She is averred to have occupied toward her said husband during the latter days of his lifetime and up to the date of his death the position of his agent, intrusted by him with the exclusive custody and control of the whole of his real and personal property, and particularly of that most important portion thereof which consisted of bonds and other securities of the value of at least one hundred thousand dollars. As to these latter properties she was his trustee, as such agent, at the time of his death, and immediately upon his death she became the trustee of all those persons who, either as heirs or legatees, were entitled to share in his said estate by virtue of this relationship or under the provisions of his will.

In addition to this trust imposed upon the respondent by the fact of her husband's death, and which antedated the presentation of his will for probate, the respondent was also made by the terms of said will the trustee of a certain legacy given to one Hannah Asher, and was nominated in said will as the guardian of said Hannah Asher during the period of her minority. In her capacity as the said trustee of each and all of these beneficiaries, and particularly as the guardian of said minor, it became and was the duty of said respondent to have exercised the utmost good faith toward each and all of said persons in relation to the extent and nature of her deceased husband's property and estate. It was her duty, not only during and through the course of the probate of said estate to make full disclosure to the court and to these several parties as to the nature, extent, and character of said estate; but, independent of and apart from such probate proceedings, it was her further duty to see to it that those several persons entitled to their distributive share in said estate were fully informed as to their rights in the premises, to the end that said rights might be fully protected in the distribution of said estate.

[2] We are of the opinion that in respect of the aforesaid duties of said respondent and of their alleged breach on her part the case of Sohler v. Sohler, 135 Cal. 323, 67 Pac. 282, 87 Am. St. Rep. 98, is to be given application to the facts of this case. In that case the defendant complained of was shown to have occupied, not merely the relation to the plaintiffs therein of executrix of the estate in question, but she occupied the further relation of mother and natural guardian of the plaintiffs in the case, who were entitled as the children of her deceased husband to certain distributive shares in his estate. Her fraud consisted in certain false and fraudulent representations made to the court in the course of the distribution of said estate, by which the plaintiffs therein were prevented from receiving such shares. The Supreme Court, while fully recognizing the rule that intrinsic fraud was not such fraud as equity would relieve against, proceeded to say:

"But when we come to scan the allegations of this complaint, it will be discovered that there is more alleged than the mere procurement of this decree by false evidence. The executrix of the estate was not alone the trustee of all of the heirs of the estate and of all the parties in interest thereto and thereunder. She was the mother of these minor plaintiffs, had their actual custody and control, and, as their natural guardian, was chargeable with all the high duties pertaining to that relationship. As executrix merely, it might be argued that she was a disinterested party, having no concern whatsoever in the question of heirship or right of distribution, standing indifferent between the parties, and interested only in carrying into effect the determination of the court upon these questions. But, as the mother and natural guardian of these plaintiffs, her position was a very different one. She was under most solemn obligation to protect the legal rights of her infant and dependent offspring. She was under like obligation to disclose to the court, on their behalf and in their interest, all knowledge which she possessed, and she was under the same obligation to see that their legal claims to the estate were properly presented before the court in probate. * * *"

And the Supreme Court holds that her failure to perform the duties imposed upon her by the aforesaid relationships constituted extrinsic fraud which entitled the plaintiffs to relief in a court of equity. We are of the opinion that the same situation is presented in the instant case; and that the fraud of the respondent herein in failing to apprise the parties plaintiff in this case and the other heirs and legatees of her deceased husband, who are also parties hereto by being made codefendants with her therein, as to the existence of the large amount of personal property of her deceased husband of which at the time of his death she was his agent and thereafter their trustee, and her further failure to keep them informed as to the status of their rights during the course of the probate of the estate, and of her especial failure to set forth their respective claims and rights in her petition for distribution of said estate, and the fraud, deception, and concealment which she thereby practiced upon said court and upon each of them in causing the whole of said estate to be distributed to herself, must be held to have

been extrinsic fraud, entitling said plaintiffs to the relief from the effects of said decree which they are now seeking in a court of equity. Sohler v. Sohler, supra; Aldrich v. Barton, 138 Cal. 220, 71 Pac. 169, 94 Am. St. Rep. 43.

The judgment is reversed, with instructions to the trial court to overrule the said defendant's demurrer and require said defendant to answer the averments of the plaintiffs' fourth amended complaint.

I concur: WASTE, P. J.

WELCH, Judge pro tem. I concur in the conclusion of Mr. Justice RICHARDS, and particularly in that portion of the opinion holding that the defendant was at the time of the death of her husband a trustee of plaintiffs, and that she now holds the property of the estate in trust. I am inclined to hold to the opinion that all the personal property of the estate was never administered upon. The executrix of the estate was interested in the property of the estate. She chose to present to the court for administration one piece of property only. In her final account and petition for distribution she stated and under oath verified:

"The entire estate of said deceased now in the hands of said executrix consists of the following [then follows a description of the piece of real estate, the only property inventoried and the only property mentioned anywhere in any of the proceedings of the estate]."

And in this same final account and petition she alleges and verifies:

"That the only property belonging to said deceased at the time of his death was the home place, being community property [and again describing the $6,500 piece of realty, the only property mentioned in the estate], * * * and all said property belonging to said estate shall be distributed to her [the defendant]."

Again, in the same final account and petition, she stated under oath that there are "no moneys or funds or personal property belonging to said deceased; 'that the estate to be distributed consists of' [again describing the before-mentioned lot of real estate]."

The decree of distribution ordered, adjudged, and decreed:

"That said Lizzie Asher, as such executrix, has in her possession belonging to said estate * * * a balance of $6,500, which consists of the real property hereinafter described, * * * and that by operation of law and in pursuance of and according to the provisions of the last will and testament of said deceased, the aforesaid balance of real estate hereinafter described and all other property belonging to said estate, whether described herein or not, is distributed as follows."

The defendant is named as the sole distributee, and the property specifically described is the same property inventoried and none other. In reference to the personal property of a value of more than $100,000 the plaintiffs, in paragraph 13 of their fourth amended complaint, seem to seek to have this property impressed with a trust independent of the administration of said estate. The paragraph reads as follows:

"Plaintiffs are informed and believe, and upon such information and belief aver the truth to be, that all of the said property mentioned in paragraph 6 hereof is now, and ever since the death of George M. Asher has been, in the hands of defendant Lizzie Asher, and this is the same property that was owned, possessed, and controlled by George M. Asher as his sole and separate property at the date of his death, and that the same was never scheduled or accounted for in any way as the property of said decedent, and said Lizzie Asher now holds said property as trustee for the benefit of plaintiffs to the extent of said abovementioned legacies, payable to each of them, and that the total value of said property so held by defendant Lizzie Asher, as before stated, is in excess of the sum of $100,000."

Under the caption, "The complaint does not state a cause of action also because it does not show injury to the appellants," the respondent argues that, inasmuch as the court found that "the property of said estate to be community property," the plaintiffs are not injured, even if defendant did deceive the court and defraud, or attempt to defraud, the plaintiffs by withholding the main body of the estate from specific administration. They reason that since plaintiffs were to receive their legacies from an excess over $80,000 and not otherwise, the allegations of the complaint show that the whole value of the estate was about $100,000, and, the court having found that the property of the estate was community property, it would leave only about $50,000 in value subject to testamentary disposition.

The portion of the decree above quoted is found in the recitals of the decree. Even if we consider such recital as an adjudication of the fact, such a judgment applies to the specific property before the court. The trial court in all of its adjudications in the matter of this estate had but one piece of property before it, and it was passing judgment on that one piece alone. It may well be that the home place was community property, and all other property not administered upon was separate property. To hold that all of the property belonging to the deceased in this case under the allegations of the pleadings of plaintiffs was distributed to defendant under the general clause of the decree would certainly be placing a high premium upon fraud. For the express purpose of defrauding the legatees named in her husband's will she withheld the property from administration. She intended the court to believe, and the court did believe, that there was no other

property than the lot of real estate hereinbefore mentioned. The court on the face of the decree, where it found that said property was "the property of said estate * * * so far as the same is known," was dealing with and passing judgment upon that piece, and that piece alone. Section 1698 of the Code of Civil Procedure implies that administration of a part of an estate, such as disclosed here, is not exclusive and complete. The property not administered upon, and which by the majority opinion is held in trust for the appellants, may be considered as property discovered after the final settlement, and therefore subject to be administered upon under a subsequent issue of letters testamentary.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [3, 4] In denying the petition for rehearing, there is one point not touched upon in the opinion of the District Court of Appeal, of which we would speak. The defendant, as executrix of her husband's will, held the property of the estate in a trust capacity for those finally entitled to it. That property she was required to account for in that trust capacity. To such accounting, to its settlement, and to the reopening of the account after settlement in order to charge her with additional property not accounted for by her, the principles apply which are applicable in the case of accounts of trustees in general. These are the principles applicable in the present case. The respondent, however, if not the appellants as well, treats the case as one of reopening a decree of distribution. It may be that in one sense, but the decree of distribution under the will in the present case was dependent upon and was determined by the amount of property for which the defendant was held accountable upon the final settlement of her accounts as executrix. The present action is therefore really one to reopen the settlement of the defendant's account, and charge her with property which she is alleged to have fraudulently failed to return. The reopening of the decree of distribution is but an incident of the reopening of the account by which the decree of distribution was determined. The principles applicable are therefore, as we have said, those applicable to the reopening of the account of a trustee after final judicial settlement.

[5] Applying those principles, the complaint in the present case is defective in a particular not noticed apparently by the counsel. It does not allege that the plaintiffs at the time of the settlement of the defendant's account were unaware of the existence as a part of the testator's estate of the property with which they now seek to charge the defendant. The defendant's application for the settlement of her account directly put in issue, as between herself and the beneficiaries for whom she was acting, among whom were the plaintiffs, the question as to what property was properly chargeable against her, and the question was concluded by the settlement of the accounts so far as the plaintiffs had information upon which they could make the issue. This last statement is subject to the qualification, of course, that the plaintiffs were not fraudulently prevented in some manner from raising the issue, but this element does not seem to be present in the case at bar. The case is one in which the beneficiaries of a trust merely refrain from taking any part in the settlement of the trustee's account. Their so absenting themselves cannot affect the conclusive nature of the settlement of the account as to any issue involved which they might have raised and contested if present. But, on the other hand, whether present and participating in the settlement or not, the settlement is not conclusive against a charge of fraud upon an issue which the plaintiffs could not have raised. Such fraud is "extrinsic" to the proceeding. There is, as we have said, no allegation in the present complaint that the plaintiffs were unaware of the property in question as a part of the testator's estate, and in the absence of such an allegation there is nothing to show that the plaintiffs were not in a position to present the claim that it was such property.

[6] While the complaint was open to demurrer in the particular mentioned, yet it is a particular to which attention was not called either in this court or in the district court. It would not be just under the circumstances that the judgment on demurrer be sustained without the plaintiffs' having an opportunity to amend the complaint if they can do so by averment in accordance with the fact. We therefore concur in the order of reversal by the District Court of Appeal.

SHAW, LAWLOR, OLNEY, and SLOANE, JJ., concur.

49 Cal. App. 78

MARIN WATER & POWER CO. v. TOWN OF SAUSALITO. (Civ. 3395; S. F. 9003.)

(District Court of Appeal, First District, Division 1, California. Aug. 26, 1920. Opinion of Supreme Court in Bank, Denying Hearing, Oct. 25, 1920.)

1. Municipal corporations ⊂=57—Proprietary and not governmental power exercised in administering water system.

In administering such a public utility as a water system, a municipality is engaged in the exercise of proprietary rather than governmental power.

2. Execution ⊂=27—Right of municipal corporation to distribute water not a "franchise," subject to execution.

The right of a municipality to distribute water derived from its waterworks to its customers, and to make charges therefor, is not a "franchise," within Civ. Code, §§ 388, 389, providing for sale of franchises under execution.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Franchise.]

On Hearing in Supreme Court.

3. Municipal corporations ⊂=1038—Waterworks property owned by municipal corporation not subject to sale under execution.

Property which a municipal corporation holds for the purpose of exercising its governmental powers, or for the purpose of exercising its constitutional power to operate waterworks to supply its inhabitants with water, or other like public purposes, is not subject to execution; but property which it holds merely as a proprietor, devoting it to no use of a public character, such as lands acquired or held for other than public purposes, and not in trust for public use, are subject to execution, unless some statutory or constitutional provision forbids it.

Appeal from Superior Court, Marin County; Edgar T. Zook, Judge.

Action by the Marin Water & Power Company against the Town of Sausalito. From an order recalling and quashing writs of execution against defendant, plaintiff appeals. Affirmed in the District Court of Appeal, and hearing denied in Supreme Court.

Lilienthal, McKinstry & Raymond, of San Francisco, for appellant.

O. F. Meldon, of Sausalito, for respondent.

RICHARDS, J. This is an appeal from an order of the trial court, recalling and quashing certain writs of execution, and the levies made thereunder, which had been caused to be issued by the plaintiff upon a money judgment obtained by it against the town of Sausalito, a municipal corporation, and which under the plaintiff's direction the sheriff had undertaken to levy upon the plant and waterworks owned and operated by the defendant as such municipal corporation for the purpose of supplying water to the town and people of Sausalito, and also upon the so-called franchise of the said defendant to use the streets and highways of such town for such purpose, and to sell such water to the inhabitants of Sausalito and its vicinity, and to charge and collect tolls therefor.

The sole question presented upon the hearing of this matter in the trial court and upon this appeal is as to whether the municipally owned waterworks of said defendant and its so-called franchise for supplying water to its people can be made the subject of levy and sale upon execution issued on a money judgment obtained against said municipality. The trial court determined this contention adversely to the plaintiff, and we are asked to reverse its order made in that regard upon this appeal.

[1] In support of its contention the appellant urges that, in undertaking to acquire and operate a municipal waterworks system, the town of Sausalito is undertaking to act not in a governmental, but in a proprietary, capacity, and that since it is so engaged in acting it stands in respect to its liability for its debts, and also in respect to the means for the enforcement of such liability, in the same position as a private corporation would stand if engaged in a similar enterprise. In making this contention the appellant strongly relies on the cases of Davoust v. City of Alameda, 149 Cal. 70, 84 Pac. 760, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847, South Pasadena v. Pasadena Land Co., 152 Cal. 593, 93 Pac. 490, and Marin Water & Power Co. v. Town of Sausalito, 168 Cal. 587, 143 Pac. 767. It may not be denied that in each of these cases and in respect to the questions presented for determination therein the Supreme Court has committed itself to the proposition that in administering such a public utility as a water system a muncipality is engaged in the exercise of proprietary rather than governmental powers, and hence that it may become liable in damages, for example, for injuries caused through the negligence of its servants in the operation of such a utility, when it would not otherwise be responsible for the acts of its servants while occupied in the administration of governmental powers.

We are constrained, therefore, to accept the distinction which the Supreme Court has thus made between the governmental and proprietary functions of municipalities, although in doing so we are disposed to give our approval to that portion of the concurring opinion of Mr. Justice Shaw in the case of Davoust v. City of Alameda, supra, in which such a distinction is declared to be wholly fictitious, and apt to produce embarrassing consequences, if extended and applied to other cases than those then before that court.

We also desire to approve and adopt the language of Mr. Justice Shaw in the case of City of Pasadena v. Railroad Commission of the State of California, 192 Pac. 25, decided August 12, 1920, and not yet [officially] reported, wherein the learned justice says:

"It is not true that a city is a private corporation when carrying on a municipally owned public utility. No decision so holds. All the decisions on the subject recognize the fact that a city does not change its character by engaging in such enterprises. The entire course of reasoning in the opinions is founded on the postulate that such city retains its character as a municipal corporation, and the burden of the arguments consists of efforts to find reasons for holding it liable to the same extent as a private corporation engaged in the same service, notwithstanding the fact that the city carries on the business as a municipal corporation. They all assume that such city is as much a municipal corporation with respect to such business functions as it is with regard to the exercise of its purely governmental powers. The distinction does not go to its character as a corporation, but to its liabilities when exercising one class of its powers, as compared to its liabilities in the exercise of its functions as a local governmental agency."

We think the foregoing language may be given pertinent application to the questions presented upon this appeal, since the effect thereof is to determine that a municipality operating a municipally owned water system is not the less a public corporation while engaged in the exercise of its powers. This being true, we are confronted with the question as to whether or not a strictly public or municipal corporation, owning and operating its own waterworks and system for supplying itself and its inhabitants with water under the powers conferred upon it by the Constitution and by the Municipal Corporations Act (Laws 1883, p. 93), under which it is organized, can have its said waterworks and system seized and taken from it under a writ of execution, and be thus deprived of the right which it thus possesses and exercises to supply its inhabitants with water. We are of the opinion that this cannot be done, that the sections of the Code giving creditors of corporations the right to enforce their judgments by means of writs of execution have reference to private and not public corporations, and that a public corporation does not become a private corporation when it undertakes to exercise such proprietary functions as the establishment and operation of such public utilities as waterworks or light works or other activities of a like character. In the case of People ex rel., etc., v. San Joaquin Agricultural Ass'n, 151 Cal. 797, 91 Pac. 740, it was held that the property of a district agricultural association, while engaged in carrying on the public functions and activities for which it was organized under the laws of the state, could not be taken by means of a writ of execution in the absence of an express statute authorizing such a levy.

In the case of Tulare Irrigation District v. Collins, 154 Cal. 440, 97 Pac. 1124, it was held that an irrigation district, organized under the statutes authorizing the formation and conduct of such districts, was a public corporation holding and using its property as such for a public use, and that its said property, while so devoted to such use, could not be made the subject of such levy and sale upon execution at the instance of a private creditor. To like effect is Denicke v. Santa Clara Agricultural Ass'n, 9 Cal. App. 228, 98 Pac. 687.

We are satisfied that a like reasoning is to be applied to the facts of the case at bar. The town of Sausalito, as a public corporation, is engaged through its waterworks and system in administering a public use under the express authority of the Constitution and of the Municipal Corporations Act under which it was organized. To permit a private creditor of such public corporation to levy an execution upon its said property while so devoted to public use would be in effect to permit such private creditor by such means to nullify the provisions of the Constitution which invest it with such powers and terms of the Municipal Corporations Act by virtue of which it is undertaking to exercise the same.

[2] It is further contended by the appellant herein that the right which the defendant as a municipal corporation possesses to distribute the water derived from its waterworks by means of its distributing system to its customers, the water users of said town and its vicinity, and to make charges therefor, is a franchise, which may be seized and sold under execution under sections 388 and 389 of the Civil Code. While it may be conceded that the grant to a private corporation of the right to exercise such functions as that of supplying water to a body of customers for a consideration in the way of tolls would be a franchise under the accepted definition of that term, we do not think such definition is to be extended to similar powers and activities, when the same are being exercised by a public corporation by virtue of the powers possessed by it under the Constitution and laws of the state. It is true that in one of the cases from which excerpts were quoted in the case of Davoust v. City of Alameda, supra, similar proprietary functions of a municipality were referred to as a franchise; but we do not understand that the Supreme Court of this state became thus committed to such an extended definition of that term. Nor do we think it can be rightly extended to such powers and functions when exercised by a public corporation within the domain of its sovereignty and

under the authority and powers with which it is invested as such public corporation by the Constitution and laws of the state. Neither do we think that sections 388 and 389 of the Civil Code can be held to have application to such public uses, for the reason that to permit the right of a city or town to deliver water or light, or any like commodity to its inhabitants, to be made the subject of sale under execution at the instance of a private creditor would be to not only interfere and destroy its exercise of this public use, but would amount to its transfer through such sale to private persons, contrary to the Constitution and legislative intent by which such corporations were invested with the powers to establish municipal waterworks and similar public utilities and to serve their people with these commodities. It seems clear that these rights of the municipality, whether properly designated as a franchise or not, cannot be made the subject of a sale.

For the foregoing reasons, we are of the opinion that the judgment should be affirmed; and it is so ordered.

We concur: WASTE, P. J.; WELCH, Judge pro tem.

Opinion of Supreme Court in Bank, Denying Hearing.

PER CURIAM. [3] In denying a rehearing in this case we think it proper to say that we do not entirely approve the reasoning of the opinion of the District Court. A city is never other than a public corporation, whether exercising its governmental powers, or other powers, in the operation of public utilities, or acting in the quiescent state of a property owner. The fact that it is a public corporation does not determine the question whether or not its property is subject to execution. The true rule is that the property which it holds for the purpose of exercising its governmental powers or for the purpose of exercising its constitutional power to operate waterworks to supply its inhabitants with water or other like public purposes is not subject to execution; the reason being that to subject it to sale would interfere with the exercise by the city of some of the powers for which it was organized. On the other hand, property which it holds merely as a proprietor, devoting it to no use of a public character, such as lands acquired or held for other than public purposes and not in trust for public use, is subject to execution, unless some statutory or constitutional provision forbids it. Holladay v. Frisbie, 15 Cal. 630; Wheeler v. Miller, 16 Cal. 124. The property here proposed to be taken in execution was used for public purposes and was necessary therefor, and hence it comes within the classes first described.

184 Cal. 266

MITCHELL v. HENRY et al. (L. A. 6272.)

(Supreme Court of California. Nov. 1, 1920.)

Municipal corporations ⊜29(4)—Annexation of territory to city of sixth class valid, though annexed territory was part of other school districts.

Annexation of territory to a city of the sixth class under St. 1913, p. 587, *held* valid, though annexed territory was a part of both a common school district and a high school district of which such city was not a part, notwithstanding Pol. Code, § 1576, providing that territory within the city of the sixth class shall not be in more than one school district, since such statute, whether construed applicable only to the matter of forming school districts, or construed to take annexed territory from school district of which it was a part ipso facto on annexation thereof, would not affect validity of annexation.

In Bank.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Petition by Robert H. Mitchell for writ of review to review acts and proceedings of C. H. Henry and others, trustees of the City of Glendale, in annexing certain territory to such City. Writ denied, and petitioner appeals. Affirmed.

Anderson & Anderson and Victor T. Watkins, all of Los Angeles, for appellant.

Evans, Abbott & Pearce and W. E. Evans, all of Los Angeles, for respondents.

OLNEY, J. The city of Glendale, by proceedings completed in the spring of 1919, endeavored to annex unto itself certain adjacent unincorporated territory. The petitioner in the court below and the appellant here owned land in the annexed district, and after the completion of the annexation proceedings sought to have them annulled by writ of review from the superior court. The writ was denied him, and he appeals.

Objection is made at the outset by the respondents that the annexation proceedings cannot now be annulled upon certiorari, since the writ was sought only after the annexation, or purported annexation, was complete. But this objection we need not consider in view of the conclusion we have reached that no grounds exist for declaring the annexation invalid either upon certiorari or otherwise. Apparently contention was made in the lower court that while the annexation proceedings were taken under the statute of June 11, 1913 (Stats. 1913, p. 587), providing for the annexation of inhabited territory, the territory annexed was, in fact, uninhabited. The lower court, however, found that the territory was inhabited, and the sufficiency of the evidence to sustain this finding is not attacked. With this objection removed, there is no contention that the proceedings taken did not in all respects meet the requirements of the annexation statute.

Before this court the sole contention of the petitioner is that the annexation is invalid because it would result in a violation of the provisions of section 1576, Political Code, with reference to school districts. It seems that the city of Glendale is a city of the sixth class, and that the annexed territory was a part of both a common school district and a high school district of which Glendale is not a part. The result of the annexation will be that, if the annexed terri-

tory remains a part of the school districts of which it was formerly a part, the city of Glendale will as to part of its territory be within one school district, and as to part be within another. This result, it is claimed, is in violation of the section of the Political Code mentioned, the material portion of which reads:

"Every city or incorporated town, except cities * * * of the sixth class, unless subdivided by the legislative authority thereof, shall constitute a separate school district: * * * Provided, however, that in no instance shall the territory within an incorporated city of the sixth class be in more than one school district."

The prohibitory proviso just quoted was added to the Code by amendment in 1917 (St. 1917, p. 208), while the annexation statute was passed in 1913, and the contention of the petitioner is that the Code section had the effect of impliedly repealing the annexation statute, or, more accurately, of amending it, so that it does not apply in any case where the territory sought to be annexed to a city of the sixth class is a part of a school district of which the city is not a part. In fact, if the petitioner's contention be correct, we cannot stop with an implied amendment of this particular annexation statute, but must extend the amendment to all annexation statutes applicable to cities of the sixth class. Not only this, but we must extend it to the statutes for the incorporation of such cities in the first instance, so that no city of the sixth class may be formed whose proposed territory is not at the time wholly within a single school district. These are rather remarkable results. The Code section is concerned only with school districts. It does not purport to touch upon and be concerned with the matter of incorporating cities or annexing territories to them. When it was amended it was certainly not contemplated that the statutes upon these wholly distinct matters were likewise being amended. That result can be justified only in case there is no reasonable construction which can be given the Code section as amended which will avoid it. But there are at least two constructions of this character which, it seems to us, can be given the section.

In the first place, the section, as we have said, is concerned and purports to deal only with the matter of school districts. In view of this it is reasonable to conclude that the prohibition it contains against more than one school district in a city of the sixth class is limited to the matter of forming school districts, is a prohibition on the creation of more than one school district in such a city, and does not extend to a forbidding of the creation or extension of a city when such creation or extension will happen to have the purely incidental effect of causing the territory of the city to be divided between two school districts.

In the second place, a not unreasonable construction of the Code section is that by it the annexed territory is upon annexation ipso facto taken out from the school district of which it was before a part and made a part of the district of which the city is either the whole or a part. This, in fact, would seem to be the probable effect in the case of the annexation of territory to a city other than one of the sixth class. Such cities have each as a part of its municipal organization a school department. Even in the absence of any express statute on the matter, it would seem likely on the principle declared in Petition of East Fruitvale Sanitary District, 158 Cal. 453, 111 Pac. 368, that it would not be permitted that the municipal school organization and an entirely distinct school organization should both function within the same municipality at the same time, and that the annexed territory by virtue of the mere fact of its annexation would pass under the jurisdiction of the municipal school department. It would seem probable that this would also follow from the language of the Code section under consideration that—

"Every city * * * except cities * * * of the sixth class * * * shall constitute a separate school district."

It may be said that the reason for the distinction which the portion of the section just quoted makes between cities of the sixth class and others is that the former do not have school departments as parts of their organizations, and that for this reason likewise the rule of the Sanitary District Case mentioned would not apply to such cities. This is true, but it might well be replied that the prohibition of the section on a city of the sixth class being in more than one school district means that nevertheless the same rule shall apply as to it, so that when territory is annexed to it it follows as an incident that the territory becomes a part of the same school district as the city.

As between the two possible constructions which we have discussed, it is not necessary to decide which is the correct one. The question has not been argued, and it is possible that there is still some other construction which is preferable to either. It is sufficient for the disposition of this case that either of the two discussed, which limit in a not unreasonable manner the effect of the Code section to the matter with which the section deals, that of school districts, is preferable in our judgment to the construction necessarily advocated by the petitioner which would extend that effect to the very different matter of the creation and extension of municipalities.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

49 Cal. App. 353

CITY INV. CO. v. PRINGLE et al.
(Civ. 3510.)

(District Court of Appeal, First District, Division 1, California. Sept. 23, 1920.)

1. Costs ⊂=3—Right to costs purely statutory.

The right to allowance of costs is purely statutory.

2. Costs ⊂=172—Attorney's fees based upon contracts not taxable as costs.

Where right to attorney's fee is based upon contract and not upon statutes, recovery, if at all, must be had upon that contract, and such fees cannot be taxed as costs under Code Civ. Proc. § 1021.

3. Costs ⊂=172—Party not entitled to attorney's fees under contract unless attorney is employed.

The object of a provision for attorney's fees in a contract is to reimburse a party for sums he pays or becomes liable to pay as attorney's fees; and, where a party has not paid attorney's fees or has not become liable therefor, he is not entitled to any.

4. Costs ⊂=203—Waived by failure to file memoranda.

Parties waived their costs through failure to file memoranda of costs.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the City Investment Company, a corporation, against Edward J. Pringle and Sydney J. Pringle, as executors of the last will and testament of William B. Pringle, deceased, and others. Judgment for defendants, and plaintiff appeals. Modified and affirmed, and cause remanded.

Charles S. Wheeler, John F. Bowie, and Nathan Moran, all of San Francisco (A. A. Heer, of San Francisco, of counsel), for appellant.

Charles A. Christin and Hutchinson, Van Fleet & Christin, all of San Francisco, for respondents.

KINSELL, Judge pro tem. Action was brought to recover unpaid rent and possession of certain real property. Demurrer to complaint was sustained. Amended complaint was filed, and defendants, Edward J. Pringle and Sydney J. Pringle, as executors of the last will and testament of William B. Pringle, deceased, moved to strike out the same. This motion was granted. Thereafter, before any further pleadings were filed, appellant filed a voluntary dismissal of the action, which was duly entered.

Defendant executors then filed a memorandum of costs, claiming an appearance fee of $3 and "attorney's fee, fixed as costs, $350." None of the other defendants filed any memorandum of costs. Appellant moved to tax costs, the grounds of the motion being:

(1) That no attorney's fee is chargeable or taxable as costs against plaintiff under the terms of the contract of lease involved in the action.

(2) That no amount has been fixed or liquidated as a reasonable attorney's fee.

(3) That it does not appear that the sum of $350, or any sum, has been incurred by the said defendants in the said action.

The motion was supported by an affidavit, from which it appears that in the lease upon which the action was founded it was agreed as follows:

"That in the event that the lessors, their successors or assigns, shall commence an action against the lessee for the enforcement of any of the provisions or conditions in the lease, and if judgment in said action shall be rendered in favor of the lessee and against the lessors, their successors or assigns, then and in that event the lessors, their heirs or assigns, will pay to the lessee the cost and expense of said action, including a reasonable attorney's fee, which said fee shall not in any event exceed the sum of $350 gold coin of the United States."

Testimony was taken on the hearing of the motion to tax costs, and the motion was denied, whereupon the court signed and filed a judgment of dismissal which provided:

"* * * That judgment be given in favor of defendants and against the plaintiff, and that said defendants have their costs, taxed at $———."

The clerk inserted therein the amount of the costs at $353. The appeal is prosecuted from the portion of the judgment awarding costs.

[1, 2] The real question presented is whether attorney's fees provided for in a contract can be allowed "as costs." It is our opinion that they cannot, and that the inclusion of the attorney fee of $350 in the present judgment is error. It must be conceded that the right to allowance of costs is purely statutory. While in certain specified cases attorney's fees may by statute be made allowable as costs, this cause does not come within the purview of any such statute. Where the right to attorney's fees, as in this case, is based upon contract and not upon statute, recovery, if at all, must be had upon that contract, and such fees cannot be taxed as costs. Code Civ. Proc. § 1021. Attorney's fees provided for in a contract have been held to be in the nature of special damage, and must be specially averred in order to admit of their recovery. Prescott v. Grady, 91 Cal. 518, 27 Pac. 755.

In the case of Brooks v. Forcington, 117 Cal. 219, 48 Pac. 1073, action was brought to foreclose a mortgage. The defendant defaulted. The mortgage provided that in the event of foreclosure the mortgagee might re-

tain from the proceeds of the sale costs and charges of suit, "including counsel fees." The prayer of the complaint asked for principal and interest "and for costs of suit," and prayed for general relief, but did not in terms ask an award of counsel fees. The trial court made plaintiff an allowance for counsel fees. In deciding, on appeal, whether such allowance was proper the court said:

"Counsel fees are not costs or disbursements in the action allowed by the statute to the prevailing party. Code Civ. Proc. § 1021. Nor, when provided for by the terms of the contract, is such charge deemed a part of the costs, or recoverable as such, but is in the nature of 'a special damage expressly authorized by the contract to be recovered in addition to the general damages;' and must be expressly averred, with the right in defendant to defend specially against its allowance."

Irrespective of the evidence adduced, therefore, it is our opinion that counsel fees were not properly allowable as costs.

But even if we concede that such fees might be allowed "as costs," it appears affirmatively that the defendant executors had neither paid nor become obligated to pay any attorney's fee. On the hearing of appellant's motion to tax costs Edward J. Pringle, one of the executors, testified that after the commencement of the action the attorney for other defendants requested that he be allowed to defend the action in the name of the executors; that Pringle told him that he would consent to such proceeding "only upon the express understanding and agreement that his so acting would be without any expense or liability on the part of the estate or the executors, either in their official or individual capacities." This was not denied.

[3] The object of a provision for attorney's fees in a contract is to reimburse a party for sums he pays, or becomes liable to pay, as attorney's fees. As was said in Bank of Woodland v. Treadwell, 55 Cal. 379, the allowance of attorney's fees is not to afford an opportunity, under cover of the name, for a speculation on the part of the creditor, but is to reimburse him in a proper amount for a sum which he pays or becomes liable to pay, or to relieve him from the burden of paying counsel fees.

[4] Accordingly, that portion of the judgment appealed from, in so far as it relates to counsel fees, should be modified, and since the respondents other than the executors waived their costs through failure to file memoranda of costs, such portion should be modified so as to provide that judgment be given in favor of defendants and against the plaintiff and that said defendants, Edward J. Pringle and Sydney J. Pringle, as executors of the last will and testament of William B. Pringle, deceased, have their costs taxed at $3. As so modified let the judgment stand.

The cause is remanded, with directions to the trial court to modify its judgment accordingly, appellant to have its costs on appeal.

We concur: WASTE, P. J.; RICHARDS, J.

49 Cal. App. 352

Ex parte AZHOCAR. (Cr. 740.)

(District Court of Appeal, Second District, Division 2, California. Sept. 22, 1920.)

Habeas corpus ⊜27—Minor illegally adjudged ward of court will be discharged.

Where an order adjudging a minor to be a ward of the juvenile court was based upon a petition filed in such court insufficient to confer jurisdiction, she will be discharged in a habeas corpus proceeding.

In the matter of the application of Esther Galvan Azhocar for a writ of habeas corpus, prayed to be directed to the juvenile court of Los Angeles County to secure release from detention. Petitioner discharged.

C. J. Novotny, of San Diego, for petitioner.

H. S. Utley, Dist. Atty., and J. D. Malcolm, Deputy Dist. Atty., both of San Diego, for respondent.

PER CURIAM. It appears from the petition for the writ, as well as from the return thereto, that the minor, Esther Galvan Azhocar, is illegally restrained of her liberty. The petition filed in the juvenile court, upon which the order adjudging the minor to be a ward of that court was based, was insufficient to confer jurisdiction.

It is ordered, therefore, that the minor be discharged.

49 Cal. App. 380

LYNCH v. HOLBROOK et al. (Civ. 3503.)

(District Court of Appeal, First District, Division 1, California. Sept. 28, 1920.)

1. Attorney and client ⊜104—Knowledge of attorney derived from other transactions not imputed to client.

Where the same attorney represented the payee of a promissory note in the transaction in which the note was given, and at the same time represented a subsequent transferee of the note in a matter unconnected with the former transaction, the attorney's knowledge of defects in the note is not imputed to the subsequent transferee.

2. Witnesses ⊜383—Statement witness had never had possession of note held immaterial, and not subject to impeachment.

In an action by the indorsee of a note against the makers, who denied bona fide purchase by plaintiff, and alleged fraud as a defense, testimony by one who was attorney for the original payee and the indorsee that wit-

ness had never had possession of the note is immaterial, so that statements by him, showing that he had possession of the note subsequent to the time plaintiff claimed delivery to him was not admissible to impeach the testimony.

3. Bills and notes ⊂497(1) — Evidence of fraud inadmissible, before proof that plaintiff indorsee was not bona fide purchaser.

In an action by an indorsee of a promissory note against the makers, evidence that the note was procured from the makers by fraud is not admissible, before the makers have proved that the indorsee was not a bona fide purchaser for value before maturity.

Appeal from Superior Court, City and County of San Francisco; J. W. Mahon, Judge.

Action by Thomas B. Lynch against C. H. Holbrook and others to recover on a promissory note. Judgment for plaintiff, and defendants appeal. Affirmed.

Alfred J. Harwood, of San Francisco, for appellants.

Charles L. McEnerney, of San Francisco, for respondent.

RICHARDS, J. This was an action brought to recover upon a promissory note for the sum of $1,500, signed by the defendants and payable to one J. B. Graves or order one month after date, and transferred by said Graves to plaintiff before maturity.

The defendants in their answer denied that the note had ever been delivered to said Graves, alleged that the same had been transferred to the plaintiff after maturity, and had been taken by him from Graves with notice of the fact that it was without consideration, and further alleged that said note had been obtained by said Graves through certain fraudulent representations which would have entitled said defendants to avoid said note in the hands of any but a bona fide transferee for value before maturity and without notice.

When the cause came on for trial the trial court refused to permit defendants to make proof of their said defense of fraudulent misrepresentations in avoidance of said note until they had presented evidence to show that the plaintiff was not a bona fide purchaser of said note for value and before maturity. In an attempt to make this showing the defendants offered evidence of the fact that Mr. C. L. McEnerney, who was the attorney of record for the plaintiff in the case at bar, had also been acting as the plaintiff's attorney in other matters at the time of the transaction between the defendants and said Graves through which said note had been given, and that said C. L. McEnerney was also at said time attorney for said Graves in connection with said transaction; the claim of the defendants being at the time of the offer of such evidence that whatever knowledge said McEnerney had become possessed of by virtue of the fact that he was the attorney for Graves in said transaction was to be imputed to the plaintiff for whom said McEnerney was at the same time the attorney in other matters unconnected with said transaction. The trial court refused to concur in this contention, and also refused to admit in evidence a letter written by said McEnerney to one of the defendants shortly after the time of the transaction between the defendants and said Graves, by the contents of which they claim the plaintiff would be bound, and by which they also claimed they would be able to contradict certain testimony which McEnerney had given as to the date and fact of the delivery of said note to plaintiff. The court refused to admit such letter for that purpose, and also refused to permit the defendants to inquire of a witness named McGuire as to certain statements which McEnerney was claimed to have made to him as to the time of the delivery of the note in question to the transferee. These various rulings the defendants have assigned as error upon this appeal.

[1] In their final brief upon appeal the appellants withdraw their contention that the plaintiff, as the transferee of the note in question, was chargeable with whatever knowledge his attorney, Mr. McEnerney, in other matters had become possessed of while acting as the attorney for Graves in the transaction in the course of which said note had been given. They still insist, however, upon the four other grounds which are specified in their closing brief. The first of these is that the court erred in its refusal to admit in evidence the aforesaid letter, written by McEnerney to one of the defendants shortly after the transaction in question, wherein he stated that he had been in possession of said note at a date after that which the plaintiff had testified as the date when the note had been delivered to him. It is clear that the defendants were not entitled to the admission of said letter for any such purpose, since nothing that McEnerney, while acting as Graves' attorney, might have written or said as to his own possession of said note could have been binding upon the plaintiff, or serve to contradict his own sworn statement as to the time of the delivery of the note to him.

[2] The appellants, however, make the further contention in respect to the admissibility of said letter that it would have served to contradict certain testimony which said McEnerney had given as a witness in the case, to the effect that he had never been in possession of said note. This contention may be well founded; but the contradiction of McEnerney's testimony in that regard was quite an immaterial matter, since said testimony of McEnerney was purely negative as to his

possession of the note at any time, and his letter, tending to contradict such statement, would only amount at best to his impeachment in that regard, but would not otherwise tend to show that the plaintiff's testimony as to the time of the delivery of the note to himself was not true. The plaintiff, on the other hand, had affirmatively shown himself to have been possessed of said note at the time to which the testimony and also the letter of McEnerney were referable, and this testimony stands without contradiction in the record. The case, therefore, will not be reversed upon the ground that there was error committed by the trial court in the exclusion of said letter.

The same reasoning and conclusion apply to the statements of McEnerney, which the defendants sought to show had been made to McGuire regarding the former's possession of the note.

[3] The next three contentions of the appellants refer to rulings of the trial court in the rejection of evidence tending to show that said note was without consideration, and was obtained by Graves through fraud; but, since the defendants had failed to produce any evidence sufficiently tending to show that the plaintiff was not the bona fide transferee of said note before maturity, for value and without notice of the alleged equities of the defendants, such offered testimony was clearly inadmissible, and hence the court was not in error in the exclusion of the same.

This disposes of the several contentions upon which the appellants have finally relied for a reversal of the cause.

Judgment affirmed.

We concur: WASTE, P. J.; BEASLY, Judge pro tem.

49 Cal. App. 361

HURD v. CITY AND COUNTY OF SAN FRANCISCO. (Civ. 3512.)

(District Court of Appeal, First District, Division 1, California. Sept. 24, 1920. Hearing Denied by Supreme Court Nov. 22, 1920.)

Appeal and error ⊂⊃1052(5), 1068(4) — Instruction and evidence harmless in view of verdict.

Admission of evidence, in an action by an administratrix for the benefit of herself and minor children for death of her husband, of acceptance of pension by plaintiff from defendant, and an instruction that on account thereof recovery must be limited to damages suffered by the children, if error, was harmless; there having been, under other proper instructions and the evidence, a general verdict for defendant.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Beatrice Hurd, as administratrix of John B. Hurd, deceased, against the City and County of San Francisco. Judgment for defendant, and plaintiff appeals. Affirmed.

Harry I. Stafford and W. F. Stafford, both of San Francisco, for appellant.

George Lull, City Atty., and R. T. Ainsworth and Chas. S. Peery, Asst. City Attys., all of San Francisco, for respondent.

KINSELL, Judge pro tem. Action by administratrix to recover damages for death of her intestate alleged to have been caused by the negligence of defendant.

Cause was tried before a jury and a general verdict was rendered in favor of the defendant.

It appears that John B. Hurd on January 27, 1918, was a police officer in the city and county of San Francisco, and while he was on duty on that day he was crushed between two cars of the Geary street line operated by the municipality, an died the following day. He left surviving his widow, Beatrice Hurd, and two minor children. The widow was appointed administratrix and sues in that capacity under section 377 of the Code of Civil Procedure.

Over the objection of plaintiff, defendant introduced evidence to the effect that the injury which resulted in John B. Hurd's death befell him while he was engaged in the performance of his duty as a police officer; that after his death, pursuant to application by his widow, the board of police relief and pension fund commissioners of San Francisco, on April 1, 1918, ordered paid to the widow a monthly compensation of $61 per month for the benefit of herself and the minor children of decedent, which amount she received and accepted every month after such date.

It was the contention of respondent that by reason of such facts plaintiff was barred from maintaining the action.

The court instructed the jury, among other things, as follows:

"In such an action plaintiff sues in her representative capacity for the benefit of all the heirs at law of said deceased, and there can be but one recovery, if any, of a total sum for the one death, and the recovery, if any, is for the benefit of all persons interested as heirs of the deceased. In such an action the jury may, if they find for the plaintiff, award such damages as under all the circumstances may be just; but, in arriving at what is just under all the circumstances, the jury must take into consideration the fact, which appears in this case, that the plaintiff as widow of said deceased, has already accepted a certain pension in compensation for her share of the damage sustained by the death of said deceased, and any recovery herein, if you find for the plaintiff, must be for damages other than those to said plaintiff as such widow."

The court also gave the following instruction:

"You are therefore instructed that by accepting the benefit of said pension said plaintiff as an individual has waived any further or other claims for compensation against said city and county which might otherwise exist in her behalf by reason of the injuries received by said deceased John B. Hurd or by reason of the death of John B. Hurd, resulting therefrom."

And further instructed the jury that in fixing damages to which plaintiff, as administratrix, might be entitled, "* * * you are limited to the damages suffered by the children of said deceased, and you can make no allowance for the individual benefit of said plaintiff as widow."

These instructions, as well as others which it is not necessary to quote, are assigned by appellant as prejudicial error. Each of the instructions complained of, however, bears solely upon the amount of damages sustained. If they be erroneous, they could prejudice the plaintiff's case only in the event that the jury found in favor of the plaintiff on the main issue of negligence.

The jury having heard the evidence, and under other proper instructions having found a general verdict in favor of the defendant, it necessarily follows that the instructions complained of, even if erroneous, do not constitute reversible error. Wilhelm v. Donegan, 143 Cal. 50, 76 Pac. 713; Cook v. Los Angeles Ry. Corporation, 169 Cal. 115, 145 Pac. 1013.

Upon the same theory appellant was not injured through the overruling of her objection to the introduction of evidence as to her acceptance of a pension from the board of relief and pension fund commissioners.

The other points urged by appellant are without merit. The evidence is in our opinion amply sufficient to support the verdict.

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

49 Cal. App. 308

NAVE v. TAUGHER. (Civ. 3389.)

(District Court of Appeal, First District, Division 1, California. Sept. 17, 1920. Hearing Denied by Supreme Court Nov. 15, 1920.)

1. New trial ⟸137—Notice of motion for new trial properly signed by defendant, who appeared for himself.

Where defendant, an attorney, appeared for himself at all times in the action, filing the pleadings and other papers, the fact that at the opening session of the trial he requested that the record show he had associated another attorney with himself did not render it necessary that notice of intention to move for a new trial be signed by defendant's associate; there being nothing to indicate that defendant had surrendered control of the litigation.

2. Appeal and error ⟸345(1)—Appellant has 30 days after determination of motion for new trial to appeal.

Where the proceedings for a motion for new trial were initiated by proper notice, the time for appeal from the judgment did not, under Code Civ. Proc. § 939, expire until 30 days after entry in the trial court of the order determining motion.

3. Attorney and client ⟸165—Complaint held to state cause of action for reasonable value of services.

A complaint alleging that plaintiff's intestate rendered legal services for defendant under an agreement that defendant should fix and determine the reasonable value of the services, that defendant fixed the value at the sum of $200, and that such sum was not the reasonable value, but that the reasonable value was $4,500, states a cause of action under Civ. Code, § 1611.

4. Pleading ⟸53(2) — Joinder of count on quantum meruit with a count asserting defendant failed to fix reasonable value not improper.

In an action for legal services, it was not improper to join one count on the quantum meruit with another count asserting that defendant was to fix and determine the value of such services, and that he fixed an unreasonably small sum.

5. Attorney and client ⟸144—Where party is to fix and determine value of services, he must fix reasonable value.

When a contract for legal services did not determine the amount of compensation, but left it to the determination of the defendant, defendant must, under Civ. Code, § 1611, fix a reasonable value on the services, and, where he does not, the reasonable value may be recovered.

6. Attorney and client ⟸167(2)—Where defendant was to fix value of services, matter should be submitted to a jury in case of difference.

Where a contract for legal services did not determine the compensation, but left the matter to defendant, there is an implied agreement that in case of difference of opinion in regard to the proper amount of remuneration the matter should be submitted to a jury.

7. Attorney and client ⟸167(2)—Questions of disputed fact for jury.

In an action for the value of legal services, where the question whether the attorney rendering them had agreed to accept a fixed sum was disputed, it was for the jury.

8. Attorney and client ⟸144—Value of services must be determined, at least on request.

Where a contract allowed defendant to fix the value of legal services, he is bound to exercise his right at the completion of services, or at least when called on to do so, and, hav-

ing failed, the attorney may recover the reasonable value of his services.

9. Attorney and client ⊂=167(2)—Question of defendant's good faith in fixing value of legal services for jury.

Where defendant, an attorney, engaged another attorney to render legal services under an agreement that he should fix the value, the fact that the attorney employed, in a letter to defendant, stated that he did not question defendant's good faith in fixing the value of the services, is not conclusive in an action for the reasonable value, so as to restrict recovery to the amount fixed, and the matter should be submitted to the jury.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by George M. Nave, as administrator of the estate of Jacob M. Blake, deceased, against J. L. Taugher. From a judgment for plaintiff, defendant appeals. Affirmed.

J. L. Taugher, of San Francisco, for appellant.

Douglas A. Nye and Vincent Surr, both of San Francisco, for respondent.

WASTE, P. J. The plaintiff brought this action to recover the sum of $4,500, alleged to be due as the reasonable value of legal services rendered by plaintiff's intestate to the defendant, who is also an attorney at law, in connection with an action pending in the United States District Court. The defendant admitted that the services were worth the sum of $200, and offered to pay that amount. The offer was declined, and the jury rendered a verdict in plaintiff's favor for the sum of $950. From the judgment entered for that amount the defendant has appealed, after motion for a new trial made and denied. He is apparently not seeking a review of the ruling on motion for a new trial, but confines himself to an attack upon the judgment. We are guided to that conclusion by the opening brief. It becomes necessary, however, to examine into the proceedings looking to a new trial, in order that we may dispose of certain preliminary objections made by respondent to a consideration of the appeal.

[1, 2] Respondent contends that the notice of intention to move for a new trial and the notice of appeal are not the notices required by law. His point is that each is signed only by the defendant personally, and by no other counsel. There is nothing in the contention. Mr. Taugher, an attorney at law, appeared for himself at all times in the action, signing the pleadings and other papers as defendant. At the opening session of the trial he asked that the record show that he had associated Mr. Frank D. McClure with himself "in the trial of this case." No formal substitution of attorneys was asked for, or made, and there is nothing to indicate that Mr. Taugher surrendered the control of the litigation to Mr. McClure, or withdrew from its active direction. He was therefore the only attorney authorized to sign a notice of motion for a new trial, or a notice of appeal. McMahon v. Thomas, 114 Cal. 588, 591, 46 Pac. 732; Beardsley v. Frame, 73 Cal. 634, 15 Pac. 310; Whittle v. Renner, 55 Cal. 395; Prescott v. Salthouse, 53 Cal. 221. As the proceedings on motion for a new trial were initiated by a proper notice, the time for appeal from the judgment did not expire until 30 days after entry in the trial court of the order determining such motion. Code Civ. Proc. § 939.

[3, 4] The respondent stated his cause of action in two counts. The first is on quantum meruit for the reasonable value of the services rendered. In the second, he alleged that the services were rendered to the defendant under a contract whereby plaintiff's intestate agreed that the defendant should fix and determine the value of the services; that defendant fixed the value thereof at the sum of $200; that said sum is not the reasonable value thereof, but that the reasonable value thereof is $4,500. An allegation of nonpayment followed. The second count, therefore, stated a cause of action under section 1611 of the Civil Code. The complaint was not rendered objectionable because the cause of action was stated in these two counts. Estrella Vineyard Co. v. Butler, 125 Cal. 232, 234, 57 Pac. 980; Cowan v. Abbott, 92 Cal. 100, 101, 28 Pac. 213.

As before stated, this is an action by the administrator of the estate of Jacob M. Blake, deceased, to recover the amount of an attorney fee alleged to be due from the defendant. In 1915 the defendant brought suit in the United States District Court against the Moore Filter Company for the value of legal services rendered to that company by himself. When the case came on for trial before the court, sitting with a jury, Taugher, intending to be a witness in his own behalf, engaged the decedent, Blake, to assist him. The trial lasted 4½ days, and Mr. Blake conducted the case, according to the testimony of Hon. William C. Van Fleet, the judge before whom it was tried, in an able manner and to a successful conclusion. He was an attorney of standing and ability, earning large fees, and experts fixed the value of the services rendered to the defendant from $2,500 to $5,000. The jury rendered a verdict in Mr. Taugher's favor in the sum of $18,358, the full amount sued for. The judgment was subsequently paid in full, with interest and costs. Taugher has never paid for the work done by Blake; hence this suit.

The defendant resisted this action in the lower court, and seeks a reversal of the judg-

ment in favor of Blake's administrator, upon the ground that the services were rendered by Blake under an express contract that he was to be paid for his services a sum not exceeding $50 a day for each day he was actually engaged in court, the amount to be determined upon, and fixed by Taugher; that the trial occupied 4½ days, including one day of effort on the part of Taugher in arguing a preliminary matter; that at the most the fee could only have been the sum of $225, hence he had fixed it at $200, which should be the amount of the judgment, and which he was ready to pay. At the conclusion of the testimony he moved the court for an instructed verdict to that effect, which was denied. He then requested the court to include an instruction to the same effect in its general charge, which was also refused.

From certain correspondence passing between Blake and Taugher, and from the latter's testimony, it clearly appears that at the outset of the employment Blake left the question of the amount he should receive for his services entirely to Taugher. The latter also testified that the agreement limited the compensation to a sum not to exceed $50 per day. Appellant contends, therefore, that the court should not have submitted the case to the jury without instructing it that it could not render a verdict in excess of $225.

[5, 6] There is a complete answer to this contention. The agreement left the amount of the compensation to be fixed by the defendant. When a contract does not determine the amount of the consideration, but leaves it to the discretion of an interested party, the consideration must be reasonable. It was therefore incumbent upon the defendant to pay to Blake so much money as his services, which were the object of the contract, were reasonably worth. Civ. Code, § 1611; Security Trust & Savings Bank v. Clausseu, 187 Pac. 142. Even without recourse to the statute the rule is the same. The person having power to fix the fee may not act fraudulently. Foster v. Young, 172 Cal. 317, 325, 156 Pac. 476. When such contracts have been made they import "an implied agreement by the parties that, in case of a difference of opinion between them with regard to the proper amount of remuneration, the question is to be submitted to a jury." 2 Labatt, Master and Servant, p. 1298, par. 438. Assuming, therefore, the contract to have been as testified to by Mr. Taugher, the question of the reasonableness of the award made by him to plaintiff's intestate was a matter for the jury to determine. The motion for an instructed verdict was therefore properly denied, and the requested instructions were correctly refused.

[7] As a part of his defense, the defendant attempted to establish a contract, which placed a limitation of $50 per day on the amount of Blake's compensation. In the light of the evidence, including the correspondence which passed between the parties to the agreement, and in view of all the circumstances of the case, it was the province of the jury to consider and determine the correctness of that contention. It may have been unwilling to accept the defendant's version of the matter. The instructions given by the trial court amply covered both of the foregoing propositions.

[8] The evidence also strongly points to the fact that Taugher unreasonably delayed the fixing of Blake's fee. The letters passing between them so indicate. For six months after the services were rendered Blake was constantly seeking a settlement. Finally he saw fit to treat Taugher's repeated refusals, based upon various excuses, to fix the fee, as a repudiation of the contract, and elected to proceed against him to fix the amount of the obligation upon quantum meruit. Of this he gave Taugher due and written notice. Not until then did the defendant fix the fee, and he never offered to pay the amount until after suit was brought. When a contract of employment is entered into, whereby the employer is to fix the compensation for the services to be rendered, if such contract is enforceable at all, the employer must exercise his right at the completion of such services, or at least when called upon to do so; otherwise, the employee will be entitled to recover the reasonable value of his services. Toledo, A. A. & N. M. Ry. Co. v. Lott, 3 Ohio Dec. 136, 10 Ohio Cir. Ct. R. 249; 34 Am. Dig. (Century Ed.) 523. Having been employed under an arrangement by which he was to have some compensation, the manner and method of fixing which was left to the defendant, and the defendant not having carried out his agreement, as he was obligated to do, Blake was entitled to proceed as he did. Ruttle v. Foss, 161 Mich. 132, 147, 148, 125 N. W. 790; Torrey v. Shea, 29 Cal. App. 313, 319, 155 Pac. 820; Rawle v. Gilmore, 76 Ill. App. 372, 375.

[9] Appellant argues that because the decedent, Blake, in one of his letters to him, wrote that he did not question Mr. Taugher's good faith in the matter of fixing his compensation, he is conclusively absolved from all imputation of fraud and bad faith in the transaction, and that the jury should have been so instructed, and directed to render a verdict in plaintiff's favor not exceeding the sum of $200. We think, under the law as we have found it, it was proper for the trial court to submit the entire transaction to the jury. It did so, under full and explicit instructions on the whole most favorable to the defendant. Foster v. Young, supra.

The judgment is affirmed.

We concur: BEASLEY, Judge pro tem.; RICHARDS, J.

49 Cal. App. 372

PEOPLE v. BRUNO. (Cr. 914.)

(District Court of Appeal, First District, Division 1, California. Sept. 27, 1920. Rehearing Denied Oct. 25, 1920. Hearing Denied by Supreme Court Nov. 24, 1920.)

1. Indictment and information ⇐110(42)—Information for kidnapping following language of statute held sufficient.

An information for kidnapping following the words of the statute *held* to state the time, place, and circumstances with certainty sufficient to inform accused of the specific offense charged and enable him to answer it, and hence sufficient.

2. Kidnapping ⇐1 — Intent or purpose need not be alleged or proved.

In a prosecution for kidnapping, it is not necessary to allege or prove the intent or purpose with which the kidnapping was accomplished.

3. Criminal law ⇐1186(4)—Failure of information to allege that subject of kidnapping was human being not reversible error.

Under Const. art. 6, § 4½, prohibiting reversals except for miscarriage of justice, the failure of an information to allege that the subject of the alleged kidnapping was a human being was not ground for reversal, where defendant did not demur, and the evidence showed that she was a person.

4. Kidnapping ⇐1—Forcible carrying away sufficient though without intent to injure and under belief that it would not be objectionable.

Where defendant forcibly placed the complaining witness in an automobile and carried her away, he was guilty of kidnapping, though he did so with no intent of injuring her or her feelings, but solely for the purpose of conversing with her, and under the belief, based on probable ground therefor, that such action would not be offensive to her or hurt her feelings.

5. Criminal law ⇐1172(7)—Defendant not entitled to complain of inconsistency in instruction, favorable to him.

An inconsistency in an instruction on a trial for kidnapping resulting from including, at defendant's request, the statement that if the carrying away was without intent to injure, and under the belief that the complaining witness would not be offended, there could be no conviction, was favorable to defendant.

6. Criminal law ⇐1134(3)—Whether defendant could be found guilty of offense submitted a moot question when convicted of crime charged.

Where on a trial for kidnapping the court submitted a form of verdict for false imprisonment, but defendant was convicted of kidnapping as charged, the question whether he could be found guilty of false imprisonment is a moot question.

7. Criminal law ⇐863(2)—Court should not have informed jury as to punishment carried by different verdicts on their request.

Where the jury returned into court and asked the court whether all verdicts of guilty submitted carried a state prison sentence, the court, after explaining that the punishment was a matter with which they had nothing to do, should not have explained the punishment that might be imposed under each verdict and the procedure that might follow a conviction.

8. Criminal law ⇐1172(9)—Explaining punishments carried by each verdict, though improper, not prejudicial error.

Though it was improper for the court on request of the jury to explain the punishment that might be imposed under different verdicts and the procedure that might follow a conviction, it was not prejudicial error, where there was no promise as to what the court would or would not do in event of a conviction.

9. Criminal law ⇐1163(1)—No presumption of prejudice from error.

No presumption of prejudice arises from the mere fact of error, and it must affirmatively appear that defendant has been substantially injured by the error complained of.

10. Criminal law ⇐762(1)—Court's remark as to second trial being unnecessary not reversible error.

On a trial for kidnapping, the court's remark at the conclusion of an explanatory instruction, given on request of the jury after they had been out for some time, that he did not want to try the case again, and felt that it was unnecessary to do so, was not ground for reversal, because expressing court's opinion, though such explanations are hazardous and might better be omitted.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Domenic Bruno was convicted of kidnapping, and he appeals. Affirmed.

H. A. Gabriel, of San Jose, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

WASTE, P. J. Defendant was convicted of the crime of kidnapping and as punishment was sentenced to imprisonment in the state prison. He appeals from the judgment, upon the grounds: First, that the information does not charge the offense of kidnapping, as defined by section 207 of the Penal Code; second, that the evidence is insufficient to support the conviction; and, third, that the court misdirected the jury in matters of law.

The information charges that—

"The said defendant, on or about the 27th day of October, A. D. 1919, at the county and state aforesaid, did willfully, unlawfully, feloniously and forcibly, without lawful warrant or authority, and against the free will and without the consent of one Rosie Sunseri steal, take, kidnap, and carry said Rosie Sunseri from a

place in said county near the McKinley School, on McLaughlin avenue in the county of Santa Clara, state of California into another part of said county of Santa Clara, state of California, to wit, the home and dwelling of Tony Cracolice on White Road, all of which is contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California."

[1, 2] The allegation of the offense follows the words of the Code section defining it. The time, place, and circumstances are stated with that certainty, which informed the accused of the specific offense with which he was charged under the statute, and gave him the necessary information to enable him to answer the charge. That was all that was required. People v. Ward, 110 Cal. 369, 372, 42 Pac. 894, and cases cited. It was not necessary to allege or prove, as contended for by appellant, the intent and purpose with which the kidnapping was accomplished. People v. Fick, 89 Cal. 144, 150, 26 Pac. 759.

[3] Appellant's further objection to the information is that it nowhere appears therein that "Rosie Sunseri," the subject of the alleged kidnapping, is a person or a human being. The omission to so state is merely an error of pleading. It has been held by this court, following the mandatory direction of the Constitution (section 4½ of article 6), that the judgment in such cases should not be reversed, or a new trial granted, "unless that error of pleading has, in the opinion of this court, formed after an examination of the entire cause, including the evidence, resulted in a miscarriage of justice." People v. Bonfanti, 181 Pac. 80. An examination of the record of this case, as in the one just cited, immediately discloses that the omission in question did not affect the trial, or the rights of the defendant, in the least. The defendant did not demur to the information, and it appeared from the evidence (a fact already well known to the defendant) that Rosie Sunseri was a person, a young schoolgirl, 15 years of age, to whom the defendant pretended to be engaged. No miscarriage of justice resulted from the error in the information.

The appellant does not specify wherein the evidence was insufficient to support the charge of kidnapping. We will therefore not consider the point any further than to briefly narrate the facts. The sister of the complaining witness is married to the brother of the defendant. The latter had been ordered away from the home of the complaining witness by her parents, because of his constant attention to her. On the afternoon in question, as the girl was going home from school, in the city of San Jose, he seized her, and forcibly dragged her into an automobile, which he had hired for the purpose. He covered her head with an overcoat and attempted to stifle her screams and outcries by putting the sleeve in her mouth. At that time the defendant told the complaining witness that he "wanted to marry her," or that "she would have to marry him." He took a pistol from his pocket and told the girl he would kill anybody who followed them, at the same time telling the driver of the automobile to drive on. A number of people witnessed the abduction, and some of them told the defendant to let the girl alone. Rosie succeeded in freeing herself sufficiently to scream and call to a number of people for help as the automobile sped along, and told the defendant the policemen would soon be after him. The party did not go very far. When they reached the home of one Cracolice, still in Santa Clara county, after a further demand or statement from the defendant that the complaining witness marry him, the girl pushed defendant out of the automobile, got into the front seat with the driver and was taken home by him.

As against this accusation, the defendant's position is that he was engaged to marry the complaining witness, that he had reason to believe that placing her in the automobile for the sole purpose of talking to her, would not be objectionable, or offensive to her, and that she would make no objection thereto. His contention is that the evidence warrants the assumption that he was justified in this belief, and that but for a misdirection in the law of the case by the court, the jury would have so concluded.

[4, 5] In this connection he submitted an instruction, modeled, he asserts, after one given in Stripling v. State (Tex. Civ. App.) 80 S. W. 377, which was as follows:

"If from the evidence you believe that this defendant took hold of the prosecuting witness for the sole purpose of placing her in the automobile for the purpose of being enabled to converse with her, and then returning her to place from which he met her, but did so with no intention of injuring her or her feelings, and had probable ground to believe, and did believe, that such placing her in said automobile, if he so did, or driving her in said automobile, if he so did, would not be objected to by her, or would not be offensive to her, or hurt her feelings—then he would not be guilty of the crime of kidnapping (*and you will acquit him on that charge. And in passing upon this issue, you will look to all of the facts and circumstances in evidence, and the conduct of the parties, both before and after the commission of the alleged offense; and if you have a reasonable doubt of the defendant's guilt, or of his intent to injure the prosecuting witness, you will find him not guilty of this charge.*)"

The court struck out, and refused to give the portion italicized, and gave the instruction with the following in its place:

"But if you should find from the evidence and circumstances in the case, beyond a reasonable doubt and to a moral certainty, that this defend-

ant, Domenic Bruno, on the McLaughlin road, on or about October 27, 1919, laid hands on Rosie Sunseri, and forcibly took her against her will and consent, and placed her in an automobile which he had provided for the occasion, and forced her to ride therein to the residence of Cracolice near Capitol avenue, then I charge you under such circumstances the defendant is guilty of violating the law of kidnapping, and that whether or not he was engaged, or sought to be engaged, to be married to her."

Appellant's complaint of this action of the court is groundless. The purported authority for the proposed instruction is a case arising out of a charge, and conviction, of the crime of assault and battery, and has no application to the facts of the case at bar. The requested instruction is an incorrect statement of the law of this state, relating to kidnapping (Pen. Code, § 207), and no part of it should have been given. The portion included in the charge of the court only resulted in an inconsistency, which was favorable to the appellant, and he did not suffer thereby.

[6] At the request of the defendant the court instructed the jury that certain lesser crimes were included in the offense charged in the information. Of its own motion the court submitted a form of verdict for false imprisonment, effected by violence and menace. Whether or not the defendant could be found guilty of that offense under the information in the case is a moot question, for he was convicted of the crime of kidnapping as charged.

When the jury retired to deliberate, two forms of verdict finding the defendant guilty of a felony, two finding him guilty of a misdemeanor, and one finding him not guilty, were submitted to it. After the jurors had deliberated for some time (appellant in his brief says 5½ hours), without arriving at a verdict, they were brought into court upon their request for further instructions, and through their forelady stated that they wished to know if all of the verdicts of guilty carried a state prison sentence. This request appears to have been predicated upon the argument of appellant's counsel in his argument. The court, in response to the query, proceeded to correctly explain to the jurors that the matter of punishment, in the event they should find the defendant guilty, was a matter with which they had nothing to do. Instead of stopping there, however, and apparently being of the view that some confusion had crept into the minds of the jurors by reason of the argument of counsel, the court took the verdicts one by one, and at some length explained the extent of the punishment that might be imposed in the event the defendant should be found guilty. The procedure that might follow a conviction, in the way of a motion for a new trial, and application for probation, was likewise stated in detail. The jury was then directed to continue its deliberation, with the admonition that out of the verdicts, explained by the court, including a verdict of "not guilty," it should select the one that conformed to its conclusions, and that if the jurors in good conscience could agree upon a verdict the court desired them to do so, but if they could not, and felt they had acted honestly and conscientiously, they would be discharged in due time.

[7-9] After some further deliberation the jurors returned a verdict finding the defendant guilty as charged in the information. The appellant attempts to predicate error upon the episode, and contends that the jury could not but be, and were influenced by this charge of the court to arrive at a verdict, believing that if they found the defendant guilty, the court would either deal leniently with the defendant, or place him on probation. His argument is that the remarks of the trial court amounted, in substance, to an admonition to the jurors not to "worry about the punishment. The punishment will be commensurate with the crime. This is not a case that would carry a 10 year sentence, it is only the most aggravated case of kidnapping where a 10 year sentence is imposed. This defendant will be taken care of. He can apply for probation, and the court will consider it." We do not so understand the remarks of the trial judge. The matter of punishment of the defendant, in the event the jurors should find him guilty, was, as bluntly stated to them by the court, "none of their business." It was for them to weigh and consider the evidence, and upon that alone, and the law as given to them by the court, to determine the defendant's guilt or innocence. Having properly instructed the jury as to their duty, the court should have stopped there. But while we are convinced that the remarks of the court were entirely unnecessary, and should not have been indulged in, we cannot hold that they were so improper as to form the basis of prejudicial error. As was said in People v. Lawlor, 21 Cal. App. 63, 71, 131 Pac. 63, 67:

> "No presumption of prejudice arises from the mere fact of error. On the contrary, it must affirmatively appear to this court that the defendant has been substantially injured by the error complained of."

There was no promise on the part of the trial court as to what it would, or would not, do in the event the defendant be found guilty, or treaty entered into to induce the jury to arrive at a verdict. This fact differentiates the situation here presented from that considered in the cases relied upon by the appellant. In State v. Kernan, 154 Iowa, 672, 135 N. W. 362, 40 L. R. A. (N. S.) 239, the jury, after being out all night, came into court, and, after stating that they had failed to agree, desired permission to make a rec-

ommendation to the court. Thereupon the judge informed them that, while it was unusual, he did not object to such a procedure, and would consider any recommendation made by the jury. The jury thereupon retired, and brought in a verdict of guilty, coupled with a plea for the clemency of the court, and the recommendation that the sentence be made as light as possible. The Iowa Supreme Court was "of opinion that the promise of the court to give the recommendation consideration might well have led the jury to believe, and doubtless did, that the sentence to follow would be somewhat modified because thereof, and that this was extremely prejudicial to the defendant." It, therefore, reversed the judgment. An almost exactly parallel case is that of Territory v Griego, 8 N. M. 133, 42 Pac. 81. In McBean v. State, 83 Wis. 206, 211, 53 N. W. 497, the error consisted of the promise made by the trial judge to the jury to the effect that if they found McBean guilty they might rely upon him to extend the clemency of the court to the prisoner. In State v. Kiefer, 16 S. D. 180, 91 N. W. 1117, 1 Ann. Cas. 268, after the jury had retired to deliberate on a verdict, the foreman sent a communication to the judge, asking if the jury could recommend the defendant to the mercy of the court, to which the judge answered in the affirmative, stating that he made it on invariable rule to follow such recommendations. This case does not fall within the application of any of the decisions cited by appellant in support of his last contention.

[10] The only other point relied upon for a reversal is that the trial judge indicated that he viewed the evidence as pointing to defendant's guilt, and that the jury should so declare by its verdict. He concluded the supplemental charge with the admonition:

"Now, as I remember it, those are the only verdicts that have been submitted to you that will carry a punishment. The other form of verdict is 'not guilty.' Now out of these verdicts that have been submitted to you ladies and gentlemen, you will select the one that conforms to your conclusion. *The Court does not want to try this case again. It feels that it is unnecessary to do so.*"

It is claimed that because of the sentences which we have italicized, the reason for a reversal given in People v. Kindleberger, 100 Cal. 367, 34 Pac. 852, and People v. Conboy, 15 Cal. App. 97, 113 Pac. 703, are applicable. The aggravated situation considered in those cases is not presented here. The facts disclosed by this record are so similar in their essentials with those considered by this court in People v. Rhodes, 17 Cal. App. 789, 793, 121 Pac. 935, that we may say they are the same. In that case, quoting from People v. Miles, 143 Cal. 636, 639, 77 Pac. 666, 668, this court said:

"That it was proper for the court to urge the importance of reaching a verdict, and as it intimated no opinion of its own or suggested how the verdict should go, the defendants were not prejudiced."

However, let this court say again, as it said upon the former occasion, that we agree with what Justice McFarland said in concurring in judgment of affirmance in People v. Miles, supra, that such expressions as the one used by the trial court in this case "are hazardous, and it would be better for the court to say nothing on that subject."

The judgment is affirmed.

We concur: RICHARDS, J.; KINSELL, Judge pro tem.

49 Cal. App. 383

DONLEY v. VAN HORN. (Civ. 3213.)

(District Court of Appeal, Second District, Division 2, California. Sept. 28, 1920. Hearing Denied by Supreme Court Nov. 24, 1920.)

1. Public lands ⟹29—On withdrawal of land from entry, no rights by settler can be initiated.

Under Reclamation Act Cong. June 17, 1902 (U. S. Comp. St. §§ 4700–4708), authorizing the Secretary of the Interior to withdraw lands from entry, such withdrawal is absolute, and no rights can be initiated by a settler during the existence of the withdrawal order.

2. Public lands ⟹53—Patent may not issue on lands for disposition of which Congress has not provided.

Under Act Cong. May 2, 1914, authorizing selection in lieu of school lands of other lands "vacant" and "unreserved," lands not within such qualification are those for which Congress has made no provision, and land not provided for is not subject to the disposition of the Land Department, and any patent therefor is void.

3. Public lands ⟹53—Lands held not "vacant" or "unreserved" lands, subject to selection in lieu of school lands.

Public land, withdrawn from entry in 1909 in connection with a reclamation project, was settled on by defendant in 1911; he making improvements and applying for a desert land entry. In May, 1915, plaintiff made selection of the land under Act Cong. May 2, 1914, authorizing selection of "vacant" and "unreserved" lands in lieu of school lands. In November, 1915, the Secretary of the Interior approved recommendations of the Commissioner of the Land Office that "the withdrawal order of 1909 be revoked and that plaintiff's selection be approved." *Held*, that the land was not "unreserved" until the attempted approval of plaintiff's selection, at which time, if it was vacant, defendant's rights attached, notwithstanding the revocation of the withdrawal and the approval of the selection were simultaneous acts. "Vacant" lands are those absolutely free, unclaimed, and unoccupied, and it is not vacant, if occupied by a settler under claim and color

of right. "Reserved" land is land that has been withheld or kept back from sale or disposition.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Vacant.]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Sarah F. Donley against Erwin Ray Van Horn. From a judgment for plaintiff, defendant appeals. Reversed.

Conkling & Brown, of El Centro, for appellant.

Haines & Haines, of San Diego, for respondent.

FINLAYSON, P. J. Plaintiff, to whom had been issued a patent to the land in controversy, sued for recovery of the premises and to quiet title. The lower court adjudged plaintiff to be the owner and entitled to possession. From this judgment, defendant appeals.

[1] The land, which is situated in Imperial county, has been in the exclusive occupancy of defendant ever since some time prior to December 26, 1911, on which date he filed in the proper office, viz. the local land office at Los Angeles, his application to make entry under the Desert Land Law. The land is a part of a large tract that, on April 2, 1909, was withdrawn from entry by the Secretary of the Interior in connection with the Yuma reclamation project, pursuant to authority conferred by the act of June 17, 1902 (32 Stats. at L. p. 388), commonly known as the Reclamation Act (U. S. Comp. St. §§ 4700–4708). This withdrawal was under what is known as the first form of withdrawal; that is, it was the withdrawal of lands that, in the opinion of the Secretary of the Interior, may be needed in the construction and maintenance of irrigation works. Such a withdrawal amounts to a legislative withdrawal, and is absolute. Until again restored to entry, the land so withdrawn is segregated from the public domain. It is excepted from the operation of public land laws, and is not subject to settlement or entry. No right can be initiated by a settler during the life of the withdrawal order, and every such settler is but a naked trespasser. Woodcock's Case, 38 L. D. 349; Pratt's Case, 38 L. D. 146; Wolsey v. Chapman, 101 U. S. 755, 25 L. Ed. 915; Bullard v. Des Moines & Ft. D. R. R. Co., 122 U. S. 167, 7 Sup. Ct. 1149, 30 L. Ed. 1123; Spencer v. McDougal, 159 U. S. 63, 15 Sup. Ct. 1026, 40 L. Ed. 76; Scott v. Carew, 196 U. S. 100, 25 Sup. Ct. 193, 49 L. Ed. 403; Whitehill v. Victorio L. & C. Co., 18 N. M. 520, 139 Pac. 184, L. R. A. 1918D, 593.

On May 10, 1915, while the land still was withdrawn from entry or sale under the Secretary's withdrawal order of April 2, 1909, plaintiff, who claimed to be the owner of a certain section of state school land, for which the state had issued to her a patent, made selection of the land in controversy under the act of May 2, 1914 (38 U. S. Stats. 372), in lieu of her school land, and a patent of the lieu land so selected by her was issued to her by the United States on August 9, 1916. The act under which plaintiff made her lieu selection—the act of May 2, 1914—provides that—

"The state of California or its grantees may, with the approval of the Secretary of the Interior, reconvey to the United States any of the lands heretofore granted to said state in the townships authorized to be resurveyed by the act of July 1, 1902, * * * and select in lieu thereof an equal amount of vacant, unappropriated, surveyed, unreserved, non-mineral public lands within said state."

[2] It will be noticed that by the terms of this act the Secretary of the Interior is authorized to approve a selection of land in lieu of the base land reconveyed to the United States when, and only when, the lieu land so selected is "vacant" and "unreserved." If it be not "vacant" and "unreserved," it is land for the disposition of which, by selection in lieu of land reconveyed to the United States, Congress has made no provision. Land for the disposition of which Congress has made no provision is not intrusted to the disposition of the Land Department, and any patent issued therefor is void, and subject to collateral attack in an action at law. Doolan v. Carr, 125 U. S. 618, 8 Sup. Ct. 1228, 31 L. Ed. 844; Burfenning v. Chicago, etc., Ry. Co., 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175; King v. McAndrews, 111 Fed. 860, 50 C. C. A. 29; Cucamonga Fruit Land Co. v. Moir, 83 Cal. 101, 22 Pac. 55, 23 Pac. 359; Edwards v. Rolley, 96 Cal. 408, 31 Pac. 267, 31 Am. St. Rep. 234; Klauber v. Higgins, 117 Cal. 451, 49 Pac. 466; Williams v. San Pedro, 153 Cal. 44, 94 Pac. 234. The doctrine of the cases last cited is thus stated by Mr. Justice Brewer with his usual lucidity and vigor, in Burfenning v. Chicago, etc., Ry. Co., supra:

"It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined. * * * But it is also equally true that when by act of Congress a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the Land Department

in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law. In other words, the action of the Land Department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof."

Appellant contends that, upon the facts found by the trial court—facts that appear on the face of the record of the Land Department—the land, when respondent's lieu selection received the approval of the Secretary of the Interior, was not "vacant" and "unreserved" public land, within the meaning of the act of May 2, 1914; that therefore the Land Department had no authority to issue the patent, and no title passed to respondent. We are constrained to hold that this is an unescapable conclusion.

[3] All the controlling facts in the case are disclosed by the records of the Land Office, copies of which were incorporated into the trial court's findings. The following summary, based upon the Land Office records and found by the trial court to be true, will suffice for an understanding of what we conceive to be the ultimate question in the case:

Subsequently to the withdrawal of the land from entry on April 2, 1909, under the first form of withdrawal authorized by the act of June 17, 1902, viz. on March 17, 1913, the reclamation service reported to the Secretary of the Interior that certain of the lands so withdrawn, including the land in controversy, were not necessary to the reclamation project, and recommended the revocation of the withdrawal order. The day following the filing of this report, viz. March 18, 1913, the Assistant Secretary of the Interior indorsed on the report of the reclamation service an order approving the recommendation. This indorsement did not operate as an absolute and immediate revocation of the withdrawal order of April 2, 1909; for, by the express terms of this order of March 18, 1913, so indorsed on the report of the reclamation service, the Assistant Secretary directed the Commissioner of the General Land Office to ascertain whether the lands included in the report of the reclamation service had been otherwise withdrawn or reserved by law, and, if not, to cause notice to be given that they will be open to settlement and entry at times to be fixed by the Commissioner. Before such notice could be given, viz. on April 17, 1913, the order of March 18, 1913, was suspended, after a copy thereof had been forwarded to the register and receiver of the Los Angeles land office. The order that the Assistant Secretary had so indorsed on the report of the reclamation service on March 18, 1913, was thus suspended "pending determination of the best method of opening the lands to entry." At the date of the suspension of the order of March 18, 1913, viz. on April 17, 1913, it was further ordered that the land that plaintiff proposed to select in lieu of her state school land be not restored to entry, in order that the Land Department might effect the exchange that it was proposed to make with her if and when the bill that later was enacted as the act of May 2, 1914, should become a law. On the same day that this suspension order of April 17, 1913, was made, the Assistant Commissioner of the General Land Office sent a telegram to the register and receiver of the Los Angeles land office, notifying the latter that the order of March 18, 1913, revoking the withdrawal of the lands, had been suspended, and to return the revocation order to the General Land Office in Washington. This was done. Thereafter no attempt was made by the Land Department to revoke the original withdrawal order of April 2, 1909, in so far as the land in controversy is concerned, until November 3, 1915, on which date the First Assistant Secretary of the Interior approved a report of the Commissioner of the General Land Office, recommending that, as to this land, the withdrawal order of April 2, 1909, be revoked, and that the lieu selection that plaintiff previously had made on May 10, 1915, under the act of May 2, 1914, be approved. The net result of the foregoing is that, as to the land in controversy, the withdrawal order of April 2, 1909, was in full force and effect from the time when it was made until November 3, 1915.

On December 26, 1911, defendant, as we already have stated, tendered to the local land office in Los Angeles an application to make a desert land entry on the land in controversy. This application was rejected on the ground that the land had been withdrawn from entry by the withdrawal order of April 2, 1909, and that such withdrawal was still in full force and effect. Defendant appealed successively to the Commissioner of the General Land Office and to the Secretary of the Interior, by both of whom his right to make such entry while the land was withdrawn for irrigation works was denied. During all these times defendant was a citizen of the United States, possessed of all the qualifications essential to qualify him to make entry upon such of the public lands as might be open to entry and legal settlement. At all times since December 26, 1911, the land has been in the exclusive occupancy of defendant, who went upon it and made settlement, with the intention of perfecting a title thereto under the United States land laws, as soon as an application to make entry might be favorably acted upon by the Land Department. During his occupancy he cultivated the land, and, at considerable expense, made valuable improvements thereon. Notwithstanding his possessio pedis and evident good faith, defendant's occupancy, during all

the time that the Secretary's withdrawal order of April 2, 1909, was in force, was no better than that of a naked trespasser, and his improvements were made at his own risk. But this would not prevent his occupancy from becoming lawful, and the land removed from the category of "vacant" land, if, before any inceptive right could vest in plaintiff, or other third person, the withdrawal order of April 2, 1909, should be revoked, and the land again restored to settlement and entry while occupied by defendant.

On February 17, 1914, which was prior to the passage of the act of May 2, 1914, and while the land was still withdrawn from settlement or entry under the Secretary's withdrawal order of April 2, 1909, plaintiff wrote a letter to the Land Department, expressing a willingness to select the land in controversy in lieu of her state school land. The First Assistant Secretary of the Interior, in a letter dated March 21, 1914, addressed to plaintiff, informed her that if the bill then pending in Congress, and which subsequently was enacted as the act of May 2, 1914, became a law, its provisions would enable her to make the selection. "In the meantime," so the letter runs, "the Commissioner of the General Land Office has been directed to withhold any of the above tract that you desire to select from restoration to entry. Should H. R. 122 be enacted into law, proper steps will be taken by this department to enable you to make selection of the land in lieu of that claimed by you under the grant from the state of California." On November 14, 1914, the Secretary of the Interior notified the Commissioner of the General Land Office that, in view of the fact that the department had knowledge of the character and status of the land that plaintiff desired to select under the act of May 2, 1914, the usual affidavit as to the character and status of lieu land, required by the departmental regulations to be made by persons making such lieu selections, could be waived. The Secretary also notified the Commissioner to instruct the local register and receiver to transmit to the General Land Office at Washington, without action on their part, the papers to be filed by plaintiff in the Los Angeles office, when she should make her lieu selection. The Commissioner likewise was instructed to take prompt action upon plaintiff's deed of reconveyance and lieu selection, upon receipt thereof. On May 10, 1915, plaintiff filed in the local land office at Los Angeles her lieu land selection, whereby she made selection of the land in controversy, and, at the same time, recorded a deed whereby she conveyed to the United States the base land for the lieu selection, viz. the state school land for which she held a patent from the state.

On June 27, 1915, the Commissioner of the General Land Office transmitted to the Secretary of the Interior a written report wherein he recommended approval of plaintiff's lieu selection. This report to the Secretary of the Interior, after reciting the complications and conflicts involved in plaintiff's school section and stating that plaintiff is willing to reconvey her school land to the United States, and, in lieu thereof, select the land in controversy, and after reciting the facts showing the exact status of the land, including defendant's attempted desert land entry and his occupancy, concludes with the following recommendations: (1) That the withdrawal order of April 2, 1909, be revoked, and the fixing of dates for settlement and entry waived; and (2) that plaintiff's selection, made May 10, 1915, be approved. On November 3, 1915, these recommendations were approved by the following order indorsed on the Commissioner's written report:

"Nov. 3, 1915. Approved; and it is so ordered. Andrieus A. Jones, First Assistant Secretary."

Thereafter, on August 9, 1916, the United States issued to plaintiff the patent under which she claims title to the land in controversy.

As we already have pointed out, the act under which respondent claims that the Land Department was authorized to issue the patent to her, the act of May 2, 1914, expressly provides that the land to be selected in lieu of the base land shall be "vacant, unappropriated, surveyed, unreserved, nonmineral public lands," and, as we have shown, if the lieu land selected under the act be not "vacant" and "unreserved," no provision for its disposition as lieu land has been made by Congress, and any patent thereto under the act of May 2, 1914, is void and no title passes. In view of appellant's contention that, when respondent's selection was made and approved, the land was not "vacant" and "unreserved," it becomes necessary to consider the meaning of those words.

"Vacant lands," says the United States Circuit Court of Appeals in Cosmos Exploration Co. v. Gray Eagle Oil Co., 112 Fed. 13, 50 C. C. A. 89, 61 L. R. A. 230, "are such as are absolutely free, unclaimed, and *unoccupied*." (Italics ours.) Public land is not vacant, if it is lawfully occupied by a settler under a claim and color of right. "The land was not vacant and open to settlement, * * * because it was then occupied by the defendant's grantors under a claim and color of right. It matters not that they had not at that time acquired any rights against the United States. * * * Whatever his rights may be, the fact that the miner is in the actual possession without having made any location at all shows that

the land is not 'vacant.' " Id. If the occupancy be unlawful, and the occupant but a mere trespasser, as is the case where the land occupied by the settler is withdrawn from settlement and entry, the land, doubtless, should be deemed to be "vacant," notwithstanding the settler's actual occupancy; but if, during the occupancy of land that, for any reason, has been withdrawn from settlement and entry, it again is thrown open to settlement, the settler's occupancy ceases to be unlawful, it immediately becomes lawful, he no longer is a trespasser or intruder, and the land so occupied by him immediately ceases to be within the category of "vacant" land.

Reserved land is land that has been withheld or kept back from sale or disposition. The word "reserved" is defined in the Standard Dictionary as "retained; kept back." Pending its withdrawal for the Yuma reclamation project, the land in controversy was "kept back" by the government from sale. It was withheld or reserved; it was not "unreserved" public land, within the meaning of the act of May 2, 1914. It is not necessary, as respondent contends, that, to be "reserved" land, the reservation should be of a more or less permanent character, as in the case of reservations for Indians, forests, forts, arsenals, and the like. In Northern Pacific Ry. Co. v. Musser-Sauntry L. & M. Co., 168 U. S. 604, 18 Sup. Ct. 205, 42 L. Ed. 596, it was held that lands within the indemnity limits of a railroad grant, that have been withdrawn from sale by order of the Secretary of the Interior until it should be known whether they would be needed to satisfy the grant, are, by the order of withdrawal, "reserved," within the meaning of a subsequent act granting lands to which the United States has "full title, not reserved, sold, granted, or otherwise appropriated." In the opinion in that case it was said:

"The withdrawal by the Secretary in aid of the grant to the state of Wisconsin was valid, and operated to withdraw the odd-numbered sections within its limits from disposal by the land officers of the government under the general land laws. The act of the Secretary was in effect a reservation."

In Alberger v. Kingsbury, 6 Cal. App. 93, 91 Pac. 674, it was held that an order of the Secretary of the Interior, withdrawing lands from disposition pending determination of the advisability of including them within a forest reservation, constitutes a "reservation" of such lands, within the meaning of section 2275 of the Revised Statutes (U. S. Comp. St. § 4860). We think it clear that from the date of the withdrawal order of April 2, 1909, made pursuant to the Reclamation Act of June 17, 1902, until the final unequivocal revocation of the withdrawal order on November 3, 1915, the land that respondent attempted to select under the provisions of the act of May 2, 1914, was reserved, and was not "unreserved" public land within the meaning of that act.

This brings us to the ultimate question in the case, viz.: Was the land, at the time of the approval of respondent's selection, both vacant and unreserved? Her counsel say that—

"The revocation of the withdrawal of the selected land and the approval of the selection thereof was made by the same indorsement and at the same instant, strictly in uno flatu."

It evidently is respondent's contention that, notwithstanding appellant's continued and uninterrupted occupancy, with the intent to make entry just as soon as it again should be thrown open to settlement, the land continued to be "vacant" up to and including the very instant when, by the revocation of the withdrawal order and the approval of plaintiff's selection, it ceased to be reserved and became "unreserved." This contention is based upon the claim that the revocation of the withdrawal order and the approval of plaintiff's lieu selection occurred at the same instant—as respondent's counsel put it, "in uno flatu"—both acts having taken place by the indorsement of the Assistant Secretary's approval on the written report of the Commissioner of the General Land Office, wherein the Commissioner had recommended the revocation of the withdrawal order of April 2, 1909, and the approval of the lieu selection that plaintiff had made on May 10, 1915.

This claim that the revocation of the withdrawal order and the approval of respondent's lieu selection took place at the same instant, without any interval of time whatever, is the Achilles' heel in respondent's contention that she acquired a right to the land under her lieu selection. If the revocation of the withdrawal order and the approval of respondent's lieu selection were so absolutely synchronous that no instant of time whatever, however short, elapsed between the revocation of the withdrawal and the approval of respondent's lieu selection, then it necessarily follows that, at the very instant when the Secretary approved respondent's lieu selection, the land still was under the spell of the withdrawal order, and that therefore, when her selection was approved, the land was not "unreserved" public land subject to disposal by the Land Department under the act of May 2, 1914.

If, to avoid this dilemma, some interval of time, however short, may be deemed to have elapsed between the revocation of the withdrawal order and the approval of respondent's lieu selection, notwithstanding both acts were effected by the one act of the Assistant Secretary in indorsing his approval on the Commissioner's written recom-

mendations, then, during that interval, however short, appellant's occupancy of the land ceased to be unlawful and he ceased to be a trespasser. At the very instant that the withdrawal order was revoked, the land became open to entry, and appellant, who had occupied the land all this time, waiting for the day when he lawfully could make entry under the public land laws, who had made valuable improvements, who, possessing the necessary qualifications, had vainly tried to enter the land under the Desert Land Act, who diligently prosecuted appeals from adverse decisions of the local land officers and the Commissioner of the General Land Office to the Secretary of the Interior himself, and whose every act betokens a patient awaiting of the time when he could make lawful entry under the public land laws, became a lawful settler in actual and lawful occupation, and at that very instant the land ceased to be "vacant." For these reasons we see no escape from the conclusion that, when respondent's lieu selection was approved, the land either was not unreserved or it was not vacant.

The status of the land at the time of the Secretary's approval of respondent's selection is the crux of the case; that is to say, in order that title should pass to respondent under the patent issued to her August 9, 1916, it is essential that the land should have been both vacant and unreserved at the time of the Secretary's approval of her lieu selection. That particular point of time, and none other, is the crucial or determinative point of time. That this is so will readily appear when we remember that at the date when respondent made her lieu selection, May 10, 1915, the land unquestionably was not "unreserved." It still was in the category of reserved land by reason of the withdrawal order of April 2, 1909, which, as to the land selected by respondent, was still unrevoked and in full force and effect. Consequently, no right in respondent, inchoate or inceptive, could attach to the land by virtue of her act of selecting it as lieu for her state school section. Unless, therefore, the land was both vacant and unreserved at the very instant of the Secretary's approval of her selection—and that, we think, was an impossibility—so that the Secretary's act of approval could create in her some sort of a right to the land, inchoate or inceptive, she never could acquire any right thereto; for, without doubt, when, on November 3, 1915, by revocation of the withdrawal order, the land ceased to be reserved and became "unreserved," appellant's occupancy, unless a right of some sort already had vested in respondent, immediately became a lawful occupancy, and, being lawful, the land ceased instanter to be "vacant," and thereby it ceased to possess one of the attributes essential to the right of disposal under the act of May 2, 1914.

Our conclusion is that the land in controversy was not subject to disposition under the act of May 2, 1914. Respondent never initiated a right at a time when the land was both vacant and unreserved. And since the United States, the proprietor of the public domain, can be dispossessed of its lands only by strict compliance with some law of Congress, we conclude that no title passed under the patent issued to respondent, and that therefore the judgment should be reversed.

It is so ordered.

We concur: THOMAS, J; WELLER, J.

49 Cal. App. 796

DONLEY v. WEST. (Civ. 317I.)

(District Court of Appeal, Second District, Division 2, California. Sept. 28, 1920. Hearing Denied by Supreme Court Nov. 24, 1920.)

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

On rehearing. Judgment reversed.
For former opinion, see 189 Pac. 1052.

Conkling & Brown and Banta & Banta, all of El Centro, for appellant.
Haines & Haines, of San Diego, for respondent.

PER CURIAM. At the oral argument following the order granting a rehearing, it was stipulated by the parties hereto that all proceedings in the land department affecting the respective rights of the parties, as shown by the records of that department, are correctly set forth in the record on appeal in Donley v. Van Horn, 193 Pac. 514, No. 3213, this day decided, and that on the appeal in this case judicial notice might be taken of all the records of the land department so set forth in the record in the Van Horn appeal. The effect of that stipulation is to show that, mutatis mutandis, the facts in this case are, in all substantial respects, the same as in the Van Horn case.

For the reasons stated in the opinion this day filed in Donley v. Van Horn, the judgment is reversed.

184 Cal. 283

COLLETTE v. SARRASIN. (L. A. 5521.)

(Supreme Court of California. Nov. 12, 1920.)

1. Witnesses ⟸222—Prior relation of attorney does not establish relation existed when deed was drawn.

That an attorney drew a will for a client and retained it in his possession until drawing a deed some two years later will not itself establish the relation of attorney and client at the time of drawing the deed so as to render testimony by the attorney as to the grantor's declarations concerning the deed privileged communications within Code Civ. Proc. § 1881, subd. 2.

2. Witnesses ⟸200—That attorney acted as mere scrivener does not make communication privileged.

Where an attorney acted as a mere scrivener in drawing a deed, and the grantor asked no advice and solicited no services from the attorney other than the delivery of the deed, communications in that connection were not privileged within Code Civ. Proc. § 1881, subd. 2; the relation of attorney and client not existing.

3. Witnesses ⟸205—Statement by client directed to be communicated to grantee of deed not privileged.

Though the relation of attorney and client existed between a grantor and the attorney who drew a deed, a communication which the grantor directed be communicated to the grantee is not privileged within Code Civ. Proc. § 1881, subd. 2.

4. Witnesses ⟸201(1)—Attorney can testify as to instructions.

Where the communication between the client and attorney is one authorizing the attorney to perform some act on behalf of the client, the communication giving such authority is not a confidential communication by the client, and the attorney may testify to the instruction, notwithstanding Code Civ. Proc. § 1881, subd. 2.

5. Witnesses ⟸222—Person objecting to testimony as privileged has the burden of showing relation of attorney.

A party objecting to testimony by an attorney on the ground that it was to a privileged communication with a client has the burden of showing the relationship.

6. Evidence ⟸471(30) — Attorney may be asked whether he was acting as such in particular transaction.

Where testimony of an attorney concerning delivery of a deed was objected to on the ground that it was privileged, it was proper to ask him whether with relation to that transaction he was acting as attorney for the grantor whose declarations were sought to be elicited.

7. Witnesses ⟸217 — Communications to attorney not competent merely because both parties claimed under client.

The mere fact that both parties claimed under decedent, who was asserted by plaintiff to have occupied towards an attorney the relation of client, does not make communications by decedent to the attorney admissible, for, under Code Civ. Proc. § 1881, subd. 2, a privileged communication cannot be received unless the privilege is directly or inferentially waived by the client.

8. Descent and distribution ⟸90(1) — Heirs may maintain action to have deed declared mortgage.

As Code Civ. Proc. § 1452, authorizes the heirs of a decedent to sue for possession of real estate or for quieting title thereto, the heirs of a decedent may maintain a suit to have declared a mortgage an absolute deed executed by decedent.

9. Descent and distribution ⟸71(1)—In action to have deed declared mortgage question of heirship may be decided.

In an action by the alleged heirs of decedent to have a deed executed by him declared a mortgage, the question of heirship may be decided; the decree sought being in effect both to quiet title to the land against the grantee's claim of ownership and to establish a right to possession subject to the rights of the administrator.

In Bank.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Zephir F. Collette against Hyacinthe Sarrasin. From a judgment for plaintiff, defendant appeals. Reversed.

Emmet H. Wilson, G. C. De Garmo, and J. Wiseman Macdonald, all of Los Angeles, for appellant.

Oscar Lawler and James E. Degnan, both of Los Angeles, for respondent.

WILBUR, J. This action is brought by the plaintiff, the father and sole heir of Clifford Collette, to have a grant deed from the latter to the defendant, his uncle, declared to be a mortgage. The judgment was in favor of the plaintiff, and defendant appeals. The appellant claims that the property was conveyed to him as a gift. When eight years of age Clifford was brought to California by the defendant and was reared by the uncle, who, when Clifford was 23 years old, purchased the land here involved, each taking title to an undivided one-half thereof. Afterwards defendant conveyed his half to the nephew Clifford and took a mortgage for $5,000 on the property. Defendant advanced about $4,000 additional to Clifford, and the property had appreciated in value until at the time of the death of the latter it was worth about $28,000. About two weeks before his death Clifford executed the deed in question. The defendant testified that Clifford gave him an old deed containing a description of the property and requested him to take it to Emmet H. Wilson, an attorney at law, and have a deed drawn conveying the property to defendant, stating that he would later go to the office and execute it. This was done. The next day the deed was delivered to defendant by the stenographer in Wilson's office. Defendant denied that the deed was given to him as security. Mr. Wilson was called to the stand by the defendant. Because of plaintiff's objection that the matter sought to be elicited from this witness was privileged he was only permitted to testify to the following effect: That he was an attorney at law; that he was acquainted with the parties to this action, and with Clifford Collette; that he became acquainted with the latter in 1910, and in June, 1912, drew a will which he executed; that he kept the will in his safe at his request until March 2, 1916, at which time he returned it to him. The trial court rigidly adhered to the ruling that upon this state of the case everything said and done between Mr. Wilson and the deceased was privileged, and therefore sustained objections to every attempted offer of proof, and to every question asked which sought to elicit any additional evidence, and declined to permit defendant's counsel to make any offer of proof, or to state what they expected to prove by the witness. Inasmuch as the deed was delivered by Mr. Wilson to the grantee, it must follow that such delivery was in accordance with the instructions of the grantor, unless we infer that such delivery was unauthorized. Under the rulings of the court, the instructions given by the deceased with relation to the deed were not admitted in evidence. Whether such delivery was authorized, and whether in connection with the delivery of the deed Mr. Wilson was either authorized or directed by the deceased to make any statement or representation as to its purpose or effect, or to make any request or to give any instructions with reference to the property, is not known because of the rulings of the court excluding such evidence.

[1, 2] Plaintiff's objection was not well taken unless the relation of attorney and client existed between the witness and the deceased. Section 1881, subd. 2, Code Civ. Proc. The fact that Mr. Wilson had drawn a will two years before and retained possession thereof did not establish the relation of attorney and client with reference to the transaction concerning the deed. The only conversation with reference to the drafting of the deed, so far as we know, was the conversation with the defendant. The record leaves us wholly in the dark as to whether anything occurred between the witness and the deceased at the time the latter signed the deed which would establish the relation of attorney and client. If Mr. Wilson acted as a mere scrivener in drawing the deed, and if the deceased asked no advice concerning it and solicited no service from the attorney other than the delivery of the deed, it is clear that communications in that connection were not privileged, for the reason that the relation of attorney and client in the matter inquired about is not established and did not exist. Gulick v. Gulick, 38 N. J. Eq. 402; Hatton v. Robinson 14 Pick. (31 Mass.) 416, 25 Am. Dec. 415; De Wolf v. Strader, 26 Ill. 225, 79 Am. Dec. 371; Borum v. Fouts, 15 Ind. 50; Grimshaw v. Kent, 67 Kan. 463, 73 Pac. 92; Randel v. Yates, 48 Miss. 685; Todd v. Munson, 53 Conn. 579, 4 Atl. 99; Branden v. Gowing, 7 Rich. (S. C.) 459; Carroll v. Sprague, 59 Cal. 655; Delger v. Jacobs, 19 Cal. App. 197, 125 Pac. 258; Smith v. Caldwell, 22 Mont. 331, 56 Pac. 590; Machette v. Wanless, 2 Colo. 169; Monaghan Bay Co. v. Dickson, 39 S. C. 146, 17 S. E. 696, 39 Am. St. Rep. 704; Aultman & Co. v. Daggs, 50 Mo. App. 280.

[3, 4] If the deceased made any communication to Mr. Wilson, and if the relation of attorney and client existed, if that communication was directed by the client to be communicated to the grantee in the deed the communication was not privileged. Rosseau v. Bleau, 131 N. Y. 177, 30 N. E. 52, 27 Am. St. Rep. 578; Koeber v. Somers, 108 Wis. 497, 84 N. W. 991, 52 L. R. A. 512; Herman v. Schlesinger, 114 Wis. 382, 90 N. W. 460, 91 Am. St. Rep. 922; Estate of Nelson, 132 Cal. 182, 64 Pac. 294. Where the communication between the client and attorney is one authorizing the attorney to perform some act on behalf of the client, the communication giving such authority is not a confidential communication by the client, and the attorney

may testify to the instructions given to him. Burnside v. Terry, 51 Ga. 186; Williams v. Blumenthal, 27 Wash. 24, 67 Pac. 393; Bruce v. Osgood, 113 Ind. 360, 14 N. E. 563.

[5-7] The defendant was not even permitted to state to the court what he intended to prove by the witness, or the nature of the evidence sought to be elicited. The witness was asked the following questions, to wit:

"Did you have any conversation with Mr. Collette about the deed at the time the deed was prepared? Was there any conversation between you and Mr. Collette at the time the deed was prepared as to the legal effect of it? Did Mr. Collette say anything to you as to why he was having the deed prepared? Did Mr. Collette ask you any questions or any advice or seek from you any advice concerning this deed? Did he say anything about what he intended to do with the deed, or what he wanted to have done with the deed when it was prepared?"

To all these questions objection was sustained, upon the ground that the matter sought to be elicited was privileged. Defendant's attorney, failing to elicit any information by question, attempted to make an offer of proof. The making of the offer was objected to, and the court sustained the objection. The colloquy in part was as follows:

"Mr. De Garmo: We offer to show at this time, your honor, by this witness, that at the time the deed was prepared, Mr. Collette told Mr. Wilson—

"Mr. Lawler: I think that is even highly improper."

After a somewhat acrimonious discussion by counsel, the following occurred:

"Mr. De Garmo: My contention of the proper way to do where the evidence sought to be elicited could not be ascertained by the question to offer—

"The Court: I don't.

"Mr. De Garmo: For instance, your honor, if he had consulted him relative to the effect of this will and this deed, then surely it is a privileged communication. Now, how does the question which I put to the witness indicate whether it is a privileged communication or not?

"The Court: Why, the circumstances fix that.

"Mr. De Garmo: Not necessarily.

"The Court: Well, presumably.

"Mr. De Garmo: I don't know of any other way of showing it.

"The Court: I don't think there is any other way.

"Mr. De Garmo: Whether this is a privileged communication according to the theory—

"The Court: I am drawing the line right here."

The court then stated that it was ruling thus "because it was shown that right up to the time that he called there, and as a part of that transaction, Mr. Wilson had retained his confidence as an attorney, and acted as custodian of his will, and the relation had not been severed." It is manifest that, if an attorney has drawn a will for a client and retained possession of it at the client's request, this fact alone would not constitute him an attorney as to every communication to him made after the execution of the will. The question as to whether or not he was acting in the capacity of an attorney and the communications to him were privileged must be determined with relation to the particular transaction involved in the inquiry, and the burden of showing such relationship is on the party objecting to the evidence. Respondent claims that the offer of proof was particularly objectionable because the effect of the offer would be to reveal the very matter that was privileged. If this contention be upheld, it is obvious that counsel are thereby precluded from showing or offering to show that the particular conversation or communication was within any of the well-recognized exceptions to the rule excluding privileged communications, and would be also prevented from offering any proof as to whether or not the witness was in fact acting as an attorney. It is true that an offer of testimony which incorporated privileged communications of such a character that it would reflect upon the client, if proved in evidence, might be nearly as objectionable as the proof itself, but something should be left to the judgment of the attorney making the offer and to the witness, who, of course, is aware of his obligations as an attorney. It is proper to ask the attorney whether or not with relation to the transaction under inquiry he was acting as the attorney for the person making the statements. If either of the parties are not satisfied with the answer of the witness, the dissatisfied party can ask such questions as are essential to enable the court to determine whether or not the relationship existed. If the relationship is established to the satisfaction of the court, it remains to be determined whether or not the communication was of such a character as comes within any of the exceptions to the rule concerning communications between attorney and client. The burden of showing that the confidential relation existed was upon the respondent. The showing made being insufficient for that purpose, the rulings excluding the testimony were for that reason erroneous, and the judgment must be reversed. Our opinion follows that of the District Court of Appeal, and we were satisfied with its conclusion. A transfer to this court was made because it was thought the exception to the rule of privilege was too broadly stated. We have therefore indicated the length to which we think the rule extends in the present case. The mere fact that both parties claim under the deceased does not, in our opinion, make the communication admissible, for under our Code (section 1881, Code Civ. Proc.) the privileged communication cannot be received unless that privilege is directly or inferentially waived by the client.

[8, 9] In view of a new trial it is proper to say that the contention of the appellant that the heir of the intestate could not maintain the action and that the trial court could not in this action determine the heirship of plaintiff is not well taken. The heirs of the deceased were expressly authorized to bring suit for the possession of real estate, or for the purpose of quieting title to the same. Code Civ. Proc. § 1452. The decree sought was, in effect, both to quiet title to the land against defendant's claim of ownership, and to establish a right to possession, subject to the rights of the administrator of the estate, and it was proper and necessary in the case to determine whether or not the plaintiff was an heir or devisee, and thus entitled to bring the suit. We think it unnecessary to pass upon any other point presented by the appellant, as the rules of evidence with relation thereto are well settled.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; SLOANE, J.; OLNEY, J.; SHAW, J.; LAWLOR, J.

184 Cal. 270

In re PINNELL'S GUARDIANSHIP. (S. F. 9558.)

(Supreme Court of California. Nov. 5, 1920.)

1. Guardian and ward ⟸13(6)—Statute provides for temporary guardianship on ex parte showing.

The order provided for by Code Civ. Proc. § 1747, is designed simply to enable the superior court, on ex parte showing of necessity, to provide for temporary custody of a child and its production in court until hearing can be had on petition for guardianship of its person and estate in the superior court, and the court informed of the immediate necessities with regard to the welfare of the child.

2. Guardian and ward ⟸13(6) — Superior court can vacate ex parte order as to temporary custody of child.

It is within the power of the superior court finally to vacate an ex parte order for the custody of a child whose guardianship is sought, made pursuant to Code Civ. Proc. § 1747, at any time during the course of the guardianship proceedings, and thus to restore the status quo if on investigation of the facts such action seems proper.

3. Guardian and ward ⟸13(6)—Order vacating temporary order for custody incorporated in judgment was not part of judgment.

The fact that the order of the superior court vacating its ex parte order, made pursuant to Code Civ. Proc. § 1747, for the custody in the father of the child whose guardianship was sought by him, was physically incorporated in the final judgment of the court denying the application of the father for letters and awarding the permanent custody of the child to the mother, does not make it part of the judgment in the guardianship proceeding; it being simply an express disposition of the provisional order for temporary custody having effect to restore the status quo.

4. Guardian and ward ⟸10—Welfare of child paramount consideration on father's application.

The welfare of the child is the paramount consideration in proceedings by its father for letters of guardianship of its person and estate as against its mother.

In Bank.

In the matter of the guardianship of the person and estate of Mildred Bernice Pinnell, wherein John Harold Pinnell, her father, applies for writ of supersedeas, pending his appeal from order denying his petition for guardianship. Order granting stay vacated, and application for writ denied.

A. M. Drew, of Fresno, for appellant.
Henry Hawson, of Fresno, for respondent.

ANGELLOTTI, C. J. This is an application by John Harold Pinnell for a writ of supersedeas pending the determination of an appeal taken by him to this court from an order of the superior court of Fresno county denying his petition for letters of guardianship of the person and estate of his minor daughter, Mildren Bernice Pinnell, a child of the age of 3½ years.

At the time of the initiation of the guardianship proceeding, on June 8, 1920, the child was in the care and custody of her mother, Erma May Pinnell, the wife of the petitioner, who was living at the home of her father in Fresno, the husband and wife having been living separate and apart for some time. On the institution by petitioner of the proceeding for letters of guardianship, he obtained from the superior court, upon an affidavit to the effect that the welfare of the child would be imperiled if she were allowed to remain in the custody of the mother, and that the mother would take the child from the state unless restrained from so doing, an ex parte order under section 1747, Code of Civil Procedure, directing the sheriff to take possession of the child and deliver her to Ella M. Towle, assistant probation officer, who should have and retain the custody "until the final hearing of the petition for letters of guardianship." Under this order the child was taken from the mother and delivered to the assistant probation officer, who has ever since retained her in her custody. The application for letters was opposed by the mother, and the matter was heard by the superior court in July, 1920. The court on August 7, 1920, gave its judgment denying the application of the father for letters of guardianship, and further decreeing that both petitioner and the mother are fit and proper persons to have the

custody of the child, that neither has any right superior to the other in regard to such care and custody, and that it would be for the best interests of the minor child in respect to her temporal, mental, and moral welfare that she be placed and remain in the custody of her mother. By the judgment the custody of the child was awarded to the mother, when she should have filed an undertaking with two sureties in the sum of $1,000, conditioned that she would not take the child from the state. Included in the judgment was an order vacating and setting aside the order of June 8th relative to the temporary custody of the child, and providing that upon the filing of the decree and the giving and approval of the undertaking the assistant probation officer shall surrender the custody of the child to the mother. The undertaking was given and approved. The petitioner at once appealed to this court from the whole of said judgment. The whole object of this application for supersedeas is to prevent the redelivery of the child to the mother pending the determination of the appeal, and in so far as any substantial material showing is concerned the application is based solely on the theory that the appeal stays the effect of the order of the superior court vacating and setting aside the order of June 8, 1920, for temporary custody and restoring the custody of the child to the mother, from whom it was taken at the commencement of the proceeding.

[1-3] We are of the opinion that the contention of petitioner involves a misconception of the nature and effect of the order provided for by section 1747, Code of Civil Procedure. It was solely by virtue of the order made under that section that the child was taken from the custody of the mother and withheld from such custody pending the hearing in the superior court. She was in the custody of the mother at the time of the institution of the guardianship proceeding, and there she would have remained throughout the proceedings in the trial court and during the pendency of any appeal but for such order. Such was the status quo. The order provided for by the section is clearly one designed simply to enable the superior court, upon an ex parte showing of necessity therefor, to provide for the temporary custody of the child and its production in court, until a hearing can be had on such petition in the superior court, and the court informed of the immediate necessities with regard to the welfare of the child. The material part of the section provides:

"In all such proceedings [applications for letters of guardianship], when it appears to the satisfaction of the court, either from a verified petition, or from affidavits, that the welfare of the minor will be imperiled if such minor is allowed to remain in the custody of the person then having the care of such minor, the court may make an order providing for the temporary custody of such minor until a hearing can be had on such petition."

And this is followed by the provision for a warrant to a peace officer for the taking of the child by the officer and the delivery by him into the "temporary custody" provided wherever it appears to the court that there is danger that the child will be carried out of the jurisdiction of the court or will suffer some irreparable injury before compliance with the order for temporary custody can be enforced. In nature and effect the order is somewhat analogous to a temporary restraining order, the functions of which are ended when a hearing is had and the trial court gives its judgment against the party in whose favor the order was made. That it is within the power of the superior court to finally vacate such an ex parte order at any time during the course of proceedings therein, and thus restore the status quo, if upon investigation of the facts it deems it proper that this should be done, cannot be doubted. This the superior court effectively did by order at the close of the hearing therein, and the fact that such order was physically incorporated in the signed judgment of the court denying the application of the father for letters and awarding the permanent custody of the child to the mother does not make it a part of the judgment in the proceeding. It is in effect simply an express disposition of a provisional order for the temporary custody pending further action by the superior court, and the effect thereof was, at least upon the giving of an undertaking satisfactory to the court, to at once restore the status quo and entitle the mother to a return of the child notwithstanding the taking and pendency of an appeal by petitioner from the judgment.

[4] We are not called upon here to question the power of the superior court to make appropriate provision for the temporary custody of a minor pending an appeal, where upon the hearing it concludes that the welfare of the child will be imperiled if it be allowed to be in the custody from which it was taken. As the welfare of the child is the paramount consideration under such circumstances as we have here, there can be no doubt that some lawful method could be found to prevent even a temporary custody imperiling such welfare. But we have no such question here. In this case the superior court, after a full hearing, has determined that the welfare of the child will be promoted, rather than imperiled, by her restoration to the custody from which she was taken under the provisional order, and therefore has vacated such provisional order for temporary custody pendente lite. That its order in this behalf is final, and not reviewable on appeal, we have no doubt.

The order heretofore made granting a stay pending determination of this application is

vacated, and the application for a writ of supersedeas is denied.

We concur: OLNEY, J.; LAWLOR, J.; WILBUR, J.; LENNON, J.; SLOANE, J.

184 Cal. 290

HARPER v. MURRAY. (S. F. 8659.)

(Supreme Court of California. Nov. 12, 1920.)

1. Cancellation of instruments ⟸37(1) — Complaint by divorced wife to set aside agreement modifying decree as to alimony sufficient.

Complaint by a divorced wife against her husband to set aside agreement between them modifying the decree of divorce as to alimony, on the ground that such modifying agreement was procured by fraud and duress on the part of defendant husband, in that he procured a man to follow and make love to plaintiff wife and compromise her, which was done, so that defendant threatened plaintiff wife with exposure and modification of the decree, *held* sufficient as against general demurrer.

2. Divorce ⟸246—Agreement by wife to modify her decree of divorce as to alimony procured by duress of husband.

A divorced husband, who instructed a man to follow his former wife and make love to her, and, if possible, compromise her, and who broke in on them in a compromising situation, when the wife had not in fact been guilty of any improper conduct, so that he threatened her with exposure and suit for modification of the divorce decree as to alimony unless she consented to modify it by agreement, exercised upon her duress by threats, entitling her to set aside an order modifying the decree as to alimony in accordance with agreement which she was thus forced to make.

3. Divorce ⟸246 — Fact of false charge against divorced wife, used to induce her to agree to modify decree as to alimony, the basis of her action to set aside agreement.

Where a divorced husband made a false charge against his former wife of improper conduct with a man in whose room he discovered her, and used the situation as a threat of exposure to force her to agree with him to modify the divorce decree as to alimony, it was the fact of such false charge against her and its threatened publicity by the husband that gave the wife her cause of action to set aside the agreement modifying the divorce decree as to alimony as procured by duress, and not the manner in which the apparent foundation for the false charge was laid by the husband, so that, in the wife's action to set aside the agreement and to vacate order modifying alimony decree, it was immaterial that the evidence that defendant husband conspired with the man in whose room he discovered his wife was insufficient.

4. Divorce ⟸246—Evidence held to support finding defendant husband threatened divorced wife to induce her to release alimony.

In such action, evidence *held* sufficient to sustain the finding that defendant husband used threats to induce plaintiff to release her rights to alimony and the decree, also to sustain finding that the agreement of release was induced by fear of publicity and disgrace.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Action by Rose Harper against Warren E. Murray. From judgment for plaintiff, defendant appeals. Affirmed.

Wm. M. Abbott, Wm. M. Cannon, and Kingsley Cannon, all of San Francisco, for appellant.

Theodore J. Savage and R. H. Morrow, both of San Francisco, for respondent.

SLOANE, J. [1] The complaint in this action sets forth that plaintiff and defendant were husband and wife; that they were divorced, and that by the decree of divorce the plaintiff was restored her maiden name of Rose Harper, and was given judgment against defendant for alimony in the sum of $100 per month until further order of the court; that subsequently defendant obtained an order of court discharging said defendant from further payment of alimony; that such release was obtained through a purported agreement, signed by plaintiff, whereby, in consideration of a promissory note for $300 executed by defendant to plaintiff, the plaintiff released defendant from further payment of alimony; that said agreement was procured from plaintiff through menace, duress, and undue influence of the defendant. The facts pleaded as constituting the fraud, menace, and undue influence were that defendant conspired with one Esterbrook to have the latter gain the confidence of plaintiff and compromise her in some fashion that would enable defendant to procure a modification of the decree for alimony; that in pursuance of this plan Esterbrook made the acquaintance of plaintiff and made love to her, followed her from San Francisco to Los Angeles, where she had gone with her married daughter, invited her to his hotel to dinner, induced her to visit his room, where the defendant and a companion suddenly rushed in upon them and accused plaintiff of having improper relations with Esterbrook; that thereafter defendant threatened plaintiff that he was about to file a petition to modify said decree of divorce by striking therefrom the provision for alimony, and would support his application by affidavits charging plaintiff with improper relations with Esterbrook, unless plaintiff entered into

the agreement of settlement and release already referred to; that the charges of improper conduct were false and unfounded, but that in fear of the publicity, humiliation, disgrace, and embarrassment which would result from the filing of such affidavits, and because of the duress, menace, and fraud thus exercised, plaintiff signed the agreement, and permitted the modification of said decree; that thereafter, having become free from the influence of such fear and menace, plaintiff served notice of the rescission of said contract, offered to return to defendant said promissory note and repay him $50 that had been paid thereon. Plaintiff prays the court for rescission of said contract, and that the order modifying her decree for alimony be vacated. A second cause of action sets up practically the same facts, and alleges invalidity of the contract of settlement for want of consideration. Defendant filed a general demurrer which was overruled. As against a general demurrer the complaint is sufficient.

[2] On the trial of the case the court found for the plaintiff in substantially the language of the complaint and against the allegations of defendant's answer, and particularly that the plaintiff had not been guilty of any improper conduct or of immoral relations with said Esterbrook, but that defendant had threatened to file affidavits accusing her of such improper conduct and immoral relations unless she entered into the agreement to release him from further alimony, and that the agreement of release was made by plaintiff because of such threats, and for no other reason. As its conclusion of law the court found that plaintiff was entitled to a judgment reviving her decree for alimony, and judgment was entered accordingly. Appellant contends that the findings of fact do not support the judgment; that the alleged menace, duress, and undue influence consisted merely of a threat to institute a proceeding in court, which defendant was entitled to resort to, and that a compromise by plaintiff to avoid further litigation was a legitimate settlement, based upon a sufficient consideration. The position of appellant is not well taken. It was the threat to disgrace and humiliate plaintiff by charging her publicly with immoral conduct that constituted menace. The fact that the threatened accusations were untrue does not relieve the threat from its unlawful force, but enhances it. It may well be that if plaintiff had been guilty of the alleged immorality it would have constituted sufficient ground for demanding a release from further liability for alimony. But the court having found her innocent, and having found that the charges against her were false, and necessarily known to be false by defendant, his threat to thus assail her reputation was as directly a menace as if he had threatened her with bodily harm.

Appellant contends that certain of the findings are not supported by the evidence.

[3] First, that the evidence that defendant conspired with Esterbrook is insufficient. The evidence of such conspiracy is entirely circumstantial, but we cannot say that it was inconsequential, and in any event, such finding is not essential to support the judgment. It does appear from the testimony that defendant had employed a detective to obtain evidence against his wife, and that apparently through this source of information he followed plaintiff to the room in the hotel, and on this circumstance trumped up a false charge against her. It is the fact of this false charge and its threatened publication, and not the manner in which the apparent foundation for it was laid, that is material.

[4] The second insufficiency of proof alleged is as to the evidence supporting the finding that defendant used any threat to induce the release by plaintiff. The testimony on this point is that shortly after the hotel episode defendant's attorney approached the plaintiff's attorney and informed him that defendant was about to move the court for a modification of the decree for alimony; that he had discovered the plaintiff in flagrante delicto with Esterbrook, and was going to base his application to the court upon affidavits containing such charge against the plaintiff. It is true there is no direct evidence that this communication to plaintiff's lawyer was made at the instigation or with the knowledge of defendant, and the circumstance, standing alone, might be insufficient to bind the plaintiff, but it further appears that the plaintiff wrote a letter to the defendant prior to the settlement, disclosing the information received from his attorney as to defendant's purpose, in which she bitterly denounces him for threatening to disgrace her. The letter contains the following language:

"I have just received a letter from my attorney and you know what it contains. Has your love for money or other influences robbed you of all sense of honor and manhood. You mean to disgrace me and my daughter by accusations you see fit to bring to cheat me of my alimony which you justly owe me."

The settlement arrived at was conducted through defendant's attorney, and it thus sufficiently appears that defendant was informed before the agreement was signed that threats had been made as an inducement to the settlement. This state of the case is strengthened by the fact that no attempt was made by defendant to deny that he instigated and had knowledge of such threat, and availed himself of the results.

The evidence also sufficiently sustains the

finding that the agreement of release from alimony was induced by fear of publicity and disgrace from the threatened accusations. The plaintiff so testifies, and the circumstances are entirely consistent with her testimony.

In considering this entire case the significant fact is that the plaintiff had not been guilty of anything immoral, and that defendant had seen nothing to justify accusing her of immorality. The trial court has so found upon evidence sufficient to make the finding conclusive on this appeal. That she had been indiscreet and had placed herself in a compromising position is evident from her own admission. There was enough foundation for the threatened accusation that she was discovered in bed with Esterbrook to make such accusation peculiarly damaging to her reputation. Had the charge been true, there would be reason to assume that the settlement was voluntary on plaintiff's part, induced by a knowledge of her guilt. But, being innocent of any actual wrongdoing, it is reasonable to conclude that she only relinquished her right to future alimony because she was driven to it by the threat of defendant to take advantage of her indiscretion to ruin her reputation by a false accusation against her chastity.

We think the evidence is also adequate to show a sufficient offer of rescission.

Judgment is affirmed.

We concur: OLNEY, J.; WILBUR, J.; LAWLOR, J.

184 Cal. 194

McCARTY v. WILSON. (L. A. 4839.)

(Supreme Court of California. Oct. 20, 1920. Rehearing Denied Nov. 18, 1920.)

1. Exceptions, bill of ⊂⊃59(4)—Application for re-engrossment held not subject to statutory limit of six months.

Where bill had been ordered settled and engrossed, but was not in fact settled at the time of an order directing a re-engrossment, the application for re-engrossment was made in a proceeding which had not been taken or completed in a legal sense so as to be susceptible of having applied to it the statutory limit of six months, under Code Civ. Proc. § 473, and the trial judge still retained jurisdictional control over the settlement of the bill, even though the time prescribed for the original presentation had expired.

2. Exceptions, bill of ⊂⊃59(1)—Court has power to direct re-engrossment by excluding matters not necessary to appeal.

A court, having jurisdictional control over settlement of a bill, has power to direct a re-engrossment so as to make the bill conform with verity and brevity by excluding therefrom such matters as are admittedly or obviously not necessary to a proper presentation of the appeal.

3. Appeal and error ⊂⊃1024(5)—Directing re-engrossment held conclusive as to materiality of matter excluded.

Where, upon plaintiff's application for re-engrossment of a bill, counsel for defendant was present by agreement and was heard upon his objection that matters material to him would be eliminated by the engrossment as ordered, and the court being fully advised in the matter denied the objection, the order of the court is conclusive that the matter stricken out was not material.

4. Executors and administrators ⊂⊃337—Order to show cause why real estate should not be sold held valid.

Under Code Civ. Proc. § 1536, prior to 1919 amendment (St. 1919, p. 1179), and section 1538, prior to repeal in 1919 (St. 1919, p. 1177), an order, requiring persons interested "to show cause why an order should not be granted to said executor to sell so much of the real estate of said deceased at private sale as shall be necessary," was not invalid as amounting to a fatal variation from the language required by the statute, although the sale was not sought because it was "necessary" to meet debts, but rather on the ground that it would be beneficial to the estate.

5. Vendor and purchaser ⊂⊃135(1) — Agreement to convey free of incumbrances did not apply to visible easement.

A general agreement to convey land free and clear of all incumbrances did not refer to an easement of way for an electric power and transmission line, consisting of wires carried upon steel piers 60 feet in height and 14 feet square at the base, resting upon solid and permanent foundations, one of which piers was known by the purchaser to be upon the land.

6. Executors and administrators ⊂⊃370—Purchaser from executor not excused from performance by depreciation caused by flood.

One contracting to purchase land from an executor under order of court under Code Civ. Proc. §§ 1536, 1538, as they stood prior to 1919, was not excused from performance by reason of fact that the property suffered depreciation by flood, being in equity the owner of the land, of which he was in possession under the contract.

7. Specific performance ⊂⊃4 — Executor may sue for specific performance, notwithstanding remedy provided by statute.

The remedy provided by Code Civ. Proc. § 1554, providing that property sold by an executor under contract pursuant to an order of court under sections 1536, 1538, as they stood prior to 1919, might be resold, and the present purchaser held responsible for any deficit, is not exclusive, and does not prevent a resort by the executor to a suit for specific performance.

In Bank.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Alva R. McCarty, executor of the last will and testament of Anna E. McCarty, deceased, against Philip L. Wilson, who filed a cross-complaint. From a judgment denying either party relief, both appeal. Reversed as to plaintiff, and affirmed as to defendant.

Alva R. McCarty and Allison & Dickson, all of San Bernardino, and Edwin A. Meserve and Shirley E. Meserve, both of Los Angeles, for plaintiff.

A. W. Ashburn, of Los Angeles, for defendant.

LENNON, J. This is an action wherein plaintiff, as executor of the estate of one Anna E. McCarty, deceased, seeks the specific performance of a contract to purchase certain real property belonging to said estate. Defendant has undertaken to avoid the contract on various grounds, and by cross-complaint seeks to recover a deposit made by him. The trial court denied relief to plaintiff on his complaint and to defendant on his cross-complaint, and each party has appealed from that portion of the judgment adverse to him, both appeals being presented in a joint transcript and joint briefs.

[1-3] There is no merit in the contention that the bill of exceptions cannot be rightly resorted to in aid of the points made upon appeal. The bill was returned engrossed within the required time, and whether or not it had been correctly engrossed was a matter for the determination of the trial judge. Merced Bank v. Price, 152 Cal. 697, 93 Pac. 866. Although the bill in the instant case had been ordered settled and engrossed, it was not in fact settled at the time the order in question here directing a re-engrossment was made. That is to say, the bill was not then certified as settled and filed as a record of the court, and, of course, this could not be done until it was engrossed. Fountain Water Co. v. Superior Court, 139 Cal. 648, 73 Pac. 590; Houghton v. Superior Court, 128 Cal. 352, 60 Pac. 972. Therefore, plaintiff's application for a re-engrossment of the bill was made in a proceeding which "had not been taken or completed in a legal sense, so as to be susceptible of having applied to it the statutory limit of six months, under section 473 of the Code of Civil Procedure." Smith v. City of Stockton, 73 Cal. 204, 14 Pac. 675. It follows that, even though the bill may have been returned defectively engrossed, the trial judge still retained jurisdictional control over the settlement of the bill, even though the time prescribed for the original presentation of the bill had expired, and accordingly had the power to direct a re-engrossment so as to make the bill conform with verity and brevity by excluding therefrom such matters as were admittedly not necessary to a proper presentation of plaintiff's appeal, and obviously of no avail to the defendant's case upon appeal. Warner v. Thomas, etc., Works, 105 Cal. 409, 38 Pac. 960. Upon plaintiff's application for re-engrossment counsel for defendant was present by agreement, and was heard upon his objection that matters material to him would be eliminated by the re-engrossment as ordered, and the court, being fully advised in the matter, denied this objection. In so doing, its order is conclusive, on the record before us, that the matter stricken out was not material. Hyde v. Boyle, 89 Cal. 590, 26 Pac. 1092; In re Gates, 90 Cal. 257, 27 Pac. 195.

[4] The sale sought to be enforced herein was made pursuant to an order of the probate court which had jurisdiction of the estate of the deceased. Defendant insists, and the trial court held, that the probate court did not have jurisdiction to make the order of sale by reason of a defect in the order to show cause, published as the notice of the hearing of the petition of the executor of the estate for an order authorizing and directing the sale of the real estate involved in the present action. At the time the sale in question was made the Code of Civil Procedure authorized the court to make an order for the sale of real estate comprised in the estate of a decedent in case of necessity to pay debts, family allowance, and the like, or in case it appeared to the satisfaction of the court that it would be for the "advantage, benefit and best interests of the estate and those interested therein." Code Civ. Proc. § 1536, prior to 1919 amendment (St. 1919, p. 1179). Section 1538 of the same Code, repealed in 1919 (St. 1919, p. 1177), was in effect at the time the sale was made, and provided that when it appeared to the court from the petition of the executor or administrator that it was necessary or would be beneficial to sell the whole or some portion of the real estate for the purposes and reasons designated by law, or any of them, the petition must be filed, "and an order thereupon made, directing all persons interested in the estate to appear before the court, at a time and place specified * * * to show cause why an order should not be granted to the executor or administrator *for the sale of such estate.*" (Italics ours.) The order which is now under attack required all persons interested "to show cause why an order should not be granted to said executor to sell *so much of the real estate* of said deceased at private sale, *as shall be necessary.*" (Italics ours.) Defendant contends that the use of the word "necessary" amounted to a fatal variation from the language required by the statute, and that it was, moreover, positively misleading, inasmuch as the sale was not sought because it was "necessary" to meet debts, expenses, or the like, but rather on the ground that it

would be beneficial to the estate, a ground which, it is insisted, was concealed and even negatived by the wording of the order. The argument is ingenious, but without merit. Reading section 1538 of the Code of Civil Procedure as a whole, it is obvious that the words "such estate" are used to designate, and do in fact mean, so much of the real estate of the deceased as the court in the exercise of its sound discretion may consider necessary to be sold, whether to secure cash to pay debts or the like or to secure the most advantageous and beneficial administration of the estate, or the advantage, benefit, and best interest of those interested, and it is expressed aptly and plainly by the language of the order to show cause which defendant criticizes. The suggestion that the word "necessary" as used in the order, should be construed as "necessary to pay debts and expenses," lies at the foundation of this criticism. The word "necessary," as used in the order, fairly and naturally means "necessary for any lawful purpose," and, so construed, it makes the language of the order comply substantially with the requirement of the statute. The validity of the sale cannot therefore be attacked on the ground that the probate court did not acquire jurisdiction to order the sale by reason of any defect in the order to show cause. The view which we have taken of the case makes it unnecessary for us to consider the point raised in the briefs concerning the precise effect upon the validity of subsequent proceedings of a defect in such an order.

[5] The order of sale was valid and within the jurisdiction of the probate court. It is therefore doubtful whether the defendant, having failed to appeal from the order confirming the sale, which fixed his liability as a purchaser, has the right to set up, as a defense to the action for the purchase price, alleged defects in the title which were within his knowledge at the time the order of confirmation was made. Hammond v. Cailleaud, 111 Cal. 206, 220, 43 Pac. 607, 52 Am. St. Rep. 167. However that may be, we are of the opinion that there is no merit in any of these defenses. Defendant contends that the claimed defect in the order to show cause, even if not in fact sufficient to vitiate subsequent proceedings, at least threw a sufficient doubt upon the title to make specific performance impossible. It cannot be fairly said that there was any defect in the order to show cause, which had the effect of throwing any reasonable doubt upon the title. Defendant's chief ground for resisting the specific performance of his contract with the estate is based upon an alleged failure of plaintiff to perform an agreement that defendant should receive a deed and certificate of title showing title in him free from incumbrances. The record shows that the incumbrance complained of existed openly, notoriously, and continuously throughout the entire period covered by the transactions here in question, and consisted of an easement of way for an electric power transmission line consisting of wires carried upon steel towers 60 feet in height and 14 feet square at the base, resting upon solid and permanent foundations, one of which towers was known by defendant to be upon the land in question. A general agreement to convey land "free and clear of all incumbrances" does not refer to visible, physical burdens upon the land, permanent in character, and, in the absence of an express agreement, the vendee is presumed to have contracted to accept the land subject to physical incumbrances of an open and notorious nature. Ferguson v. Edgar, 178 Cal. 17, 171 Pac. 1061; Jaques v. Tomb, 179 Cal. 444, 177 Pac. 280; Sisk v. Caswell, 14 Cal. App. 377, 112 Pac. 185; Brewster on Conveyances, § 203. Therefore, even assuming that this representation to convey the land free and clear of incumbrances was made by plaintiff in his capacity as executor, and not as an individual, and assuming, also, that the defense may be considered in an action brought by the executor for the purchase price after confirmation of the sale, defendant cannot rely upon the representation as a ground for refusal to perform, for there has been no misrepresentation.

[6] Defendant finally insists that he is excused from performance by the circumstance that the property suffered a 10 per cent. depreciation in value by reason of a flood occurring between the time of the confirmation of the sale and the date of the commencement of the action. Bearing in mind that prior to the injury to the property defendant was in equity the owner of the land; that he was unquestionably entitled to the possession of the land under the contract with the estate, and that he had actually gone upon the land with men and teams and done about $1,700 worth of grading, we have no doubt that the risk of loss was upon him.

[7] By virtue of the right conferred by section 1554 of the Code of Civil Procedure, the property might have been resold and the present purchaser held responsible if, on the second sale, enough was not realized to pay costs and the amount of the present bid, but that remedy is not exclusive, and does not prevent a resort by the executor to a suit for specific performance. Crouse v. Peterson, 130 Cal. 169, 62 Pac. 475, 615, 80 Am. St. Rep. 89.

It follows from what has been said that plaintiff is entitled to have the contract specifically enforced. The judgment for plaintiff and cross-defendant upon the cross-complaint is affirmed, and the judgment for defendant upon the complaint is reversed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SHAW, J.; WILBUR, J.; SLOANE, J.; LAWLOR, J.

On Petition for Rehearing.

PER CURIAM. In denying the petition for a rehearing we desire to say that, in regard to the claimed depreciation in value by reason of flood, the fact that upon the confirmation of the sale the whole purchase price at once became due and payable, at least upon the original tender and deposit of the deed by the executor, distinguishes the case from the cases relied upon by petitioner.

Rehearing denied.

184 Cal. 63

In re WILSON'S ESTATE. (Sac. 3058.)

(Supreme Court of California. Oct. 8, 1920. Rehearing Denied Nov. 4, 1920.)

1. Wills ⊂⊃440—Instrument must be construed according to intent of testator.

Under Civ. Code, §§ 1317, 1318, the paramount rule in the construction of a will is that a will is to be construed according to the intention of the testator as expressed therein, which intention must be given effect as far as possible; statutory rules of interpretation are to be followed in so far as they aid in determining testator's intention, but all are subject to the rule that intention as shown by the will must prevail.

2. Wills ⊂⊃506(2)—"Heirs" defined.

The word "heirs" is a technical term, and in its technical sense means the persons entitled to succeed at a person's death to his estate in case of intestacy by virtue of the statutes relative to succession.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Heirs.]

3. Wills ⊂⊃506(2)—Nieces and nephews of testatrix entitled to her realty on son's death childless.

By her will giving her son all her realty for life, remainder to his living children, and, if he left none, then on his death to be distributed among "my heirs as provided by the laws of the state of California, the same as if I had died intestate," etc., testatrix's nephews and nieces, determined as of the termination of the son's life estate, surviving her son, who died without issue, *held* to be entitled to all of the realty, except property given absolutely by a codicil to the son, as against the son's surviving wife, it being the intention of testatrix, evident in other provisions, that the word "heirs" be not construed in the strict technical sense.

In Bank.

Appeals from Superior Court, Sacramento County; Charles O. Busick, Judge.

In the matter of the estate of Ellen M. Wilson, deceased. From decree of final distribution, and from an order settling two final accounts, appeals are taken. Decree and order reversed.

Grove L. Johnson, of Sacramento, and Wm. M. Sims, of San Francisco, for appellant.

White, Miller, Needham & Harber, of Sacramento, for respondent.

ANGELLOTTI, C. J. We have here appeals from a decree of final distribution and from an order settling two final accounts. It is stipulated that if the decree of distribution is affirmed, the order settling the accounts shall likewise be affirmed, and that if the decree of distribution is reversed, the order settling the accounts must likewise be reversed.

The question presented on the appeal from the decree of final distribution is one of the construction to be given to certain provisions of the will of the deceased, in view of certain events that have happened since the death of deceased.

By her will, dated April 30, 1896, which was prepared by "an attorney of recognized standing and ability throughout the state of California," deceased first gave all her personal property to her son, Thaddeus McConnell, "to have and to hold the same absolutely, for his own use and benefit." Then followed the provisions as to her real property, which were, omitting certain words not important here, as follows:

"All the real property * * * I give and devise unto my said son, to have and to hold the same for and during the term of his life; and at his death the same shall go to and be the property of his then living children, * * * it being my intention to devise unto him a life estate in the whole of said realty, with remainder over at his death, to his then living children; and if he leave no issue, then upon his death, all such real property shall be distributed among my heirs, as provided by the laws of the state of California, the same as if I had died intestate.

"If my said son shall die before me, leaving issue, then all my property and estate, of every kind, shall go to such issue, to whom I hereby give, devise and bequeath the same; but if he shall die before me without issue, then I give, devise and bequeath the whole of my property and estate * * * unto my heirs, * * * the same to be distributed among them according to the Californian laws of succession in cases of intestacy."

The son was designated as executor, without bonds.

The first codicil, dated February 14, 1898, and admitted to probate as a part of the will, gave $4,000 and a diamond ring to her niece, Carrie J. Doolittle, and contained the following provision, viz.:

"I also give and bequeath to my beloved son Thaddeus C. McConnell my ranch property known as the Stickney place to be his own

property, in fee simple, free from all claims or conditions whatsoever."

On June 2, 1899, she executed a second codicil which merely revoked the legacy of $4,000 to Carrie J. Doolittle, the amount of the same having been given her that day in money, and confirmed and ratified her previously executed will in all other respects.

At the date of the original will Mrs. Wilson was a widow of the age of about 60 years, and Thaddeus C. McConnell, her son by her first husband, was her only child. He was then about 31 years of age and married, but without issue. He had then been married about 4 years. He was possessed of real and personal property, received by him from his father's estate, having taken one half of such estate, while his mother took the other half. Mrs. Wilson's estate consisted entirely of the property derived from her first husband's estate and additional property acquired through her own subsequent investments. At the date of the execution of the will she had several brothers and sisters still living, and numerous nieces and nephews, and the relations between her and her relatives were "very friendly." In the year 1900, Thaddeus C. McConnell "had born to him a son." Mrs. Wilson died on or about April 7, 1907, leaving as her sole heir at law her son, Thaddeus C. McConnell. She left surviving her a brother and numerous nieces and nephews. The son of Thaddeus C. McConnell was accidentally killed in the year 1917, unmarried and without issue. Subsequent to her death and prior to the death of Thaddeus C. McConnell, her brother and one of the nieces, Ellen Flanagan Purchase, died, leaving certain heirs at law. On April 10, 1919, Thaddeus C. McConnell died testate, without living issue, and leaving as his sole heir at law and also his sole devisee and legatee, his widow, Etta M. McConnell.

This being the situation, the 19 nieces and nephews of Mrs. Wilson surviving Thaddeus C. McConnell, claimed to be entitled under the will to all of the real estate left by Mrs. Wilson, except the Stickney property given absolutely by the first codicil to the son. On the other hand, Etta M. McConnell, the surviving wife of Thaddeus C. McConnell, claimed to be entitled to all of the property, including such realty. This claim must, of necessity, be based upon the theory that her husband succeeded to the same under Mrs. Wilson's will, and that it has passed from him to her as his sole heir, legatee, and devisee. As to the personalty and the real property known as the Stickney property, her claim is concededly well based. The only dispute is as to the remaining realty. The superior court sustained the claim of Mrs. McConnell in all respects, and distributed all the property of Mrs. Wilson, including all the real property, to her. The nieces and nephews of Mrs. Wilson appeal from this decree.

[1, 2] The question presented is, of course, as to the intention of the testatrix as disclosed by the language she has used in her will, taking into view in case of any uncertainty arising upon the face of the will, the circumstances under which it was made, exclusive of her oral declarations. The paramount rule in the construction of wills, to which all other rules must yield, is that a will is to be construed according to the intention of the testator as expressed therein, and this intention must be given effect as far as possible. Civ. Code, §§ 1317 and 1318. Statutory rules of interpretation are to be followed in so far as they aid in determining the intention of the testator, but they are all subject to the fundamental rule that the intention as shown by the will must prevail. Respondent's claim is based on the use of the words "my heirs, as provided by the laws of the state of California, the same as if I had died intestate," in designating to whom this real property shall go in the event of the death, after her own death, of her son without living issue. Our statutory rules of interpretation of wills provide that "the words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained" (section 1324, Civ. Code), and that "technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention, or unless it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense." Section 1327, Civ. Code. The word "heirs" is a technical term, and in its "technical sense" one's "heirs" means the persons who would be entitled to succeed at his death to his estate in case of intestacy, by virtue of our statutes relative to succession. See Estate of Watts, 179 Cal. 20, 22, 175 Pac. 415. In this sense of the word the sole "heir" of the deceased was the son, Thaddeus C. McConnell, for at the time of the making of the will and thenceforth to the death of deceased he was entitled under our succession statute to succeed to the whole of her estate in the event of her death without a will. Subdivision 1, section 1386, Civ. Code. It is upon this fact that counsel for respondent base their claim. It is urged that no one can come within the designation "my heirs" other than the son, with the result that the will should be construed substantially as giving the real property absolutely to the son subject only to the contingency of his dying with issue surviving him, in which event it was to go on his death to such issue.

In support of their construction of the will learned counsel for respondent have cited and discussed very many decisions of courts of last resort. It may be said as to all of them that none disputes the paramount rule that the ultimate question is the intention of the testator as expressed in the will, and that

technical rules of interpretation must yield to an intention clearly expressed. The real question discussed in all of them is, What did the testator mean in view of the language he has used in his will, in the light afforded by certain rules of interpretation which must prevail where a contrary intent does not clearly appear on the face of the will? Such is the question here involved. We have said:

"Of this class of questions it may be said, with more truth, perhaps, than of any other, that each case depends upon its own peculiar facts, and that precedents have comparatively small value. Except for the establishment of general principles, very little aid can be procured from adjudged cases in the construction of wills." Estate of Henderson, 161 Cal. 353, 357, 119 Pac. 496, 498.

See, also, Rosenberg v. Frank, 58 Cal. 387; Le Breton v. Cook, 107 Cal. 410, 416, 40 Pac. 552.

[3] To our minds, it seems perfectly clear from the will, in the light of those circumstances which we are entitled to consider, that the testatrix could not have intended her son to constitute or be included within the "my heirs" "among whom" the real property was to be distributed upon the death of the son without issue surviving. It is true that it has often been held that there is no legal inconsistency in an heir who is made a life tenant by a will being included among "the heirs" to whom the remainder is given. If there was nothing in the will here involved to show that others than the son were intended by the designation "my heirs" it might well be claimed that the courts must accept the term in its technical meaning as including only those who at the moment of the death of the testatrix, constituted her heirs at law, viz. her son. See Estate of Watts, supra. But the very language upon which respondent must rely, viz., "Then upon his [her son's] death, all such real property shall be distributed among my heirs, as provided by the laws of the state of California, the same as if I had died intestate," is opposed to the theory of any such intention. It is self-evident that while the son, who was in the strict technical sense the sole heir apparent of this widow of 60 years of age, was an heir, he could not be "heirs," nor could the real property be distributed "among" him, the term "distributed among" necessarily referring "to a gift to more than two" heirs. See In re Hildebrant's Estate (Pa.) 110 Atl. 760. It is almost impossible to conceive that the testatrix, knowing, as she must be held to have known, that her son was her sole heir at law, taking the word "heir" in the technical sense, would have used this language, "distributed among my heirs," etc., to indicate a gift to him.

Especially is this true in view of the fact that wherever before or after these words she referred to her son in the will she designated him as "my son, Thaddeus McConnell," or "my said son," or "my said son, Thaddeus McConnell," indicating that in every case where she intended to provide for or refer to him, she thus described him. If she had intended him or his heirs or devisees to take the real property absolutely in the event that he died after her leaving no issue, would she not necessarily have said, in view of the way in which she had theretofore referred to him, that in that event the real property was to be distributed to "my said son" or to "the heirs or devisees of my said son" instead of "shall be distributed among my heirs," etc.?

Furthermore, the intention to limit the interest of the son in the real property to a life estate appears to be most definitely and clearly expressed. Not only did the testatrix say that she gives the property to him "to have and to hold the same for and during the term of his life; and at his death the same shall go to and be the property of his then living children," but she went further and said, "it being my intention to devise unto him a life estate in the whole of said realty, with remainder over at his death, to his then living children," following this with the provision that "if he leave no issue, then upon his death, all such real property shall be distributed among my heirs," etc. It seems clear that in so far as her son was concerned, the provisions specifically made for him were intended to be the sole provisions in his behalf, and that by the term "my heirs" who were to take in default of issue of her son surviving him was meant her next of kin other than her son. This view is strengthened by the provision made in the next paragraph as to those who shall take her property if her son should die before her. If he died leaving issue, the property was to go to such issue, but if he died before her without issue, then she gives all her property "unto my heirs—the same to be distributed among them according to the Californian laws of succession in cases of intestacy," to the entire exclusion of the wife of the son, or any heir, devisee or legatee of the son.

Particular reliance is placed by counsel for respondent on the words following "my heirs," viz. "as provided by the laws of the state of California, the same as if I had died intestate," but we do not see that they strengthen their claim that the son was intended to be included within the term "my heirs." Obviously this language referred simply to the manner of distribution among the persons constituting "my heirs" "among" whom the property was to be distributed. She gives the property to "my heirs" to be distributed among them in the same manner as is provided by law in cases of intestacy. This thought was clearly in mind with regard to the succeeding paragraph, the paragraph dealing with the property in the event that the son died before her, and is perhaps better expressed therein. She there gave the property in a certain contingency "unto my heirs—the same to be distributed among them

according to the Californian laws of succession in cases of intestacy." In each the idea is that the property is given to the persons denominated "my heirs," to be apportioned among them in the manner provided by the succession statute in case of intestacy.

As we have practically said, it is clearly manifest on the face of this will, when considered as an entirety, that the testatrix could not have intended her son or any person claiming under her son to be included within the "my heirs," "among whom" in a certain contingency the real property was to be distributed. Considering the will in its entirety, the scheme of the testatrix is perfectly clear to our minds. If her son died before her leaving issue, she desired such issue to have all her property, and if he died before her without issue surviving, she desired her own relatives to have all the property, to the utter exclusion of any person or persons taking solely under the son. If he survived her she desired him to have all her personal property as his own, and a life estate only in her realty, with remainder to any of his children who survived him, but if, surviving her, he died without issue surviving him, she desired the real property to go to her next of kin, other than her son.

The case is one where "the context clearly indicates" (section 1327, Civ. Code) that the word "heirs" was not used in the strict technical sense as designating the person or persons who would have succeeded under our succession statutes to the estate of deceased had she died intestate, but was intended to designate only those who would have been her heirs at law but for her son, either at the time of her death or at the termination of the life estate, by the death of the son.

Whether in view of the language of the will such heirs are to be determined as of the date of the death of the deceased or as of the date of the death of the life tenant is a matter of no great moment to the respondent, who was not entitled to any of the real property in dispute in either event, but we think it clear that the intention was that they should be determined as of the date of the termination of the life estate. Apparently those who appeared to claim the realty as against the respondent in the lower court would have been entitled to the great bulk of the realty in either event, all being "heirs" of the deceased but for the son and his issue, both at the date of the death of deceased, and at the termination of the life estate. If the heirs are to be determined as of the date of the termination of the life estate, as we think is the proper construction of the will, such claimants constitute the whole of the heirs to whom such realty is given, and they are entitled to distribution thereof.

The decree of distribution and the order settling the accounts are reversed.

We concur: OLNEY, J.; SHAW, J.; LAWLOR, J.; SLOANE, J.; LENNON, J.

On Rehearing.

PER CURIAM. The petition for a rehearing is denied. In view, however, of the application for modification of the opinion filed herein by one Thomas McConnell, claiming to be an "heir" of deceased within the meaning of the will, and in order that he and others similarly related may not be prejudiced by anything said in the opinion, the last paragraph of the opinion is hereby amended to read as follows:

"If the heirs are to be determined as of the date of the termination of the life estate, as we think is the proper construction of the will, in so far as the record before us shows such claimants constitute the whole of the heirs to whom such realty is given."

ANGELLOTTI, C. J., and SHAW, OLNEY, LAWLOR, and LENNON, JJ., concur.

(49 Cal. App. 493)

BRADFORD v. TRAPP et al. (Civ. 3506.)

(District Court of Appeal, First District, Division 1, California. Oct. 6, 1920. Hearing Denied by Supreme Court Dec. 4, 1920.)

1. Judgment ⟸501—Binding on other courts when within jurisdiction.

Judgment of a court having jurisdiction is binding on other courts, errors being correctable only from within by motion or appeal.

2. Judgment ⟸719—Conclusive on parties on matters in issue passed on.

Judgment of a court having jurisdiction is, under Code Civ. Proc. § 1908, conclusive on the parties on all issues raised in the pleadings and passed on; so the parties may not litigate the same matter in a new action.

3. Records ⟸18(6, 7) — Service in statutory mode effective.

Service of summons in a McEnerney Act suit in the statutory manner is as effective as personal service.

4. Records ⟸18(10)—Error in decision not a mistake.

Error in the decision of the issue of title, directly before the court in a McEnerney Act suit, is not, in the legal sense, a "mistake" for which the judgment may be impeached.

5. Records ⟸18(10)—Not set aside for forged deed in evidence, equivalent to perjured testimony.

The forged deed in evidence on which plaintiffs in a McEnerney Act suit based title is the equivalent of perjured testimony for which a judgment cannot be set aside.

6. Records ⟸18(10)—Grantor in forged deed is a party bound by proceedings to establish title.

The grantor in a forged deed, which was the basis of the title of plaintiffs in a McEnerney

Act suit against all persons claiming any title in the property, was a party, as though expressly named, and so after the time for appeal bound by the regular judgment for plaintiffs; there having been no mistake and no fraud of plaintiffs for which the judgment can be impeached.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Suit by William Bradford against John G. Trapp and another. Judgment for plaintiff, and defendants appeal. Reversed, with directions.

George Clark Sargent, Tobin & Tobin, and Geo. A. Clough, all of San Francisco, for appellants.

Charles L. Brown and Clarence E. Todd, both of San Francisco, for respondent.

KINSELL, Judge pro tem. Defendants prosecute this appeal from a judgment in a suit in equity brought to vacate a judgment obtained by them as plaintiffs in a suit brought pursuant to the McEnerney Act (St. [Ex. Sess.] 1906, p. 78) against all persons.

There is no material dispute as to the facts of the case, which are substantially as follows:

Defendants purchased certain real property on March 4, 1915, and upon paying therefor received a deed wherein one William Bradford was named as grantor, which deed was immediately recorded. They entered into possession of the premises and proceeded to erect a dwelling thereon, and on June 4, 1915, commenced a suit under the McEnerney Act, which resulted in a judgment establishing the fact that they were the sole owners of the premises, which judgment was entered September 25, 1915. The proceedings in such suit are apparently regular, and the judgment on the face of the record appears to be valid. The respondent was not in name made a party defendant in such suit nor was he personally served with summons therein.

In January, 1917, after the McEnerney judgment had become final, respondent Bradford appeared, claiming that the deed to appellants, and on which they based their title and claim in the McEnerney suit, was a forgery. His motion for relief in the McEnerney suit having been denied, the present suit was instituted.

In this suit respondent recovered the judgment from which the appeal is taken. The respondent sought judgment on several counts, but that relied upon, and upon which the judgment of the lower court rests, sets forth that the judgment in the McEnerney suit was granted by mistake in that it was not disclosed to the court that said deed purporting to have been executed by respondent to the appellants was a forgery. There is no element of fraud involved, since it appears affirmatively, and the trial court found, that the appellants did not know their deed to be a forgery, but believed it to be valid. The trial court further found, however, that the deed in dispute was a forgery.

Appellants contend that the judgment in the McEnerney suit is final and conclusive upon the question of title to the property. Stripped of its side issues concerning the admissibility of evidence, the appeal becomes practically a test of the strength of a McEnerney title.

It is our opinion that appellants' contention must be sustained.

[1] It is a doctrine of law too long established to require the citation of authorities that where a court has jurisdiction it has a right to decide every question arising in the cause, and, whether its decision be correct or otherwise, its judgment until reversed is binding on every other court. Errors which it may make must be corrected from within by motion or appeal.

[2] A judgment is conclusive upon all the issues raised in the pleadings and passed upon by the court, and the parties are precluded from litigating the same matter in a new action. Code Civ. Proc. sec. 1908.

[3] The proceedings in appellants' McEnerney suit were regular and the statutory mode and requirements for service of summons were fully complied with. Hence the service of summons by such mode was as effective for all purposes as personal service. Emery v. Kipp, 154 Cal. 83, 97 Pac. 17, 19 L. R. A. (N. S.) 983, 129 Am. St. Rep. 141, 16 Ann. Cas. 792.

[4] It is true, as respondent contends, that a judgment may be impeached for mistake as well as for fraud, but error by the court in the decision of an issue squarely before it is not, in the legal sense of the word, a mistake. The court in the McEnerney suit had jurisdiction to try and determine all estates in the property. Title was the issue directly before the court. Its mistake, if any, was one in the very matter before it; hence it was intrinsic and not subject to correction after the time for appeal had expired.

[5] The forged deed in evidence was the equivalent of perjured testimony, and it is the settled law of this state that a judgment cannot be set aside because it is predicated upon perjured testimony. There must be an end to litigation. Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; People v. Mooney, 178 Cal. 525, 174 Pac. 325.

[6] Since the McEnerney suit brought in as defendants all persons claiming any estate in the property in dispute, respondent was in law a party thereto just as though he had been expressly named therein. The court had jurisdiction of the subject-matter and of the parties, and the decree operated upon all persons claiming or having any claim to any estate, right, or title in the property in question.

Judgment is therefore reversed, and the trial court is instructed to enter judgment for defendants.

We concur: WASTE, P. J.; RICHARDS, J.

49 Cal. App. 497

MATHEWS v. MATHEWS. (Civ. 3408.)

(District Court of Appeal, First District, Division 1, California. Oct. 6, 1920.)

1. Divorce ⟸243—Interlocutory judgment for permanent alimony enforceable though not carried into final decree.

Provision in an interlocutory judgment of divorce for payment of certain permanent alimony, though subject to modification, need not be expressly carried into the final decree to be enforceable where not modified.

2. Divorce ⟸243—Award of permanent alimony in interlocutory judgment not modified by silence of final decree.

Silence of the final decree of divorce as to alimony is not to be taken as a modification of the provision of the interlocutory judgment for payment of certain permanent alimony, but as an acquiescence in the correctness of the judgment in that respect.

3. Divorce ⟸245(1)—Alimony may be modified.

Under Civ. Code, § 137, the court at all times has power to modify its orders in respect to alimony, at least where they are based on evidence heard rather than on the parties' agreement.

4. Appeal and error ⟸854(2)—Erroneous order as to alimony not sustained on reason not given.

The principle that an order sustaining a demurrer or a motion for a new trial may be upheld on a ground of the demurrer or motion, though an erroneous reason is assigned by the trial court for its action, *held* not applicable to erroneous order that alimony cannot be collected because the provision of the interlocutory judgment was not carried into the final decree.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Ada E. Mathews against William H. Mathews. From an adverse order, plaintiff appeals. Reversed.

H. W. Glensor and Aitken, Glensor, Clewe & Van Dine, all of San Francisco, for appellant.

Ross & Ross, of Redwood City, for respondent.

KINSELL, Judge pro tem. Appeal from a special order of the superior court of San Mateo county, granted on motion of defendant for an order vacating the portion of an interlocutory judgment allowing plaintiff alimony.

Plaintiff instituted the action for divorce on grounds of extreme cruelty. Before a trial a written stipulation was entered into between the parties which provided, among other matters, that if the court awarded a decree of divorce to plaintiff, $30 per month might be awarded to plaintiff as permanent alimony. Thereafter an interlocutory judgment was granted to plaintiff which provided that defendant pay plaintiff $30 per month as permanent alimony. This interlocutory judgment was not appealed from nor modified, and, the necessary time having elapsed, final decree of divorce was entered, which decree was silent on the subject of maintenance or alimony.

Shortly after six months from the entry of such final decree defendant moved to modify the interlocutory judgment by vacating the portion thereof which provides for the payment of alimony. Such motion was made upon the grounds that the final decree did not contain any direction as to the payment of alimony, and that the financial circumstances of the parties had so changed as to make the requirement as to payment of alimony unjust. The motion was supported by the affidavit of defendant, alleging changes in the financial situation of the parties, as well as other matters immaterial to our consideration of the case. Plaintiff filed a counter affidavit setting forth the stipulation above referred to, and joining issue with the averments of defendant's affidavit as to the financial status of the parties.

The motion having been submitted, the trial court made the following order:

"Payment of alimony provided in the interlocutory decree herein was not carried into the final decree, and hence alimony herein cannot now be collected."

[1, 2] It is respondent's contention, apparently approved by the trial court, that since the final decree made no reference to the subject of alimony, he is entitled to relief from the payment required by the interlocutory judgment.

With this contention we cannot agree. The failure of the court to carry into its final decree the provisions for alimony provided in the interlocutory judgment does not in or of itself entitle the husband to an order relieving him from the requirements of the interlocutory judgment in that behalf. By section 137, Civil Code, it is provided that when an action for divorce is pending the court may require the husband to pay as alimony any money necessary to enable the wife to support herself and her children. Thus, when the court by its judgment does require the husband to pay alimony, and that judgment is not appealed from or vacated, it

stands as the judicial determination of the right of the wife to such alimony, subject always to the retention by the court of jurisdiction to modify its judgment from time to time in that respect.

That the court may modify its orders with respect to alimony there can be no question. It is so provided in Civil Code, § 139, and our courts have so held. See Howell v. Howell, 104 Cal. 45, 37 Pac. 770, 43 Am. St. Rep. 70; Soule v. Soule, 4 Cal. App. 97, 87 Pac. 205.

In Bancroft v. Bancroft, 178 Cal. 367, 173 Pac. 582, our Supreme Court said:

"It is well settled that an interlocutory decree of divorce is only subject to attack in the proceeding in which it is entered upon appeal, or by proceedings under section 473 of the Code of Civil Procedure, within six months after the entry of such decree, and that, after the expiration of the period within which either of these forms of attack may be made, the trial court is without jurisdiction to alter or set aside its interlocutory decree."

That is a correct statement of the law, but is not intended to, nor does it, mean that provisions in such interlocutory decree for payment of alimony may not be modified.

In the instant case the right to alimony was presented and litigated in the action and established by the interlocutory judgment. The trial court would have the right to modify the order in that respect in and by the final decree, as well as before or after entering the same, but it did not do so, nor can it be said that the judgment was modified by the final decree in respect to alimony simply because such decree is silent on that subject. On the contrary, silence at such time must be construed to be acquiescence in the correctness of the previous judgment on that subject.

[3] It is urged by appellant that the alimony provisions of the interlocutory judgment cannot be modified because they were fixed by agreement of the parties. We cannot assume in this case that such provisions were fixed by agreement. The so-called agreement is simply a stipulation as to what the court might do with respect to permanent alimony if at the trial of the cause a divorce were awarded plaintiff. Since at such trial evidence was taken, and the decree makes no reference to the stipulation of the parties concerning alimony, we must assume, in the absence of further showing, that the award of the trial court was based upon the proofs taken on the trial, rather than upon agreement of the parties. Under such circumstances the court at all times has power to modify its orders in respect to alimony. Soule v. Soule, supra. No showing having been made that the requirements of the interlocutory judgment as to payment of alimony were made pursuant to agreement of the parties, it is unnecessary for us to decide whether the court would lose its right to modify an order based solely upon such agreement.

[4] Respondent urges that, because of the fact that his motion sought relief on the further ground that the financial circumstances of the parties had changed, we should uphold the ruling of the lower court. We are cited to numerous authorities holding that, in the event of a ruling by the lower court on a demurrer or motion for new trial, the respondent is not limited to the reason assigned by the trial court for its action, but may urge all the grounds specified in his demurrer or notice of motion. Burke v. Maguire, 154 Cal. 461, 98 Pac. 21; Morgan v. Robinson, 157 Cal. 348, 107 Pac. 695. The soundness of these decisions cannot be questioned, but they are not applicable to the present case.

This appeal is prosecuted from the special order of the trial court above quoted. The proceeding was instituted by defendant's motion. The court did not grant such motion, but made an order which shows by its very terms that it was based upon the proposition that a provision for the payment of alimony in an interlocutory judgment of divorce cannot be enforced unless it is carried into the final decree. Such is not the law.

The trial court's order was erroneously made, and is reversed.

We concur: WASTE, P. J.; RICHARDS, J.

49 Cal. App. 40

KATSCHINSKI v. KELLER et al.
(Civ. 3485.)

(District Court of Appeal, First District, Division 2, California. Sept. 29, 1920.)

1. Trade-marks and trade-names ⊜93(3)—Evidence held not to sustain findings defendants had never done business under name complained of.

In an action to restrain defendants from conducting a shoe store under the name of "Philadelphia Shoe Store," evidence *held* not to support the trial court's findings adverse to plaintiff that the defendants had never at any time done business, and were not doing business, under such name, and that plaintiff had never demanded of defendants that they desist from using such name.

2. Trade-marks and trade-names ⊜9—Geographical name used fictitiously to indicate ownership may be good.

When a geographical name is not used in a geographical sense, but in a fictitious sense merely to indicate ownership independent of location, as the name "Philadelphia Shoe Store" used by plaintiff doing business in California and seeking to enjoin defendants from

using the same name, it may be a good trademark or trade-name.

3. Appeal and error ⊂⊃1122(2)—Clear evidence does not warrant appellate court in making finding.

Though the evidence is clear and undisputed on a given point of fact, the appellate court is not thereby warranted in making a finding thereon, which duty rests solely with the trial court.

4. Trial ⊂⊃397(1)—Admission by counsel on point of fact not so clear as to relieve court from making finding.

In an action to enjoin defendants from using the name "Philadelphia Shoe Store," claimed admission by defendants' counsel during trial that they were doing business under such name, and not under the name of "Philadelphia Shoe Store of Fresno," *held* not so clear and definite, in view of the record, as to relieve the trial court of making a finding thereon.

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by Bernard Katschinski against John J. Keller and others. From judgment for defendants, plaintiff appeals. Reversed.

Norman A. Eisner, of San Francisco, for appellant.

E. A. Williams and C. K. Bonestell, both of Fresno, for respondents.

NOURSE, J. Plaintiff and appellant, doing business under the name and style of "Philadelphia Shoe Company," with its principal place of business in San Francisco, commenced this action to restrain defendants from conducting the same line of business in the city of Fresno under the name of "Philadelphia Shoe Store." Two causes of action were included in the complaint, the first based upon plaintiff's exclusive state ownership of the name by virtue of his continuous use thereof since 1881 and his registration of the trade-name with the secretary of state pursuant to section 3197 of the Political Code, and the second based on the common-law right of protection against unfair trade and competition. Judgment was given in favor of defendants, from which plaintiff has appealed on the ground that the evidence does not support the findings made by the trial court.

The allegations of the first cause of action found to be true by the court are, generally, that in 1881 plaintiff commenced doing business as a dealer in boots and shoes in the state of California, with his principal place of business in the city and county of San Francisco, under the name of "Philadelphia Shoe Company," and adopted said name as a trade-name in his said business; that ever since said date he has conducted and is now conducting his said business under said trade-name; that on the 12th day of July, 1900, and before the filing of said trade-name by any other person, plaintiff filed with the secretary of state his claim to said name pursuant to section 3197 of the Political Code; that the name "Philadelphia" as adopted and used by plaintiff in connection with said business was and is a purely arbitrary and fanciful designation for the purpose of identifying and distinguishing the business of plaintiff, and has not been used for the purpose of indicating a particular locality as in any way connected with the business or the place where the business is carried on.

[1] The findings of the trial court as to the first cause of action adverse to plaintiff are that the defendants have never at any time done business, nor are they now doing business, in the name and style of "Philadelphia Shoe Store," and that plaintiff has never demanded of defendants that they desist from using the name "Philadelphia Shoe Store." That these findings are not supported by the evidence is too plain to be questioned, and this apparently is conceded by counsel for respondents, as they have made no attempt in their brief to sustain the findings. At the trial the defendants offered no evidence on any branch of the case. The evidence produced by plaintiff showed conclusively that defendants for a long time prior to the time of the commencement of the action had been doing business in the city of Fresno under the name of "Philadelphia Shoe Store"; that their checks were signed in that manner; that their stationery contained the same designation, and it is argued that their certificate of copartnership under which they were doing business carried the name "Philadelphia Shoe Store." There was not a particle of evidence controverting this showing, and, in fact, the court found in relation to the second cause of action "that defendants are copartners doing business in the city of Fresno, county of Fresno, state of California, under the name and style of Philadelphia Shoe Store." As to the finding with reference to plaintiff's demand of defendants that they desist from using the name "Philadelphia Shoe Store," the only evidence of any nature upon this branch of the case was to the effect that such demand had been made. Furthermore, demand was admitted by defendants' failure to deny the allegations of the complaint relating thereto.

As to the second cause of action, the court found that the defendants were copartners doing business in the city of Fresno under the name and style of "Philadelphia Shoe Store," and followed this immediately with a finding that they were not doing so. The evidence upon which this latter finding is based being the same as that hereinbefore referred to in relation to the first cause of action, the error of the finding is apparent.

Objection is also made to other findings of the trial court relating to the second cause of

action, but it will serve no purpose to discuss them here, inasmuch as from what has heretofore been said it is apparent the judgment must be reversed, and it is unlikely that the same errors will again occur.

[2] Respondents rest their case on this appeal upon the argument that the word "Philadelphia," being a geographical name, is one which cannot be exclusively appropriated by plaintiff. The argument is unsound. The allegations of the complaint, the evidence offered at the trial, and the finding of the trial court all show that the word "Philadelphia" was used by both parties as a purely arbitrary and fanciful name for the purpose of distinguishing and identifying the business, and not in any way in a geographical sense. When a geographical name is not used in a geographical sense, but is used in a fictitious sense merely to indicate ownership, independent of location, it may be a good trade-mark or trade-name. Drake Medicine Co. v. Glessner, 68 Ohio St. 337, 67 N. E. 722, 727; Sanders v. Utt, 16 Mo. App. 322, 326.

[3, 4] Appellant insists that this court should direct judgment in his favor because the evidence upon which the adverse findings are based is so clear and undisputed that the findings must be disregarded as nugatory. It is true that as to the finding of failure to make demand the allegations of plaintiff's complaint were admitted by the failure of defendants to deny them, and the adverse finding should be disregarded. But as to the use of the name "Philadelphia Shoe Store" the admissions in the pleadings are not sufficient to relieve the court of a finding upon that issue. The evidence is clear and undisputed, but this does not warrant this court in making a finding thereon. That duty rests solely with the trial court. It is argued that counsel for defendants admitted during the course of the trial that they were doing business under that name, and a portion of the record is quoted in appellant's brief to support that argument. Reference to the record discloses that the admission made by counsel for defendants did not go to the extent claimed by appellant. During the course of the trial plaintiff offered in evidence the certificate of copartnership of defendants as indicating that they were doing business under the name of "Philadelphia Shoe Store." The court asked if it would be admitted, and counsel for defendants answered in the affirmative. It was then stated by plaintiff's counsel:

"They admit now that they are doing business now under the name of Philadelphia Shoe Store."

To which counsel for defendants replied:

"The admission is in the record. We are not making any admission now. Your allegation in the complaint is not denied."

To which counsel for plaintiff replied:

"I understood you did deny it. You allege in your answer that you are not doing business under the name of Philadelphia Shoe Store, but under the name of Philadelphia Shoe Store of Fresno. I am offering this to prove that you are doing business without any appendage to it, but just Philadelphia Shoe Store. If you make an admission to that effect, I don't need to make proof; if it is not, I will prove it. I will offer the certificate."

To which defendants made no objection and stipulated that the certificate be read. It is not made a part of the record, and it is now impossible to determine its contents. Upon this state of the record the court cannot say that the admission was so clear and definite as to relieve the court of making any finding thereon.

For the reasons given, the judgment is reversed.

We concur: LANGDON, P. J.; BRITTAIN, J.

49 Cal. App. 410

LANE v. PACIFIC GAS & ELECTRIC CO.
(Civ. 3545.)

(District Court of Appeal, First District, Division 1, California. Sept. 29, 1920.)

1. Gas ⟸13(6)—In action for discontinuing service a rule of commission, requiring deposit of amount of disputed bill, was admissible.

In a damage action against a gas company for discontinuing service, it was proper to introduce a rule of the Railroad Commission, preventing such companies from discontinuing service for nonpayment of disputed bills on deposit of the amount of the bill.

2. Gas ⟸13(6)—Rule requiring deposit to prevent company cutting off gas held applicable.

A rule of the Railroad Commission, preventing companies from discontinuing gas service for nonpayment of disputed bills for metered service, where consumer deposited amount with Railroad Commission, applies to bill for gas which a defective meter had failed to measure, but which amount had been determined by test.

3. Gas ⟸13(6)—Rule preventing gas companies cutting off service for nonpayment of bills, not void.

A rule of the Railroad Commission, preventing water, gas, and light companies from discontinuing service because of nonpayment of disputed bills, where consumer placed the amount in dispute with the commission for settlement, is not void because of provisions of Public Utilities Act, §§ 13, 73, giving patrons of gas companies a right of action for its illegal acts.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

4. Appeal and error ⊂=1064(4)—Reference to order of Railroad Commission as statute in instructions held not prejudicial error.

In an action against a gas company for shutting off service, a slip of the tongue on the part of trial judge, by which he referred to a rule of a railroad commission relating thereto as a statute, could not have prejudiced plaintiff's case before the jury.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Helen V. Lane against the Pacific Gas & Electric Company. Verdict and judgment for defendant, and plaintiff appeals. Affirmed.

Reisner & Stoney, of San Francisco, for appellant.

Thos. J. Straub, Wm. B. Bosley, and Stanley Moore, all of San Francisco, for respondent.

BEASLY, Judge pro tem. This is an action for damages for the discontinuance by defendant of the service of gas to plaintiff's premises. The defendant had a verdict from a jury, and from the judgment entered upon it the plaintiff appeals.

[1] The pertinent facts of the case are few; the questions of law arising therefrom simple. A meter was installed by defendant on plaintiff's premises on January 18, 1918, for measuring the gas used by plaintiff. The defendant supplied gas to plaintiff measured through this meter until February 24, 1919. During this period defendant presented bills monthly to plaintiff for the gas consumed as indicated by this meter, and these bills were paid by plaintiff. About December 13, 1918, defendant discovered that the meter did not register correctly, and installed on that date a new meter. This new meter registered more gas than the old meter. Thereupon the defendant estimated a quantity of gas, which it claimed plaintiff had used in excess of that registered by the former meter during the time the latter was in operation, and presented a bill of $26.30 for the same. Plaintiff disputed the bill, and refused to pay it. She was willing to pay for all gas registered by the meters, new and old, but not for this estimated quantity above the readings of the meters. Thereupon defendant demanded by letter that the plaintiff deposit the $26.30 thus claimed with the Railroad Commission, and submit the controversy between the parties to that body for decision. This she refused to do, and defendant thereupon shut off her gas. She then brought this action to recover from the defendant $25,045.50 as damages.

In course of the trial the defendant offered rule 6 of the Railroad Commission in evidence, and it was admitted. The court also gave to the jury the following instruction as to the effect of this rule upon the rights of the parties:

"I instruct the jury that the following rule and regulations on the subject of the disputed bills has been established for the guidance of the defendant and its consumers by the Railroad Commission of the state of California: 'A water, gas, electric or telephone utility may not discontinue service by reason of nonpayment of bills for metered or measured service theretofore delivered, in cases in which there is a dispute as to the amount of the bill. In case of such dispute the consumer shall deposit with the Railroad Commission the amount claimed by the utility to be due, whereupon the Railroad Commission will investigate the facts and communicate its findings to the parties. Failure of the consumer to make such deposit within fifteen days after demand by the utility that such deposit shall be made, shall warrant the utility in discontinuing the service.' And I further instruct you that the defendant and its consumers are bound and controlled by the above regulation of the Railroad Commission. If you believe in this case that there was a dispute between the plaintiff and the defendant as to the correct amount of the bill rendered by the defendant for gas service from June 1, to December 13, 1918, claimed to have been furnished to the plaintiff, and that thereafter the defendant notified the plaintiff to deposit with the Railroad Commission of the state of California the amount claimed by the company to be due, in order that the Railroad Commission might investigate the facts and communicate its findings to the parties, and that the defendant notified the plaintiff that the service would be discontinued if she failed to deposit such amount with the Railroad Commission or pay the same within 15 days after the defendant's notice so to do, and that after receiving said notice the plaintiff failed for said period of 15 days thereafter to either deposit the amount of the disputed bill with the Railroad Commission or to pay the same, or any part thereof, then and under such circumstances the court instructs the jury that the defendant was justified at the end of 15 days in discontinuing the service without further notice."

Upon the admission of the rule in evidence and the above instruction predicated thereon the plaintiff bases her demand for a reversal of the judgment.

Neither the admission of the rule in evidence nor the instruction was erroneous. Pursuing the course laid down by the rules of the Railroad Commission in the matter was a complete defense to this action. This court so held in Hartigan v. Pacific Gas & Electric Co., 38 Cal. App. 763, 177 Pac. 484. In deciding that case, the facts of which were in most respects similar to this, this court said:

"The court is of the opinion that the petition for the writ is deficient in its failure to state that the petitioner had complied with the rules and regulations formulated by the Railroad Commission under the Public Utilities Act of this state (St. 1911, Ex. Sess., p. 18); the commission being given statutory control of

the subject-matter involved in this particular proceeding. For that reason the demurrer to the petition will be sustained."

[2] The plaintiff contends, however, that rule 6 is not applicable to this case because, as it is claimed, it covers only "metered" and "measured" service, and that the gas here charged for was neither metered nor measured. The terms "metered" and "measured" are used in the rule to distinguish service paid for by quantity from that paid for at a flat time rate. The Railroad Commission so decided in its case No. 683. In that decision the Railroad Commission divides all services rendered by public utility companies, such as gas companies, into two kinds or classes only, to wit: (a) Metered service, by which is meant all service for which the consumer pays according to the amount of the commodity used by him; and (b) unmetered service, by which is meant service paid for at a flat rate per month, regardless of the quantity of the commodity actually consumed. This distinction seems to us reasonable, and, interpreted in the light of it rule 6, must be held to include the claim involved in this case.

[3] Nor can we agree with the contention of plaintiff that this rule is void because of the provisions of sections 13 and 73 of the Public Utilities Act. Those sections give patrons of gas companies rights of action for illegal acts committed by the public utility, but in making this rule the commission acted within its authority (Hartigan v. P. G. & E. Co., supra; Pac. Tel. & Tel. Co. v. Eshelman, 116 Cal. 640, 137 Pac. 1119, 50 L. R. A. [N. S.] 652, Ann. Cas. 1915C, 822, Const., art. 12, § 23); and, if the facts were as above recited —which is not disputed—the defendant corporation was acting strictly within its rights when it shut off the plaintiff's gas, after she had refused to comply with its demand that she submit her controversy to the commission. This much may be further said concerning this rule: It was formulated for the convenience and protection mainly of consumers, to prevent the purveyors of gas or water from shutting off the consumers' supply pending the decision of controversies as to their bills. The consumer can under the rule deposit the amount of the company's claim with the commission, and litigate the dispute before it, his supply being in the meantime continued, thus escaping the hardship of having his service cut off—an act of public utility concerns which frequently, from a practical standpoint, deprived the consumer of his remedy by appeal to the tedious processes of the regularly constituted courts in matters where the sums involved were usually trivial.

From all this it appears that the admission of the rule in evidence and the instruction based thereon were proper.

[4] The slip of the tongue on the part of Judge Hunt (for such it appears to have been), by which he referred to this rule as a statute of the state, could not have prejudiced the plaintiff's case before the jury. Whether statute or rule it was binding on them.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

49 Cal. App. 436

LEARNED v. PENINSULA RAPID TRANSIT CO. (Civ. 3549.)

(District Court of Appeals, First District, Division 1, California. Sept. 30, 1920.)

1. Trial ⟸296(7)—Instruction as to burden of proving negligence of another held not erroneous.

In an action by passenger for injuries, an instruction that the burden of proving the carrier's affirmative defense that the injuries were caused by the negligence of another was on carrier was not erroneous as requiring carrier to prove such negligence by a preponderance of the evidence, where the court also instructed the jury that throughout plaintiff must prove his case by preponderance of the evidence, and that defendant was not liable unless its negligence was either the sole or contributing cause to the accident.

2. Damages ⟸216(7)—Instructions as to future suffering held correct.

Instruction authorizing the jury to consider the pain and suffering which will be a result of the injuries sustained by her restricts recovery to the pain and suffering certain to result from the injuries, which is allowable under Civ. Code, § 3283, and is not objectionable as permitting the jury to speculate as to what suffering might thereafter be endured.

3. New trial ⟸101 — Testimony of unlocated witness not newly discovered.

A witness whose testimony was known to defendant before the trial, but whose location was unknown, so that he could not be produced at the trial, is not newly discovered evidence on which a motion for new trial can be based; defendant's remedy being by motion for continuance to procure the attendance of the witness.

4. New trial ⟸104(2)—Not granted for cumulative testimony.

Newly discovered evidence as to a fact concerning which a number of witnesses for both sides testified is cumulative, and does not require the granting of a new trial.

5. Appeal and error ⟸1004(3)—Verdict for $6,000 reduced to $2,000 held not to be reversed.

In a suit for personal injuries, where the verdict awarding plaintiff $6,000 was reduced by the trial court to $2,000, and there was evidence to support recovery for the latter sum,

the appellate court will not reverse the judgment on the ground that it is excessive.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Lillian Learned against the Peninsula Rapid Transit Company. Judgment for plaintiff, and defendant appeals. Affirmed.

A. D. Thomson, of Oakland, and Ray Benjamin, of San Francisco, for appellant.

Reisner & Honey, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of plaintiff in an action for damages for injuries sustained by her in a collision between a motorbus of the defendant, upon which she was a passenger, and a street car of the municipal railroad of San Francisco. The jury returned a verdict in plaintiff's favor for the sum of $6,000, for which judgment was entered; but the court, upon defendant's motion for a new trial, ordered that, unless the plaintiff should consent to a reduction of this amount to $2,000, a new trial would be granted. The plaintiff consented to this reduction, whereupon the new trial was denied.

The defendant appeals from the judgment as thus modified, and urges four points upon appeal: (1) That the court's instruction upon the burden of proof was erroneous; (2) that its instruction concerning future suffering was erroneous; (3) that the motion for a new trial upon the ground of newly discovered evidence should have been granted; and (4) that the damages were excessive.

The instruction upon the burden of proof of which the defendant complains reads as follows:

"Contributory negligence on the part of a passenger cannot be presumed from the mere fact of an injury, but must be proved. On the other hand, the proof of an injury to a passenger on the bus or vehicle of a common carrier casts upon the common carrier the burden of proving that the injury was occasioned by inevitable casualty or some other cause which human care or foresight could not prevent, or by the contributory negligence of the passenger. In the answer filed by the defendant it has claimed that the injuries, if any, sustained by the plaintiff on the 10th day of September, 1917, referred to in plaintiff's complaint were sustained through the negligence of the operatives of the municipal street car. I charge you that this defense is an affirmative defense, and under the law of this state the burden of proving such defense is upon the defendant; and I instruct you in this connection that if you find from the evidence that the operatives of the municipal street car were negligent, and that the operatives of the motor bus were also negligent, then your verdict must be in favor of the plaintiff and against the defendant, Peninsula Rapid Transit Company."

[1] The objection which the defendant urges to this instruction is that the jury is therein instructed that the defendant was required to prove by a preponderance of evidence its affirmative defense that the plaintiff's injuries were sustained through the negligence of the employés of the municipal railroad. The instruction does not so declare, as did the instruction in the case of Valente v. Sierra R. R. Co., 151 Cal. 534, 91 Pac. 481, upon which the defendant relies to support its contention in this regard; but, on the contrary, the Supreme Court in that case, while disapproving the instruction therein given, said:

"Instructions declaring that when such an accident is shown the 'burden of showing' want of negligence is on the defendant do not mean, according to the decisions of this state, that the defendant is compelled to show want of negligence by a preponderance of evidence. The term 'burden of showing' or 'burden of proof,' used in that connection, signifies simply the burden of meeting the prima facie case made by the plaintiff."

In that case also the Supreme Court substantially approved an instruction in the form of the one above quoted; but in addition to this the trial court in the instant case gave a number of other instructions at the defendant's request, among which was the following:

"Throughout the plaintiff must prove his case by a preponderance of evidence. In no case is the defendant required to offset the testimony or presumption favoring the plaintiff by a preponderance of testimony. Such burden is at all times upon the plaintiff and the plaintiff alone."

The court also instructed the jury at the request of the defendant as follows:

"Even though the defendant in this case was acting in a negligent manner, nevertheless, if that negligence was not either the sole or a contributing cause to the accident, you should find in favor of the defendant."

We think these instructions, taken together, correctly state the law touching the subject in respect to which they were given.

[2] The next contention of the appellant is that the court's instruction respecting the plaintiff's future suffering as a basis for damages was erroneous. This instruction reads as follows:

"If you believe from the evidence that the plaintiff, Lillian Learned, is entitled to a verdict against the defendant, you may assess the amount of damages in a sum not to exceed the amount prayed for in the complaint, and in so doing you have a right to consider the character of the injuries, if any, sustained by the plaintiff; the pain and suffering, if any, endured and which will be endured as a result of said injuries sustained by her, if any; the effect of such injuries, if any, upon the plaintiff; the permanent character of said injuries, if any; what before the injuries complained of was the

health and physical condition of plaintiff, her physical ability to maintain herself as compared with her condition afterwards."

The appellant's criticism of this instruction is that it does not instruct the jury in the language of section 3283 of the Civil Code, which provides that "damages may be awarded, in judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future," but that the instruction given leaves the jury to conjecture or speculation as to what suffering might thereafter be endured. We do not think the instruction is subject to this criticism. The jury is plainly instructed that it may consider "the pain and suffering, if any, endured and which will be endured as a result of said injuries." This instruction, we think, is in substantial compliance with the terms of the section of the Civil Code above quoted, and that the jury were confined in their admeasurement of damages to such pain and suffering as the plaintiff would, or, in other words, would be certain to, endure as a result of her injuries.

[3] The appellant's next contention is that the trial court should have granted its motion for a new trial upon the ground of newly discovered evidence. The gravamen of the appellant's complaint under this contention is that certain witnesses to the collision who would have testified in support of its defense that the accident occurred through the negligence of the employees of the municipal railroad were not located by it until after the trial. As to one of these, the witness Dias, the defendant knew what he would have testified to before the trial, and hence his evidence is not to be classed under the head of newly discovered evidence for the purposes of a new trial. If he could not be found by the exercise of due diligence prior to said trial, that would have been a ground for a continuance for which the defendant did not move; but it cannot be made the basis of a motion for a new trial under the head of newly discovered evidence.

[4] As to the other of these witnesses, we are not satisfied as to the defendant's showing of due diligence in seeking out these witnesses prior to the trial already had; but, conceding that such showing was sufficient, the testimony of said witnesses would be merely cumulative upon a matter of fact upon which a number of witnesses for both sides were sworn and testified. A new trial will not as a rule be granted upon a showing of the delayed discovery of evidence of this character. The case of Spear v. United Railroads, 16 Cal. App. 637, 117 Pac. 956, upon which appellant relies in support of this point, does not present, in our opinion, a parallel to the instant case. The trial court was not in error in refusing to grant a new trial on this ground.

[5] The appellant's final contention is that the damages were excessive, and in support of it certain evidence as to the extent of plaintiff's injuries is quoted in its brief. The appellant does not, however, either in said brief or in any supplement thereto, give us the benefit of the entire evidence upon this subject, but from that portion of it which the respondent supplies we are satisfied that the appellant's contention in this regard has no merit. The trial court, upon defendant's motion for a new trial upon this particular ground and with all of the evidence on the subject before it, reduced the verdict from $6,000 to $2,000, and in so doing removed the entire basis of the appellant's claim as to the excessiveness of the original award.

No other errors being urged, the judgment is affirmed.

We concur: WASTE, P. J.; BEASLY, Judge pro tem.

49 Cal. App. 441

QUINN v. QUINN. (Civ. 3551.)

(District Court of Appeal, First District, Division 1, California. Oct. 1, 1920.)

Divorce ⟸156—Wife's appeal from order refusing to vacate interlocutory decree did not stay entry of final decree.

Plaintiff wife's appeal from order refusing to vacate and set aside interlocutory judgment of divorce on the ground its entry was due to inadvertence, mistake, and excusable neglect on her part, not being an appeal from the interlocutory judgment itself, it did not, under Civ. Code, § 132, stay entry of final decree of divorce in favor of plaintiff wife on motion of defendant husband.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action for divorce by Mary Quinn against J. W. Quinn. From an order denying motion to set aside final decree entered in her favor on defendant's motion, plaintiff appeals. Affirmed.

Jesse Robinson and Robinson & Sizer, all of Oakland, for appellant.

Ben F. Woolner, of Oakland, for respondent.

BEASLY, Judge pro tem. This case comes here upon an appeal from an order denying a motion of plaintiff to set aside a final decree of divorce entered in her favor upon motion of the defendant.

Plaintiff began this action for divorce from defendant. The property rights of the parties were settled out of court, and thereupon and on March 30, 1918, the plaintiff amended her complaint by elimating the charge of adultery which had been incorporated there-

in, and thereafter and in due time and upon the report of a commissioner to whom the case had been referred for the taking of testimony an interlocutory judgment of divorce was entered in plaintiff's favor. A few days before the lapse of six months from the date of the entry of the interlocutory judgment the plaintiff moved to set it aside upon the ground that its entry was due to inadvertence, mistake, and excusable neglect upon her part. She had changed her attorneys before the notice of this motion; and in support thereof she offered the affidavit of one of her new attorneys excusing the delay in making the motion, and her own affidavit, in which she stated in substance that she had been deceived by her former attorney as to the effect of her action for a divorce and of the interlocutory judgment therein; and that she had intended and desired only to institute a proceeding to bring her husband to time in the settlement of their property rights, and to make him give up his vices, including his association with another woman, and to secure his return to his home. The court denied her motion to vacate the interlocutory judgment, and from the order denying the same the plaintiff appealed. When a year had elapsed from the time of the entry of the interlocutory judgment, a final judgment of divorce in favor of plaintiff was entered on motion of the defendant. Thereupon the plaintiff moved to set aside this final judgment upon the ground that the court had no power to make or enter it while her appeal from the order refusing to vacate the interlocutory judgment was pending. Her technical statement of the grounds of her motion is that the entry of the final judgment was the result of mistake and inadvertence.

The appeal rests upon the claim of appellant that the first appeal, namely, that from the order refusing to vacate the interlocutory judgment, stayed the entry of final judgment by reason of the provisions of section 132 of the Civil Code. In that section it is provided that, if an appeal be taken from an interlocutory judgment or a motion for a new trial is made, final judgment shall not be entered until such motion or appeal has been finally disposed of. But the appeal from the order refusing to vacate and set aside the interlocutory judgment upon the ground that its entry was due to inadvertence, mistake, or excusable neglect is not an appeal from the interlocutory judgment itself. By the terms of the statute the entry of final judgment must be postponed only by an appeal from the interlocutory judgment itself or a motion for a new trial, and we have no power to add provisions to the section.

This reasoning, if correct, disposes of the cases cited by appellant, none of which is in point as we read the section upon which appellant relies for a reversal.

The order appealed from is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

49 Cal. App. 443

AZEVEDO v. DAVIDSON et al. (Civ. 3552.)

(District Court of Appeal, First District, Division 1, California. Oct. 4, 1920.)

1. Appeal and error ⟸1008(1)—Finding on oral evidence not disturbed.

Fact finding of the lower court on oral evidence will not be disturbed.

2. Contracts ⟸26—To constitute contract by correspondence, there must be a proposal squarely assented to.

To constitute a contract by correspondence, there must be a proposal squarely assented to, and, where the correspondence indicates that the negotiations are not to be considered closed until investigation should be made or other acts performed, no contract results.

3. Frauds, statute of ⟸118(3)—Correspondence not sufficient to show completed contract, taking it without the statute.

In an action for specific performance of an alleged agreement by trustees to lease land for a five-year term, correspondence indicating that the negotiations were not to be considered closed until the tenant to whom the land was proposed to be sublet was investigated *held* insufficient to establish a completed contract taking the transaction without the statute of frauds.

Appeal from Superior Court, Marin County; Edgar T. Zook, Judge.

Action by J. S. Azevedo against Frank Davidson and Gavin McNab. From judgment for defendants, plaintiff appeals. Affirmed.

G. P. Hall, of Petaluma (E. J. Dole, of Petaluma, of counsel), for appellant.

Morrison, Dunne & Brobeck, of San Francisco (Herbert W. Clark, of San Francisco, of counsel), for respondents.

WASTE, P. J. Plaintiff brought this action in specific performance to compel the defendants, as trustees, to execute to him a lease, according to the terms of an alleged verbal contract, claimed to be evidenced by a memorandum in writing. Judgment was entered for the defendants, and plaintiff appeals.

Plaintiff, as tenant, was in possession of the premises, the John Davidson ranch in Marin county, under a lease which was to expire on the 1st day of October, 1919. The trustees, Frank Davidson and Gavin McNab, defendants and respondents herein, are trus-

tees of the estate of John Davidson, deceased; one of the properties of the estate being the ranch here involved. Desiring to renew his lease of the premises, plaintiff had a conversation with Alice Davidson, one of the cestui que trusts, who agreed to such renewal for a period of five years, at the annual rental of $1,800. She stated to plaintiff that the defendants would agree to a renewal on such terms. Thereafter the respondent, Frank Davidson, executed a lease of the ranch, running to plaintiff for a period of five years, but this document was never signed or executed by the cotrustee, McNab. The trial court found that McNab never promised to execute a new lease to plaintiff. Inasmuch as all the other facts were found for plaintiff and appellant, the correctness of this finding presents the question to be considered on this appeal.

[1] The contention of the appellant is that the undisputed evidence shows that McNab upon two separate occasions did promise a new lease to the appellant, and that this engagement is evidenced in writing by letters written by McNab to his cotrustee, Davidson, to the officers of the Petaluma National Bank, and to the Petaluma Swiss-American Bank. The evidence on the question of the alleged promise to execute the lease is substantially conflicting. Plaintiff and his nephew, Manuel Ennis, testified as to what took place upon the occasion of two visits to Mr. McNab's office. Mr. McNab also testified as to what occurred upon those visits. The testimony of the latter puts in issue the statements of the other witnesses. On the oral testimony, therefore, this court, following the well-established rule, will not disturb the finding. Levi v. Chesley, 178 Cal. 145, 172 Pac. 607.

[2, 3] Appellant contends in the next place that support of his averment that defendant McNab promised to execute the lease is found in the correspondence referred to, which was sufficient to remove the transaction from the bar of the statute of frauds. The matter of a new lease was first discussed at Mr. McNab's office in May, at which time it was agreed that plaintiff should have his attorney prepare a form of lease, covering his renewal proposition, to be submitted to the trustees. On June 10, at the request of the plaintiff, Mr. Reghetti, cashier of the Petaluma Swiss-American Bank, wrote Mr. McNab as follows:

"We have been requested by Mr. J. S. Azevedo to write and ascertain from you if you are willing to renew his lease, which will expire soon. He states that he had an understanding with Miss Davidson whereby the rent would be increased to $1,800 per year beginning October 1, 1919. Kindly advise if this will be satisfactory to you."

To this letter Mr. McNab replied:

"Replying to your letter of June 10, 1919: Some time ago I wrote to Miss Davidson that I was entirely agreeable to the new lease of Mr. J. S. Azevedo. I suggested that she ask the opinion of Mr. Frank R. Davidson, cotrustee with me, who is at Sebastopol. I have not heard since. I suggest that Mr. Azevedo inquire of Miss Davidson what she has done in the matter, or write to Mr. Frank R. Davidson at Sebastopol."

In July plaintiff and his nephew again visited Mr. McNab's office and had a conversation about the matter. Plaintiff presented a lease drawn by his attorney, which McNab did not sign. He referred plaintiff to his cotrustee, Davidson, with the following letter:

"My dear Frank: Mr. J. C. Azevedo, tenant of the ranch of your father's estate, wishes a new lease, which permits him to assign to any person acceptable to your father's trustees, the purpose of which is that Mr. Azevedo has already sold his cattle and personal property. I explained to him that I had no knowledge of the people to whom he is selling, whether they would be good tenants and entirely responsible or otherwise. This is a matter to be passed upon by you, who are familiar with the standing of the people of the county. While this does not enter directly into the lease itself in the present form, as it is his purpose to sell to these people, it should be considered at this time so that the two transactions may go through together. If you approve of the lease and the transaction, please sign the lease and write me a letter."

Davidson signed the lease, but instead of himself passing upon the standing and responsibility of Azevedo's prospective assignee, Kullberg, referred him to the president of the Petaluma National Bank, Mr. Gwinn, who reported to Mr. McNab that he would "make a satisfactory tenant."

In the meantime negotiations looking to the sale of the ranch by the trustees were under way, and were subsequently consummated. The lease was never signed by McNab or by the plaintiff. The appellant contends that these letters, taken in connection with the lease which was prepared by plaintiff's attorney, and referred to Davidson by McNab, prove an agreement on the part of McNab to execute the lease, which can be specifically enforced. The court below was correct in deciding to the contrary. To constitute a binding contract by correspondence, there must be a proposal squarely assented to. Wristen v. Bowles, 82 Cal. 84, 87, 22 Pac. 1136. In this case the correspondence indicates that the negotiations were not to be considered closed until certain investigations should be made to the satisfaction of the trustees. Consequently a concluded and accepted contract has not been shown. Pacific Rolling Mill Co. v. Railway Co., 90 Cal. 627, 632, 634, 27 Pac. 525; Brown v. San Francisco Savings Union, 134 Cal. 448, 66 Pac. 592.

The judgment is affirmed.

We concur: BEASLY, Judge pro tem.; RICHARDS, J.

49 Cal. App. 462

MURRAY v. UNITED RAILROADS OF SAN FRANCISCO. (Civ. 3505.)

(District Court of Appeal, First District, Division 1, California. Oct. 5. 1920. Hearing Denied by Supreme Court Dec. 2, 1920.)

1. Carriers ⊂=314(5)—Complaint of passenger sufficient to state cause of action.

A complaint, alleging that plaintiff was a passenger on defendant's car, that after it had stopped to allow passengers to alight plaintiff rose from her seat for the purpose of walking to the end of the car and alighting, and that after she had arisen, defendant negligently, carelessly, and suddenly started the car, causing plaintiff to lose her balance, etc., is sufficient to state a cause of action.

2. Carriers ⊂=320(26)—Negligence in starting car after stopping for passengers to alight held for jury.

In an action by a passenger who lost her balance when a car started, where there was evidence as to the suddenness and jerkiness of the start, the question whether the carrier was negligent in so starting the car was for the jury, and a directed verdict was properly refused, despite carrier's contention that the testimony as to the sudden start was a mere conclusion.

3. Trial ⊂=194(18)—Instructions in passenger's action for injuries held not a charge on the facts.

In a passenger's action, instructions that in order to make out a prima facie case it was sufficient for plaintiff to show she was a passenger, and that the injuries were sustained by reason of her being thrown to the floor of the car by the sudden starting thereof after it had stopped to allow plaintiff to alight therefrom, that contributory negligence cannot be presumed, and that proof of injury to a passenger casts on a common carrier the burden of proving that it was occasioned by unavoidable casualty, etc., were not objectionable as an attempt on the part of the trial court to charge the jury with respect to matters of fact in violation of Const. art. 6, § 9.

4. Carriers ⊂=316(3)—Doctrine of res ipsa loquitur applicable where passenger is injured as result of sudden start.

Where a passenger is injured while in a carrier's vehicle, though the injury is the result of a sudden start of car, the doctrine of res ipsa loquitur is applicable, and the carrier has the burden of showing that the injury was the result of some unavoidable casualty, etc.

5. Trial ⊂=260(1)—Refusal of instructions covered by those given not error.

The refusal of requested instructions covered by those given is not error.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Edith M. Murray against the United Railroads of San Francisco. From judgment for plaintiff, defendant appeals. Affirmed.

Wm. M. Abbott, Wm. M. Cannon, and Kingsley Cannon, all of San Francisco, for appellant.

Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff in an action for damages for personal injuries alleged to have been sustained by plaintiff while a passenger on one of the defendant's cars.

[1] The first contention of the appellant is that the trial court erred in overruling the defendant's general demurrer to the plaintiff's amended complaint. The averments of said complaint are, in substance, that on the 4th day of March, 1915, said plaintiff was a passenger upon one of the defendant's cars being run and operated by it in an easterly direction from Sansome street to the Embarcadero in San Francisco; that when said car reached the Embarcadero it was run or operated around the curve or loop in defendant's tracks at that point, and while on said curve or loop was stopped by said defendant for the purpose of enabling passengers to alight therefrom; that after said car had been stopped by said defendant for said purpose the plaintiff arose from her seat within said car for the purpose of walking to the end thereof and alighting therefrom, and that after she had thus arisen and was about to walk toward the end of said car in order to alight therefrom the defendant "negligently and carelessly, and without allowing said plaintiff sufficient time to walk toward the end of said car to alight therefrom, suddenly started said car, and then and there and by reason thereof caused said plaintiff to lose her balance and fall with great force and violence upon the floor of said car," from which she received the injuries complained of. We are of the opinion that these averments sufficiently state a cause of action, and hence that there is no merit in the appellant's first contention, and that its demurrer upon that ground was properly overruled.

[2] The appellant's next contention is that the trial court erred in refusing to grant defendant's request for an instruction directing a verdict in favor of the defendant because of the insufficiency of the evidence to establish negligence. The appellant's argument in support of this contention, after quoting extracts from the testimony of the plaintiff and of her main witness as to the facts respecting the stopping and sudden starting of the defendant's car, proceeds to claim that the evidence thus given consisted merely in conclusions of these two witnesses in regard to the starting of the defendant's car and as to the series of jerks accompanying and immediately following the starting of the car by which the plaintiff was caused

to lose her balance and to fall upon the floor of the car. We do not so read this evidence, but, on the contrary, think it relates quite vividly and circumstantially the action of said car by the suddenness and jerkiness and jolting of which the plaintiff was caused to fall. Whether this method of starting a car after it had been stopped for the purpose of enabling passengers to alight, and while passengers were in the act of alighting, was or was not negligence on the part of the defendant was clearly a question for the jury. None of the cases cited by appellant in support of this contention are predicated upon facts as vividly and circumstantially related as are the facts in the instant case. The trial court, therefore, properly denied the defendant's motion for a directed verdict. Renfro v. Fresno City Ry. Co., 2 Cal. App. 317, 84 Pac. 357; Babcock v. Los Angeles Traction Co., 128 Cal. 174, 60 Pac. 780.

[3, 4] The next contention of the appellant is that the trial court erred in instructing the jury that proof of an injury to a passenger caused by the operation of defendant's car cast upon the defendant the burden of proving that the injury was occasioned by inevitable casualty or contributory negligence. The instructions of which the appellant complains are the following:

"In order to make out a prima facie case against defendant, United Railroads of San Francisco, in this action it is sufficient for the plaintiff, Edith M. Murray, to show that at the time she sustained the injuries, if any, of which she complains, she was a passenger upon one of the cars of, and being operated by, the defendant on the Embarcadero in the city and county of San Francisco, and that said injuries, if any, were sustained by her by reason of her being thrown to the floor of said car by the sudden starting of said car by said defendant, United Railroads of San Francisco, after said car had been stopped for the purpose of enabling plaintiff to alight therefrom. The law does not impose upon plaintiff, Edith M. Murray, the duty of showing that at the time of said accident she was free from fault, or did not contribute by her own negligence to the injuries, if any, of which she complains."

"Contributory negligence on the part of a passenger cannot be presumed from the mere fact of injury, but must be proved. On the other hand, the proof of an injury to a passenger on a car of a common carrier, caused by the operation of the car, casts upon the common carrier the burden of proving that the injury was occasioned by inevitable casualty, or some other cause which human care and foresight could not prevent, or by the contributory negligence of the passenger, unless the proof on the part of the passenger tends to show that the injury was occasioned by the contributory negligence of the passenger, or by inevitable casualty, or by some other cause which human care and foresight could not prevent."

The first objection which the appellant urges against the above instructions is that they constitute an attempt on the part of the trial court to charge the jury with respect to matters of fact in violation of the provisions of section 19, article 6, of the state Constitution. We do not think the instructions above quoted are subject to this objection. They differ materially, both in form and substance, from the instructions in the case of Quint v. Dimond, 147 Cal. 707, 82 Pac. 310, upon the criticism of which by the Supreme Court the appellant relies to sustain this point. On the other hand, the foregoing instructions, and particularly the latter portion thereof relating to contributory negligence, are cast in a form which has been quite frequently used in recent cases, and which has been expressly approved by the Supreme Court in the cases of Steele v. Pacific Electric Ry. Co., 168 Cal. 375, 143 Pac. 718, Wyatt v. Pacific Electric Ry. Co., 156 Cal. 174, 103 Pac. 892, McCurrie v. Southern Pacific Co., 122 Cal. 558, 55 Pac. 324, Housel v. Pacific Electric Ry. Co., 167 Cal. 245, 139 Pac. 73, 51 L. R. A. (N. S.) 1105, Ann. Cas. 1915C, 665, and, finally, by the Supreme Court in denying the petition for rehearing in the case of Bourguignon v. Peninsula Ry. Co., 181 Pac. 669. In each of the foregoing cases the application of the doctrine of res ipsa loquitur to cases where the plaintiff was a passenger of a common carrier has been fully upheld. It is not necessary, therefore, to comment upon the cases cited by the appellant from other jurisdictions relating to the applicability of this rule to the facts of the case at bar.

[5] The next contention of the appellant is that the court erred in refusing to give an instruction requested by it to the effect that the plaintiff could not recover if her fall resulted from the jerking and swaying of the car incident to its ordinary operation. While the instruction in the form requested might well have been given, we think that its subject-matter is fully covered by the other instructions which the court did give, in some instances at the defendant's request, and by which the jury were fully informed that the plaintiff, as a prerequisite to her recovery, was compelled to prove by a preponderance of evidence that her injuries were the direct result of the defendant's negligence in the sudden starting and jerky operation of its car.

As to the other of the defendant's objections to the form and substance of the instructions which were given to the jury, we are of the opinion that the instructions taken as a whole contained a full and fair statement of the law applicable to cases of this character, and that they were not subject to the objections repeatedly directed against them by the appellant, to the effect that they constituted an invasion of the province of the jury through being instructions as to matters of fact.

Having thus disposed of the various con-

tentions urged by the appellant, we are of the opinion that the judgment should be affirmed; and it is so ordered.

We concur: WASTE, P. J.; KINSELL, Judge pro tem.

49 Cal. App. 468

BAR ASSOCIATION OF SAN FRANCISCO v. CANTRELL. (Civ. 3437.)

(District Court of Appeal, First District, Division 2, California. Oct. 5, 1920. Rehearing Denied Nov. 4, 1920. Hearing Denied by Supreme Court Dec. 2, 1920.)

1. Attorney and client ⟸102 — Attorney for executor stands in trust relationship to beneficiary under will.

An attorney for the personal representatives of a decedent charged with the duty of administering the estate stands in the same trust relationship to the beneficiary as the personal representatives, and his misrepresentation that the law of the state required personal representatives to be represented by counsel is fraudulent.

2. Attorney and client ⟸38—Good moral character is condition to continuance of practice of law.

As a good moral character is a condition precedent to admission to the bar, so it is a requisite condition to the rightful continuance in the practice of the profession.

3. Attorney and client ⟸44(2) — Attorney who misappropriates client's money guilty of moral turpitude though he returns it.

An attorney who made misrepresentations to secure fees and improperly applied a client's money to his own use in two different cases is guilty of moral turpitude, regardless of whether he intended to return the funds, and the fact that pending investigation he did so, for it is indispensable that an attorney be trustworthy.

4. Attorney and client ⟸58 — Attorney improperly using client's funds should be suspended though he makes restitution.

Where an attorney not only made misrepresentations but improperly used his client's funds making restitution only during the pendency of an investigation of his conduct, he should at least be suspended from the practice of his profession for the period of one year.

In the matter of the application of the Bar Association of San Francisco for disbarment of Russell W. Cantrell, attorney and counselor at law. Respondent ordered disbarred.

Perry Evans, of San Francisco, for petitioner Bar Association.

Nathan C. Coghlan, of San Francisco, for respondent.

BRITTAIN, J. The Bar Association of San Francisco accused Russell W. Cantrell, an attorney and counselor at law, of certain acts in his office as attorney which were alleged to have involved moral turpitude and dishonesty within the scope of subdivision 5 of section 287 of the Code of Civil Procedure, which provides that an attorney and counselor may be removed or suspended "for the commission of any act involving moral turpitude, dishonesty or corruption, whether the same be committed in the course of his relations as an attorney or counselor at law, or otherwise, and whether the same constitute a felony or misdemeanor or not; and in the event that such act shall constitute a felony or misdemeanor, conviction thereof in a criminal proceeding shall not be a condition precedent to disbarment or suspension from practice therefor."

The accusation was in four counts, to one of which a demurrer was sustained. The other three counts may be summarized as follows:

First, that the respondent, who was the attorney for the executor and executrix of the will of Alice Wall, a deceased person, after the admission of the will of the decedent to probate, for the purpose of seeking additional employment and compensation, wrote to one Alice Foley, a beneficiary under the will, then residing in the state of Connecticut, informing her that he was acting as the attorney for the executor and executrix, and further stating, "As I deem it advisable for the quick winding up of the estate to have the parties interested represented by as few attorneys as possible, I write to inquire if you desire me to represent you in this proceeding"; that on receipt of this letter, Alice Foley, through her attorney in Connecticut, wrote the respondent for a copy of the will and for such papers as the respondent might suggest she should sign; that on February 27, 1914, the respondent replied as follows:

"Under our law foreign heirs or beneficiaries under a will must have a local agent to represent them. This appointment may be made either voluntarily or through an order of court."

It is further alleged that these statements were untrue. Both the statements and their untruth are conceded.

Second, that the statements set forth above were made, and that in March or April, 1914, the respondent in fact became the attorney of Alice Foley, and as such attorney and for her, on or about January 24, 1917, he received from the executor and executrix of the will in question the sum of $751.15, in payment of the legacy to her; that the respondent "willfully and fraudulently neglected and failed to pay said sum of money to said Alice Foley," and appropriated it to his own purposes against her will and consent; that the money so alleged to have been embezzled was not paid to Alice Foley until the month of March, 1918, and not until there had been an investi-

gation of the respondent's conduct by the accuser's committee of discipline and grievances. The facts alleged are conceded.

Third, that the respondent as the attorney for the plaintiff in an action in the superior court in San Francisco, entitled Stefano Demartini v. Lewis Packing Company, procured a mandatory injunction requiring the defendant forthwith to remove an encroachment from the property of the plaintiff, which encroachment consisted of a portion of a building, and the judgment awarded the plaintiff in that action $400 damages and costs; that the defendant appealed from the judgment; that thereafter, on or about August 20, 1918, the attorney for the defendant in that action offered to the respondent, as the attorney for Demartini, to satisfy the money part of the judgment and to dismiss the appeal, provided the defendant were granted until March 1, 1919, to remove the encroachment; that Demartini refused to approve this settlement and instructed the respondent not to enter into it, notwithstanding which the respondent entered into a stipulation, the effect of which was to delay the appeal and to stay the mandatory injunction until March 1, 1919, and, coincident therewith, on or about August 24, 1918, the respondent received from the defendant $450 in satisfaction of the money portion of said judgment; that for over six months thereafter the respondent failed to pay the said money to his client, and during said period purposely concealed from his client the fact that the respondent had collected the same, and until his client was informed by the attorney for the defendant in said action that the money had been paid. These facts also are conceded.

On behalf of the respondent in regard to the withholding of the money in the Wall estate from Alice Foley, the following quotation is made from his brief:

"The only explanation offered by the respondent in his defense to this charge was that at the time he received this money he was engaged in extensive litigation, his compensation for his legal services being rendered therein being dependent upon the successful outcome of said litigation; that said litigation was pending at the time he received the said money, and continued for a period of fourteen months; that during this period respondent received no money from his law practice, as his time was exclusively engaged in the said litigation, and he was unable to borrow any money on his contemplated fee in this litigation until on or about the 1st day of March, 1918, when respondent did borrow the sum of $1,350, and thereupon paid to his client the amount due her in full. The respondent appropriated the money received by him, as aforesaid, to his own use for living expenses, during said period, anticipating an early determination of the said litigation, when he could have arranged for the return of the said money so withheld; that during this period the respondent was practically insolvent; that respondent did not at any time conceal from any one the receipt by him of the said money belonging to his said client; that in the month of December, 1917, respondent paid to the said client, through a local attorney, $100 on account of the amount collected by him."

In regard to the Demartini Case the respondent seeks to justify his having failed to obey the instructions of his client by an unsupported statement that he was following the wishes of his client's son. The only explanation of his having retained his client's money for a period of many months is that he thought his client would be angry if he thought the settlement had been made in violation of the instructions he had given the attorney.

[1] Of the misrepresentations made by the respondent to Alice Foley by which he was placed in a position which made possible his misappropriation of her money, no justification was attempted. He was the attorney of the personal representatives charged with the duty of administering the estate of Alice Wall. He stood in the same trust relationship to the beneficiary of her will as the executor and executrix. Bergin v. Haight, 99 Cal. 52, 33 Pac. 760. His misrepresentation concerning the law of this state to his trustee residing in another state was one of fact and fraudulent.

[2-4] In view of the admissions of the respondent no conclusion is possible but that he has been guilty of several acts involving moral turpitude. "As a good moral character is a condition precedent to admission to the bar, so it is a requisite condition for the rightful continuance in the practice of the profession. Ex parte Brounsall, 2 Cowp. 829; Penobscot Bar v. Kimball, 64 Me. 146; Strout v. Proctor, 71 Me. 290; Delano's Case, 58 N. H. 5; In re Davies, 92 Pa. St. 120; Ex parte Wall, 107 U. S. 280." In re O., 73 Wis. 602, 42 N. W. 221. "It is indispensable that an attorney be trustworthy. And he is not trustworthy if he is capable of improperly applying to his own use his client's money, whether he intends to return it or not." In re Treadwell, 67 Cal. 353–358, 7 Pac. 724, 728. Where attorneys have mingled their client's money with their own and have used it for their own purposes, even though, as in this case, settlements were thereafter made with their clients, particularly pending investigations concerning their acts, courts have repeatedly held that such conduct requires at least suspension of the attorney for a period commensurate with the wrongdoing. In re Dobbs, 173 App. Div. 605, 160 N. Y. Supp. 173; In re Evans, 169 App. Div. 502, 155 N. Y. Supp. 491; In re O., 73 Wis. 602, 42 N. W. 221; In re Eisenberg, 173 App. Div. 598, 160 N. Y. Supp. 143; In re Treadwell, 67 Cal. 353, 7 Pac. 724.

It is ordered that the respondent be suspended from his office as an attorney and counselor at law in the courts of this state

and from practice as an attorney and counselor at law in this state for the period of one year from and after the date when this judgment shall become final.

We concur: LANGDON, P. J.; NOURSE, J.

49 Cal. App. 364

MARR v. WHISTLER. (Civ. 3403.)

(District Court of Appeal, First District, Division 1, California. Sept. 27, 1920.)

1. New trial ⟸163(2)—Order granted on all grounds set forth in notice included that of insufficiency of evidence.

Court's order, specifying that new trial was granted on "all of the grounds set forth in the notice, was based on ground of insufficiency of evidence, where that was one of the grounds specified in the notice, notwithstanding Code Civ. Proc. § 657, as amended by St. 1919, p. 141, requiring that an order granted upon the ground of insufficiency of evidence should so specify.

2. Negligence ⟸119(6)—Contributory negligence in issue.

While ordinarily contributory negligence is an affirmative defense to be specially pleaded, it became an issue, where plaintiff pleaded certain matters to negative contributory negligence, which allegations were squarely denied by the defendant.

3. New trial ⟸71—Granting, where evidence is conflicting, not an abuse of discretion.

When there is a substantial conflict in the evidence, trial court will not be deemed to have abused its discretion in granting a new trial, when it has determined that the verdict or the finding is against the weight of the evidence; it being the duty of the trial court to grant a new trial if it is not satisfied with the verdict.

4. Appeal and error ⟸933(4)—Refusal to direct verdict would not prevent granting new trial, in view of presumption on appeal.

That at the conclusion of the testimony the court denied instructed verdict for defendant, did not prevent the trial court from granting a new trial on the ground that the verdict was against the weight of the evidence, since it must be presumed in favor of the order that the court changed its opinion as to the effect of the evidence, and reached a conclusion on the hearing of the motion favorable to defendant.

5. Innkeepers ⟸10—Maintenance of fire escape in violation of ordinance negligence per se.

Maintenance by a hotel of a fire escape with an opening in the platform in violation of a city ordinance was negligence per se.

6. Innkeepers ⟸10—Liability for leaving opening in fire escape.

The presence of an unguarded opening in the platform of a fire escape just outside and practically opposite the doorway of a room in the hotel, in violation of a city ordinance, rendered an innkeeper liable for injuries to a guest, who was injured thereby, unless the guest's own negligence proximately contributed to her injuries.

7. New trial ⟸70—Court did not abuse discretion in granting new trial.

In an action by a hotel guest for personal injuries sustained when she fell through an opening in the platform of a fire escape, *held* that court did not abuse its discretion in granting defendant a new trial, on the ground of insufficiency of evidence to sustain a verdict and judgment in favor of plaintiff.

8. Innkeepers ⟸10—Guest using fire escape a trespasser.

A guest in a hotel, stepping out upon the platform of a fire escape with knowledge that it was not used for any purpose except to escape from fire, was a trespasser.

9. New trial ⟸66—Verdict for wrong party one against law.

If the evidence was not sufficient to warrant the conclusion arrived at by the jury that the negligence of defendant was the proximate cause of injury, the verdict should have been in defendant's favor, and may be said to be "against the law."

10. Negligence ⟸122(2), 138(2)—Burden of proving contributory negligence.

An instruction "that the burden of proving the contributory negligence of plaintiff is upon the defendants" is erroneous, the correct rule being that negligence on the part of the plaintiff is a matter of defense, to be proved affirmatively by the defendant, unless it can be shown or inferred from the evidence given in support of plaintiff's case.

11. Innkeepers ⟸10—Instruction in relation to ordinance held proper.

In an action by a guest in a hotel for personal injuries received when she fell through an opening in a fire escape platform, *held* proper to instruct the jury in relation to an ordinance of the city regulating the construction and maintenance of fire escapes.

12. Appeal and error ⟸1048(6)—Refusal of questions on cross-examination of witness held harmless.

In an action by a hotel guest for injuries sustained when she fell through an opening in the platform of a fire escape, any error of the court in sustaining an objection to questions on cross-examination of plaintiff as to her motive in going upon the fire escape was harmless, where plaintiff's counsel stipulated that her going on the balcony "was not on account of fire."

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by Josephine Marr against H. S. Whistler. From an order granting defendant's motion after judgment for a new trial, plaintiff appeals. Affirmed.

Everts & Ewing and M. G. Gallaher, all of Fresno, for appellant.

C. K. Bonestell, of Fresno, for respondent.

WASTE, P. J. This is an action for personal injuries sustained by the plaintiff in falling through an unguarded opening in the platform of the fire escape adjacent to her room, on a building in the city of Fresno, owned by the defendant Rowell, and in which the defendant Whistler, as lessee, conducted a hotel. The action was instituted against both the owner and lessee. They appeared separately by demurrer to the amended complaint, that of the defendant Whistler being overruled; that of the defendant owner, Rowell, was sustained, without leave to amend, and judgment was entered in his favor. The plaintiff, the appellant here, appealed and the judgment was reversed by this court, a hearing in the Supreme Court being denied. Marr v. Rowell, 185 Pac. 1000. In the meantime the action was tried as between plaintiff and the defendant Whistler. The jury rendered a verdict, fixing the plaintiff's damages in the sum of $6,050, for which amount the judgment was entered. Thereafter the defendant made a motion for a new trial, which was granted. This appeal is by the plaintiff from that order.

[1] The motion for a new trial was made upon three grounds specified in the notice, namely: Insufficiency of the evidence to justify the verdict; that the verdict was against law; and errors of law occurring at the trial. The order of the court specified that the motion was granted "on all of the grounds set forth in the said defendant's notice of intention to move for a new trial." Section 657 of the Code of Civil Procedure, as amended by St. 1919, p. 141, provides that

"When a new trial is granted upon the ground of the insufficiency of the evidence to sustain the verdict, the order shall so specify; otherwise, on appeal from such order, it will be presumed that the order was not based upon that ground."

Appellant argues, therefore, that in determining the correctness of the court's ruling in granting a new trial, we are not at liberty to consider the insufficiency of the evidence as one of the grounds appealing to the lower court as a basis of its order. We think there is nothing in the point. The court's order specifies that the new trial was granted on all of the grounds set forth in said defendant's notice of intention, one of which is the insufficiency of the evidence to justify the verdict. While the form of the order is not to be commended, we think there was such a substantial compliance with the requirement of the Code section as to warrant us in concluding that the insufficiency of the evidence to sustain the verdict was one of the grounds upon which the new trial was granted.

It appears from the evidence in this case that at about 9:30 o'clock in the evening of the 6th day of August, 1917, the plaintiff and appellant, Josephine E. Marr, applied to the respondent Whistler for a room in the Kern-Kay Hotel in the city of Fresno, kept by him. He assigned her to room 25, and immediately conducted her to it. This room was at the end of the hallway on the second floor of the hotel. At the opposite side of the room from the door opening into it from the hall there was a doorway giving access to the floor of the lowest balcony of a fire escape. In this doorway was an ordinary swinging wood door, opening into the room, which was open at the time. There was also a screen door opening out, which at the time was closed, but neither locked, barred, nor latched. At about 10 o'clock, it being dark, the appellant swung the screen door open and stepped through the door leading to the fire escape on the outside. She took hold of the iron railing, and immediately fell through an aperture in the platform, falling to the ground, a distance of from 18 to 20 feet, sustaining very severe injuries. The hole through which appellant fell was a rectangular opening, 22 by 24 inches, in the floor of the fire escape, and about 18 inches of the opening was directly in front of the door through which the appellant stepped. The near margin of the opening was about 22 inches from the doorsill. The appellant testified that, looking through the screen door, she saw the railing of the fire escape, and believed that the platform was a balcony for the use of the guests of the hotel. She denied seeing the ladder of the fire escape leading to the floor above. She had previously been a guest at the hotel, was familiar with the fire escape in another part of the building, which was through a window to a platform barred by an iron railing. Her testimony is that she did not know that the door through which she walked led to the fire escape outside of room 25, but thought that the balcony was a perfectly safe place, she having been informed by another woman resident of the hotel that she had used it as a place on which to sit and dry her hair. She had heard room 25 referred to as a "fire escape room" but did not know that the balcony onto which she stepped, through the unprotected door, was a part of the fire escape. Because of the darkness, she testified, she did not see the opening in the platform.

An ordinance of the city of Fresno, in force at the time of the accident, provided that the floor or bottom of the lowest balcony of every fire escape should have no opening or open space therein, of a greater width than one inch. It also provided that where fire escapes could not be so placed as to be accessible from the hall or corridor, and where the only means of reaching the fire escape was through a room, the door of such

room should be a sash door, over which should be suspended a light of not less than eight candle power, encased in a red-colored globe, which should be kept continuously lighted from sunset to sunrise of each day, and in addition there should be painted upon the wall, contiguous to this light, or upon a sign suspended not more than 12 inches below it, the words "To the Fire Escape," the letters to be not less than 3 inches in height. While it does not appear that there was any lighted red danger signal, as required by the ordinance, the hallway adjacent to room 25 was shown to be fairly well lighted, and on the cross-examination the appellant admitted that on the night of the accident there was a sign on the wall, within 5 or 6 inches of the right-hand side of the door leading into the room, which bore the legend, "Fire Escape through This Room."

The appellant alleged and testified that there was no sign, or warning of danger in room 25, or at the door opening out onto the fire escape. The respondent Whistler and witness Hart testified that at the time of the accident such a warning was in place. During the trial the jury inspected the premises, and at that time there was a sign with the words "Fire Escape" printed on it in large letters over the door in question. There was also evidence that the fire escape was on the side of room 25 which overlooked an alley; that when the wooden door was opened, and the screen door closed, a person could see the ladder or stairway on the fire escape; it being painted black and being located directly in front of the door. Respondent Whistler testified that when he took appellant to room 25 on the night in question, and turned on the light, Mrs. Marr went over to the door and looked out on the fire escape and said, "I am going to pull the bed over in front of the fire escape door as the air will blow in," and that immediately after the fall, Mrs. Marr said to him:

"Oh, Mr. Whistler, I didn't know the hole in the fire escape was uncovered. Mrs. Robinette [a former occupant of room 25] told me it was covered up."

Appellant denied making either of these statements. Mrs. Robinette testified that, as nearly as she could remember the conversation, she had told Mrs. Marr that room 25 was "a nice cool room, * * * there was a fire escape in there, and we left the door open, and I used to go out there and dry my hair."

[2] In instituting her action the appellant relied on, and pleaded, the carelessness and negligence of the respondent in maintaining the platform of the fire escape with the opening, and the doorway near it, without signs of danger, or warning. But she went further, and pleaded certain matters intended, so she states in her brief, "to negative contributory negligence" on her part. These were that she had no notice of the dangerous condition of the fire escape, could not see its condition from the room, did not know that the platform was part of the fire escape, but believed it was a balcony for the use of guests in the room. These allegations were squarely denied by the defendant, and we do not think the appellant can now escape their effect by arguing that they were unnecessary. While, ordinarily, contributory negligence is an affirmative defense to be specially pleaded, in this case the appellant tendered the issue herself, and it was met by the denials and proof of the respondent. The case was tried on the theory thus presented, evidence was introduced without objection as to its materiality, and the court included in its charge to the jury instructions covering the question of the contributory negligence of the plaintiff, and the burden resting on the defendant to prove the same. We are convinced from the entire record that the question of the contributory negligence of the plaintiff must have been uppermost in the consideration of the trial court in granting the motion for a new trial. Otherwise there would be scant reason for such action on its part.

[3] The wide extent of the discretion of the trial court in granting or denying a new trial for insufficiency of the evidence is well-nigh axiomatic. Its action in such matters is conclusive upon the appellate court unless there has been an abuse of discretion. When there is a substantial conflict in the evidence, the trial court will not be deemed to have abused its discretion when it has determined that the verdict, or the finding, is against the weight of the evidence, and that there should be a new trial. Gordon v. Roberts, 162 Cal. 506, 509, 123 Pac. 288. It was the duty of the court to grant the new trial in this case if it was not satisfied with the verdict (Curtiss v. Starr, 85 Cal. 376, 377, 24 Pac. 806), and it was not bound by the rule as to conflicting evidence, as is this court (Pollitz v. Wickersham, 150 Cal. 238, 244, 88 Pac. 911; Condee v. Gyger, 126 Cal. 546, 547, 59 Pac. 26).

"Even in cases where there may not appear to be a conflict in the evidence, and where all the proofs seem to be favorable to the one or the other of the parties litigant, the question as to the probative force or evidentiary value of the testimony, in a proceeding on a motion for a new trial based upon the ground that the evidence is insufficient to justify the verdict, is one whose determination is with the trial court. The rule (elementary and commonly familiar in our system of jurisprudence) is that the plaintiff in a civil action must establish his case by a preponderance of proof, but, although many witnesses may testify directly in favor of his position, and no adversary testimony directly adduced, it is still with the jury, in the first instance, and finally with the trial

court, where a new trial is asked on the ground stated, to say whether such testimony, when subjected to the legal tests whereby the probative value of evidence is to be judged, measures up to the requirement of the law as to the degree of proof essential to the support of an issue of fact." Otten v. Spreckels, 24 Cal. App. 251, 257, 141 Pac. 224, 226.

In such cases the presumption is in favor of the order and against the findings, or the verdict. Condee v. Gyger, supra; Hass v. Mutual, etc., Ass'n, 118 Cal. 6, 10, 49 Pac. 1056.

[4] The fact that at the conclusion of the testimony the defendant made, and the court denied, a motion to instruct the jury to bring in a verdict for the defendant, does not change the situation. We must presume in favor of the order granting the new trial that the court changed its opinion as to the effect of the evidence, and reached a conclusion upon the hearing of the motion, favorable to the defendant. Clohan v. Kelso, 183 Pac. 349.

[5-7] In the instant case the maintenance by the defendant of the fire escape in violation of the ordinance of the city of Fresno was negligence per se. The presence of the unguarded opening in the platform, just outside, and practically opposite, the doorway of room 25, resulted in maintaining a dangerous trap. The defendant being thus shown to be negligent, the plaintiff was entitled to recover, unless her own negligence proximately contributed to her injuries. The conflict in the testimony which we have already summarized turns upon that question. It would subserve no useful purpose to restate at length the facts of the case, as they are shown by the record. So far as the sufficiency of the evidence is concerned, we cannot say that any such abuse of the discretion lodged in the trial court appears, as would justify this court in reversing the order granting a new trial.

[8] That the knowledge plaintiff possessed, concerning the fire escape and its surroundings, was a material issue in the case is conceded by the appellant, when she admits in her brief that—

"If the plaintiff in this action had known that the platform was that of a fire escape, and had known or had had reason to believe that it was not used for any purpose except to escape from fire in the building, then to step upon it for any other purpose would have made her a trespasser."

Her concession is borne out by the authorities. McAlpine v. Powell, 70 N. Y. 126, 131, 26 Am. Rep. 555; Mayer v. Laux, 18 Misc. Rep. 671, 673, 43 N. Y. Supp. 743; Kelly v. Smith, 29 App. Div. 346, 349, 51 N. Y. Supp. 413.

[9] The second ground on which the motion for a new trial was granted was "that said verdict was against the law." This is largely corollary of the first, for if the evidence was not sufficient to warrant the conclusion, arrived at by the jury, that the negligence of the defendant was the proximate cause of plaintiff's injuries, the verdict should have been in his favor.

[10] Certain "errors of law occurring at the trial," which was one of the grounds upon which the motion for a new trial was granted, are pointed out by the respondent. In the instructions given by the trial court, on the question of the contributory negligence of the plaintiff, which appear to have been given in keeping with the understanding, and theory, upon which the case was tried, the jury were told "that the burden of proving the contributory negligence of the plaintiff is upon the defendants." The rule, correctly stated, is that negligence on the part of the plaintiff is a matter of defense to be proved affirmatively by the defendant, unless it can be shown or inferred from the evidence given in support of the plaintiff's case. Green v. Southern Pacific Co., 132 Cal. 254, 257, 64 Pac. 255; Robinson v. W. P. R. R. Co., 48 Cal. 409, 426.

[11, 12] It was proper to instruct the jury in relation to the ordinance of the city of Fresno regulating the construction and maintenance of fire escapes. Sheyer v. Lowell, 134 Cal. 357, 359, 66 Pac. 307. During the cross-examination of the appellant she was questioned by counsel for the respondent as to her motive in going upon the fire escape. The court sustained an objection to the testimony. Respondent assigns this as error. In view of the fact that her counsel stipulated that her going on the balcony "was not on account of fire" the manifest purpose respondent had in view was accomplished, and no harm resulted from the ruling.

The order granting a new trial is affirmed.

We concur: WELCH, Judge pro tem; RICHARDS, J.

49 Cal. App. 489

REMLEY v. REMLEY. (Civ. 3507.)

(District Court of Appeal, First District, Division 1, California. Oct. 6, 1920.)

1. **Divorce ⊂=249(3, 6)—Homestead ⊂=158—Homestead and community property may be assigned by divorce decree; dissolution of marital status and assignment of homestead destroys its character.**

The court has power in a divorce action to make disposition of community property, including the homestead, and on dissolution of the marital status by court decree, and assignment of the homestead therein, its character as such is destroyed.

2. **Divorce ⊂=156—Interlocutory judgment not decree of divorce, and does not dissolve marriage.**

Interlocutory judgment in divorce action is not a decree of divorce, nor does it dissolve the marriage under Civ. Code, § 131, being merely a declaration that one of the spouses is entitled to divorce, and, under section 132, when one year has expired after its entry, the court may enter final judgment, granting divorce and such other relief as may be necessary to complete disposition of the action.

3. **Divorce ⊂=249(1)—Court should not dispose of community property or homestead until final decree.**

In view of Civ. Code, §§ 131, 132, 146, 147, the court trying action for divorce should not assign or dispose of the community property or homestead until such time as the marriage is actually dissolved by final judgment granting divorce one year after interlocutory judgment.

4. **Divorce ⊂=156 — Interlocutory judgment should remain interlocutory so long as court may refuse final decree.**

So long as the court which tried a divorce action may refuse to enter final decree, if intervening conditions justify its refusal, its determination, as evidenced by its interlocutory judgment, should be in the fullest sense interlocutory, without interference with the parties' property rights or otherwise, so that at any time during pendency of the action substantial justice may be done the parties, no matter what the eventuality.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action for divorce by Lena Remley against John Remley. From an interlocutory decree for plaintiff, defendant appeals. Modified and affirmed, with directions.

Percy S. King and E. L. Webber, both of Napa, for appellant.

E. S. Bell, of Napa, for respondent.

KINSELL, Judge pro tem. Defendant appeals from an interlocutory judgment of divorce in favor of plaintiff, wherein the court declared each party the owner of one-half of certain homestead community property, and awarded plaintiff a monthly allowance for the support of the minor children of the parties, such allowance to constitute a lien upon defendant's interest in such homestead property until paid.

Defendant urges two points for a reversal, viz.: (1) That the corroborating testimony was insufficient to warrant the trial court in finding for respondent; and (2) that the court erred in awarding the real property in the manner that it did in the face of the fact that there was a subsisting homestead on the same, and that the security was unreasonable.

1. The first point is so destitute of merit as hardly to warrant notice. The record discloses abundant corroborative testimony. The evidence is conflicting. The trial court found in favor of the plaintiff. In view of the conflict, this court will not disturb such findings.

2. In support of his second contention, appellant urges that the court's judgment cannot destroy the homestead character of the property assigned; that the homestead can be destroyed by two methods only: (a) By abandonment by the parties as provided in section 1243, Civil Code; or (b) by decree of court in a proceeding instituted for that purpose.

[1] That the court has power in a divorce action to make disposition of the community property, including the homestead, there can be no question (sections 146, 147, Civ. Code), and it has been repeatedly held that upon the dissolution of the marital status by court decree, and the assignment of the homestead therein, its character as such is destroyed. Shoemaker v. Chalfant, 47 Cal. 435; Grupe v. Byers, 73 Cal. 271, 14 Pac. 863; Simpson v. Simpson, 80 Cal. 237, 22 Pac. 167; Lang v. Lang, 190 Pac. 181. Therefore, appellant cannot maintain his contention that a decree of court in a proceeding instituted for that purpose is necessary to destroy a homestead.

It is our opinion, however, that the interlocutory judgment in this action cannot of itself have the effect of nullifying the homestead character of the property.

Section 146, Civil Code, provides:

"*In case of the dissolution of the marriage* by the decree of a court of competent jurisdiction, the community property, and the homestead shall be assigned as follows," etc.

Section 147, Civil Code, provides:

"The court, in rendering a *decree of divorce*, must make such order for the disposition of the community property, and of the homestead as in this chapter provided," etc. (The italics in each instance are ours.)

[2] The interlocutory judgment in a divorce action is not a decree of divorce nor does it dissolve the marriage. It is merely a declaration that one of the spouses is entitled to a divorce (section 131, Civ. Code), and

when one year has expired after the entry of such interlocutory judgment the court may enter the final judgment granting the divorce, and such other relief as may be necessary to complete disposition of the action. Section 132, Civ. Code; Estate of Dargie, 162 Cal. 51, 121 Pac. 320; Olson v. Superior Court, 175 Cal. 250, 165 Pac. 706, 1 A. L. R. 1589.

[3] In view of the provisions of sections 131, 132, 146, and 147, Civil Code, the court should not assign or dispose of the community property or homestead until such time as the marriage is actually dissolved.

Nor is this view in conflict with Pereira v. Pereira, 156 Cal. 1, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107, or John v. Superior Court, 5 Cal. App. 262, 90 Pac. 53. As was pointed out in those cases, the court has power to try and determine the issues between the parties to a divorce action with respect to their property, and this may and should be done at the time of the trial of the issues as to the divorce. It is at this time that the court is required to file its decision and conclusions of law, and its decision must respond to all the issues involved in the action. In such decision the court should determine whether a divorce ought to be granted; it should designate the party entitled thereto, and if property rights are involved it should determine how the property should be disposed of or assigned when such divorce is granted.

It will be noted that in the reporter's syllabus of John v. Superior Court, supra, it is stated that the court had jurisdiction, *and it was its duty*, under section 131, Civil Code, at the time of granting the interlocutory judgment, to include in such judgment an assignment of the homestead. This is not a correct statement of the law, nor is the statement justified by the court's decision in that case.

In the instant case the character of the homestead property was made an issue, and the trial court at the time of the rendition of its interlocutory judgment properly determined the status of the property and properly determined how such property *ought* to be assigned, just as it determined that a divorce *ought* to be granted; but in such interlocutory judgment the trial court should not attempt to destroy the homestead character of the property, nor to make an assignment thereof. At the time of the dissolution of the marriage, and at that time only, the homestead character may be abolished, and the property assigned to the respective parties pursuant to the determination made by the court at the time of the trial.

That this interpretation of the scope of the sections referred to is sound in principle will be readily appreciated, in view of the decision in Olson v. Superior Court, 175 Cal. 250, 165 Pac. 706, 1 A. L. R. 1589, holding that a final decree of divorce may not be entered after reconciliation of the parties within the one-year period following entry of the interlocutory, and that of Bancroft v. Bancroft, 178 Cal. 367, 173 Pac. 582, to the effect that after expiration of the time within which appeal may be taken or proceedings had under section 473, Code of Civil Procedure, the trial court is without jurisdiction to alter or set aside its interlocutory judgment.

[4] So long as the court may refuse to enter the final decree, if intervening conditions justify such refusal (Olson v. Superior Court, supra), its determination, as evidenced by its interlocutory judgment, should be in the fullest sense interlocutory, so that at any time during the pendency of the action substantial justice may be done the parties no matter what the eventuality.

It follows, therefore, that the interlocutory judgment in the present case should be held to be, in so far as the property is concerned, merely an adjudication of the character thereof, and a determination as to how it should be ultimately assigned. It would seem that since the property is impressed with a homestead no lien could be created by interlocutory judgment on the interest of either spouse, and therefore the decree in that behalf should be modified by striking therefrom the following:

"* * * And that defendant's one-half interest in the community real property shall be subject to the payment of said allowance for the support of said minor children; and said allowance to be and constitute a lien upon said defendant's one-half interest in said community real property, until paid."

As so modified, the judgment is affirmed. Let the court upon entering its final decree assign the property according to the determination expressed in its interlocutory judgment, and at that time (Civ. Code, § 140) it may require such reasonable security as it may deem proper for payment of maintenance.

We concur: WASTE, P. J.; RICHARDS, J.

49 Cal. App. 487

SIMMONDS v. BELL. (Civ. 2052.)

(District Court of Appeal, Third District, California. Oct. 6, 1920.)

Appeal and error ⇐1010(1)—Finding of trial court supported by evidence affirmed.

Where a tenant's appeal presents the simple proposition of the amount due for rent, and the record contains evidence to support the findings of the trial court, the judgment will be affirmed.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by W. S. Simmonds against B. L. Bell. From judgment for plaintiff, defendant appeals. Affirmed.

Charles B. Harris and Ralph H. Lewis, both of Sacramento, for appellant.

J. W. S. Butler and B. F. Van Dyke, both of Sacramento, for respondent.

BURNETT, J. Plaintiff executed and delivered to defendant a lease which by its terms expired on November 20, 1916. The lease contained the following covenant:

"The lessees have the privilege of renewing this lease at its expiration on November 20, 1916, for five additional years at a monthly rental to be agreed upon by the lessor and lessees, and if they cannot agree on a monthly rental, they shall submit to an arbitration board of three or more persons, and their decision shall fix the monthly rental."

It is admitted that the lessee, Bell, remained in possession of the premises until February 20, 1919, when he vacated the same. On November 20, 1916, the lessee was in arrears for two months' rent to the amount of $180. No written notice of intention to exercise the option for renewal of the lease was ever given, and the evidence is in conflict as to whether there was an oral notice to that effect. No board of arbitration was ever selected; no award was ever made, the amount of rent for the new term was never agreed upon, and no new lease was ever prepared or executed. The complaint contained three counts. The first was for an injunction against the continuance of certain acts claimed to constitute a nuisance, for damages therefor, and for possession of said premises. The second was for rental and water rates from November 20, 1919, to October 5, 1918, and the third for damages for strip and waste in the sum of $150. It was stipulated at the trial that the plaintiff need not file a supplemental complaint or new action for such rents as he might claim for the period between the filing of the complaint and the vacation of the premises by defendant, which occurred before said trial, but that such matter might be considered by the court as though properly pleaded and denied.

The court found that the lease was terminated on November 20, 1916, and thereafter the defendant remained in possession by consent of plaintiff at the rental of $90 per month. There is evidence to support this finding, and the computation made by the court as to the amount due plaintiff for said possession is not subject to criticism. The court also allowed plaintiff $150 for strip and waste, as alleged in the complaint, and it is not disputed by appellant that there is sufficient evidence to sustain that contention. As against said allowance the court permitted an offset in behalf of defendant to the extent of $984.50. It is not claimed by appellant that the record demands the allowance of a larger counterclaim. In short, the case is one involving no novel principle of law, but presenting the simple proposition of the amount due for rent, the record containing evidence to support the findings of the court.

Some questions are discussed by counsel for appellant that have no application to the facts as revealed by the record, and we, therefore, pass them by without specific consideration. We may remark in conclusion that the contentions of appellant are conclusively answered in the brief of respondent, to which no reply has been made, apparently for the reason that no satisfactory reply can be made.

We are satisfied that the appeal is without merit, and the judgment is affirmed.

We concur: PREWETT, Presiding Judge pro tem.; HART, J.

49 Cal. App. 460

MAGINNIS v. HURLBUTT. (Civ. 3515.)

(District Court of Appeal, First District, Division 1, California. Oct. 5, 1920. Hearing Denied by Supreme Court Dec. 2, 1920.)

1. Public lands ⇐61(14) — Lands between meander line of lake and low-water mark cannot be granted as swamp lands.

Where lands lying between the meander line of uplands granted by the United States and the edge of a lake at low-water mark were not swamp and overflowed land within the Swamp Land Act of 1850 (U. S. Comp. St. §§ 4958–4960), they could not be granted by the state under California act of March 24, 1893, known as the Lake Location Act, and a purported grant by the state was not validated by Pol. Code, § 3493s, but such land passed to the patentee of the uplands.

2. Appeal and error ⇐1011(1) — Finding on conflicting evidence not disturbed.

A finding by the trial court on conflicting evidence will not be disturbed; there being sufficient evidence to support it.

3. Quieting title ⇐29—Where no adverse title was acquired, delay does not amount to laches.

Where defendant's predecessor did not succeed in establishing title to land by adverse

possession, and for many years before suit there was no regular occupancy by defendant's predecessor, etc., plaintiff, who had title, was under no duty to commence an action to quiet title against occasional occupants, and so a later action to quiet title was not barred by laches.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Action by J. H. Maginnis (L. J. Shuman, substitute) against Emeline W. Hurlbutt. From a judgment quieting plaintiff's title, defendant appeals. Affirmed.

See, also, 34 Cal. App. 504, 168 Pac. 368.

H. B. Churchill, of Lakeport, and Lovett K. Fraser, of San Francisco, for appellant.

Arthur C. Huston, of Woodland, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff in an action to quiet title.

The lands embraced in said action lie along the shore of Clear Lake between the meander line of the lands granted by the United States government to the predecessors of the plaintiff, in the patent on which the latter relies, and the edge of Clear Lake at low-water mark. The defendant, in her pleadings and proofs in the trial court and in her briefs upon this appeal, relies: First, upon a certificate of purchase to said strip of land issued by the state of California to her predecessor; second, upon adverse possession of said strip of land by H. B. Guernsey, one of the defendant's predecessors in the possession of said premises; and, third, upon the plaintiff's laches in the institution of the present action.

[1] As to the first of these contentions it was resolved by the trial court against the defendant upon evidence which sufficiently tended to show that the lands in question were not swamp and overflowed land within the meaning of that term as used in the act of Congress of September 28, 1850, commonly known as the Swamp Land Act, and hence that the attempted grant of said lands under the act of the state of California approved March 24, 1893, and commonly known as the Lake Location Act (St. 1893, p. 341), conveyed no title to the defendant's original predecessor claiming under said grant. Churchill v. Kingsbury, 178 Cal. 554, 174 Pac. 329. In that case also the claim of the defendant that grants of the character of that under which she claims were validated by section 3493s of the Political Code is disposed of adversely to her contention.

[2] The appellant's second contention is that she has become entitled to said lands by adverse possession. With respect to this contention the evidence is conflicting. The trial court, in its opinion in the decision of said cause, reviews this evidence, and arrives at the conclusion that the defendant failed at the trial to establish the right of her predecessor, Guernsey, to the ownership of said lands by adverse possession. We have examined the record with reference to this subject, and are of the opinion that the conclusion of the trial court in this regard must be sustained.

[3] The final contention of the appellant is that the plaintiff was guilty of laches in delaying the institution of this suit during a period of some 16 years after the alleged adverse holding of the defendant's predecessor, Guernsey, during which time the successors of Guernsey down to the defendant herein was dealing with this land. The evidence in the case, however, shows that said Guernsey did not succeed in establishing his title to said land by adverse possession, but that subsequent to the year 1903 there was no regular occupancy of said land either by said Guernsey or by his successors down to the defendant herein, and hence that the plaintiff, having title to said land under the terms of his patent to the uplands adjacent to the same, had laid upon him no duty of commencing an action to quiet title against persons whose occasional occupancy of the premises, or whose payment of taxes thereon, would not have sufficed to create during said period a title by adverse possession. It is not contended that the respondent did any act which could be construed into an estoppel, and, this being so, his mere delay in the institution of an action to quiet his title against occasional occupants of this portion of his lands cannot be held to constitute such laches as would bar his right of recovery in the instant case.

This disposes of the several points made by the appellant.

The judgment is affirmed.

We concur: WASTE, P. J.; KINSELL, Judge pro tem.

(49 Cal. App. 357)

HINRICHSEN v. IMPERIAL WATER CO. NO. 1. et al. (Civ. 3341.)

(District Court of Appeal, Second District, Division 1, California. Sept. 23, 1920.)

1. Corporations ⟸123(14)—Pledgor by specifying method of sale on default waives compliance with statutory method.

Where trust deed conveyed land and also corporate stock, and provided for sale thereof by trustee on default in payment of note in the manner described in the trust deed, the trustee, as a condition to sale of the stock, was not required to give the notice required on sale of pledged personal property by Civ. Code, § 3005, and Code Civ. Proc. § 692, but was merely required to proceed in the manner specified in the deed, since the grantor, by specifying the notice to be given, waived compliance with the statutory method.

2. Corporations ⟸123(14)—Pledgor held to have ratified sale estopping him from questioning its validity.

Pledgor of stock who directed trustee who had sold stock on default in payment of note secured to pay out of the purchase money received from the sale several sums of money, exhausting proceeds over and above sum owing to holder, is estopped to question validity of sale for insufficiency of notice.

3. Corporations ⟸133 — In suit to compel transfer of stock bought at trustee's sale, held purchaser might show ratification of sale.

In action by purchaser of stock at trustee's sale to compel transfer of stock on books of corporation, where pledgor joined as a defendant, in answer and also in cross-complaint alleged ownership of stock, and where plaintiff in answer to cross-complaint denied such allegation, plaintiff could show that such defendant ratified the sale, and was therefore estopped to question its validity, being entitled under such pleadings to introduce any evidence showing that the title and right of possession was vested in himself.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Irl E. Hinrichsen against the Imperial Water Company No. 1, L. F. Farnsworth, and others, in which last-named defendant filed cross-complaint. Judgment for plaintiff, and last-named defendant appeals. Affirmed.

E. R. Simon, of El Centro, for appellant.

Hickcox & Crenshaw and Frederick J. Trude, all of El Centro, for respondent.

CONREY, P. J. This is an action brought by the plaintiff to compel the transfer to him, on the books of defendant corporation, of 160 shares of its capital stock. The defendant Farnsworth filed with his answer a cross-complaint, alleging that the plaintiff converted the stock to his use, to Farnsworth's damage in the sum of $4,800. Judgment was entered in favor of the plaintiff, and Farnsworth appeals therefrom.

On the 1st day of June, 1910, L. F. Farnsworth and R. H. Benton executed to A. A. Cox their note in the sum of $12,600, due on or before January 1, 1916, secured by a trust deed of that date conveying to the trustee certain described real property in the county of Imperial together with said 160 shares of capital stock of Imperial Water Company No. 1. It was provided therein that upon default in payment of the debt the trustee "shall sell the above-granted premises, or such part thereof as in his discretion he shall find it necessary to sell," in the manner described in the deed, namely, by first publishing notice of the time and place of such sale, with a description of the property to be sold, at least once a week for four weeks in some newspaper published in said county of Imperial. On May 29, 1918, Cox transferred to Hinrichsen said promissory note, together with the security. Default having been made in the payment of the note, the trustee, on request of Hinrichsen, advertised the property in the manner described in the trust deed for sale on the 16th day of July, 1918. At that time the trustee offered for sale to the highest bidder all of the property described in the deed, including said 160 shares of capital stock. At the time of execution of the trust deed Farnsworth and Benton had caused the water stock to be issued to Cox, pledgee of Farnsworth and Benton, and had delivered said water stock to Cox without the indorsement of said pledgors. At the time appointed for the sale, and when the property was offered for sale, both Farnsworth and one Wallace Merchant were present. This occurred pursuant to an agreement in writing theretofore made between the two men last named which referred to the proposed sale of land and water stock, and wherein Merchant agreed to bid for the property the sum of $30,000, and further agreements were made with respect to the terms on which Merchant should hold the title if Merchant became purchaser at such sale. Merchant did bid the sum of $30,000, but the property was sold to Hinrichsen by reason of the fact that Hinrichsen bid the higher sum of $30,350. After the sale and on the same day the defendant Farnsworth directed the trustee to pay out of the purchase money received from the sale several sums of money, and said sums were by virtue of such order paid out by the trustee, thereby exhausting the entire proceeds of the sale over and above the sum of approximately $20,000 owing to Hinrichsen.

Notwithstanding the facts above stated, appellant Farnsworth claims that the sale of the water stock was void because the only notice of sale given by the trustee did not include a notice given by posting written no-

tice of the time and place of sale in three public places in the township or city where the same was to be made; in other words, that the notice of sale was not the kind of notice required to be given upon sale of personal property under execution, as provided by Civil Code, § 3005, and section 692 of the Code of Civil Procedure, and that, the indebtedness to Hinrichsen having been satisfied by virtue of the sale (which is admitted to have been valid with respect to the real property described in the trust deed), the shares of stock became the property of Farnsworth, free from any claim of Hinrichsen.

[1] It is true that the trust deed did not in terms and by special or separate reference to the shares of stock provide for the manner of sale thereof, but it did grant and convey the land and the shares of stock to the trustee, authorized the trustee to pay all taxes, assessments, and liens "upon said premises," and "all assessments against said shares of capital stock which may in their judgment affect said real or personal property or these trusts," and provided that in case of default in payment when due of any of the indebtedness covered by the instrument, the trustee, on application of the creditor, "shall sell the above-granted premises, or such part thereof as in his discretion he shall find it necessary to sell in order to accomplish the object of these trusts," and that such sale should be made in the manner described in the trust deed. We are of the opinion that this instrument, taken as a whole and considered in the light of the purposes for which it was made, intended that the manner of sale and the notice of sale set forth in the trust deed should apply to the shares of stock as well as to the land described in the deed. So construed, the terms of the deed as agreed to by Farnsworth in executing the same constituted a waiver of compliance with the statutory method of sale of pledged personal property. This being so, the sale carried to the purchaser full right and title to the shares of stock, and the plaintiff is entitled to have the same transferred to him on the books of the corporation. It is conceded that Hinrichsen presented the certificate of stock to the secretary of the water company, together with the trustee's deed, and duly made demand for such transfer, which was refused.

[2, 3] We further agree with the suggestion made by respondent that if by reason of the claimed failure to give notice as required by the statute in case of sales of pledged property the sale was not legally made, nevertheless appellant by his acts, which we have briefly described, ratified the sale and should not now be heard to question its validity. To meet this contention of the respondent, appellant insists that ratification of the sale cannot be claimed against him, because such ratification was not pleaded by respondent in his answer to the cross-complaint, and because at the time of such alleged ratification Farnsworth did not know of the material facts relative to the sale; that is to say, did not know what the law was with regard to the sale of pledged property, or what steps a pledgee must take in order legally to sell pledged property, or that the statutory notices had not been posted. Under the circumstances of this case, we think that such pleading on the part of the plaintiff was not necessary. Defendant Farnsworth answered, apart from his cross-complaint, affirmatively alleging that he was the owner of the water stock and entitled to possession of the certificate therefor. In his cross-complaint he again alleged that he was then and there the owner of said certificate and shares of stock, which allegation was denied by the answer to cross-complaint. This was sufficient to entitle the plaintiff to introduce any evidence showing that the title and right of possession of the property at the time in question was vested in himself. Summerville v. Stockton Milling Co., 142 Cal. 529, 548, 76 Pac. 243.

There is no evidence that the sale of the land alone would have brought a sum sufficient to have paid the indebtedness to Hinrichsen, even if we exclude from consideration the fact that a large additional sum paid out by the trustee to Hinrichsen as purchaser was in effect paid over to Farnsworth after the sale, and on his order, to his other creditors. Nevertheless, without tendering to the plaintiff any sum whatever, he seeks to have returned to him a valuable part of the property which was included in the trustee's sale. The injustice of appellant's claim is clear on the face of the record.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

49 Cal. App. 395

HUMPHREY v. UNITED STATES MACARONI CO. (Civ. 3346.)

(District Court of Appeal, Second District, Division 1, California. Sept. 28, 1920.)

1. Master and servant ⊂=329—Pleadings held not to raise issue of ownership of automobile or employment of driver.

In an action against an automobile owner for injuries, in which the complaint alleged that the automobile was owned by defendant and was driven by defendant's employé, an answer admitting that defendant had a person in its employ whose duties were to drive, but denying that the automobile was driven by the driver thereof, or any employé of the defendant, negligently or unlawfully, *held* not to raise issue of defendant's ownership or employment of driver.

2. Municipal corporations ⊂⊃592(1)—Ordinance held not inconsistent with Motor Vehicle Act.

Ordinance requiring driver of vehicle to drive on right-hand side of street as near right-hand curb as possible *held* not inconsistent with Motor Vehicle Act, § 20, subd. (a), requiring driver, wherever practical, to drive on right-hand side of highway; the ordinance not requiring travel on right-hand side of street when the conditions are such that it is not practical.

3. Municipal corporations ⊂⊃592(1)—Motor Vehicle Act prevails over inconsistent ordinance.

Motor Vehicle Act, § 22, prescribing rate of speed, prevails over inconsistent ordinance, the ordinance in such case being void.

4. Appeal and error ⊂⊃1051(1)—Admission of void ordinance held harmless.

In action for injury sustained when struck by defendant's automobile, admission in evidence of void ordinance prescribing rate of speed *held* not prejudicial to defendant, where the evidence proved that automobile driver at time of accident was violating the Motor Vehicle Act.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Henry S. Humphrey against the United States Macaroni Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Duke Stone, of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondent.

CONREY, P. J. The defendant appeals from a judgment rendered in favor of the plaintiff for the sum of $5,635 on account of alleged negligence of the defendant in the operation of its automobile at the intersection of Lyons and Ramirez streets in the city of Los Angeles on the 3d day of October, 1918.

Appellant contends that the findings are not sustained by the evidence, in this, that there is no evidence showing that defendant owned the automobile or that the person driving it was in defendant's employ or was acting in any way for the defendant. The complaint alleged that—

"While plaintiff was walking carefully along on the sidewalk of the northerly side of Lyons street, at or near the intersection of Ramirez street, which are public streets in the city of Los Angeles, state of California, the aforesaid automobile of the defendant herein, while being driven and propelled by the aforesaid driver and employé of said defendant herein, was so negligently and unlawfully operated that it overturned upon and over plaintiff and violently struck and threw down plaintiff herein while he was on the said sidewalk at or near the aforesaid intersection, and injured him as hereinafter set out."

The answer on that subject is as follows:

"Admits that on or about October 3, 1918, defendant herein had a person in its employ whose duties were to drive an automobile for the defendant, but denies that on October 3, 1918, while plaintiff was walking carefully along or on the sidewalk of the northerly side of Lyons street, at or near the intersection of Ramirez street, in the city of Los Angeles, the automobile of the defendant was driven or propelled by the driver thereof, or any employé of the defendant, negligently or unlawfully, or that the same was so negligently or unlawfully operated that it overturned upon or over plaintiff, or violently struck or threw down plaintiff while he was on the sidewalk, or at or near the aforesaid intersection, or that plaintiff was thereby injured."

[1] This answer in effect admits that defendant's automobile was being driven by defendant's employé and as such employé at the time and place indicated. The only denial is that the driving of the automobile by defendant's employé was negligent or unlawful, or so negligent or unlawful that the automobile was overturned upon the plaintiff, to his injury, etc. On the issues thus limited, it was not necessary for the plaintiff to introduce evidence to prove that the defendant owned the automobile or that the driver was in the defendant's employ.

Appellant next contends that the court erred in admitting in evidence certain sections of an ordinance of the city of Los Angeles, thereby overruling defendant's objection that the provisions of the ordinance are different from the provisions of the Motor Vehicle Act on the same subject, and that the state law controls. Section 6 of the ordinance provides that—

"The driver of any vehicle, upon meeting any other vehicle at any place upon any street shall turn to the right, and, on all occasions shall travel on the right-hand side of such street, and as near the right-hand curb thereof as possible," with exceptions which need not be discussed.

The Motor Vehicle Act (section 20, subd. [a], Stats. of 1917, p. 400) requires that the driver of a vehicle on a public highway "wherever practicable shall travel on the right-hand side of such highway." Appellant contends that the language of the ordinance requiring vehicles to travel on the right-hand side of the street is absolute in terms, whereas the Motor Vehicle Act only requires such travel on the right-hand side of the street wherever practicable.

[2] It would be absurd to construe the ordinance as requiring such travel on the right-hand side of the street when the conditions are such that it is not practicable. There is no difference in effect between the terms of the ordinance and of the statute with regard to this rule.

[3, 4] Section 80 of the ordinance provides that—

"Any person who shall ride, drive or propel or who shall cause or permit to be ridden driven or propelled, any vehicle at a rate of speed greater than twenty (20) miles per hour and not greater than thirty (30) miles per hour along or upon any street in the city of Los Angeles," outside of certain described territory, shall be deemed guilty of a misdemeanor.

The Motor Vehicle Act (section 22 [a], Stats. 1917, p. 404) provides, among other things:

"That no person shall operate or drive a motor vehicle or other vehicle on any public highway at a greater rate of speed than fifteen miles an hour * * * in approaching or traversing an intersecting highway, or crossing or intersection of highways, or in approaching or going around corners or curves in the highway, when in any of the foregoing cases the operator's or chauffeur's view of the road * * * is obstructed."

At the time and place in question in this case the defendant's automobile was traveling in a southerly direction on Lyons street and approaching Ramirez street. The evidence tends to prove that the automobile was traveling in the middle of the street at a rate of speed in excess of 20 miles per hour; that the operator's view of the road—that is to say, of Ramirez street—so far as travel from the west on that street was concerned, was obstructed by a two-story building located at the northwest corner of the two streets. At the intersection the automobile made a sharp turn to the left, and turned over. We concede that the Motor Vehicle Act on the subject prevails over the ordinance, and that the provisions of the ordinance are invalid. Ex parte Daniels, decision by the Supreme Court, rendered September 10, 1920, 192 Pac. 442. It appears by the evidence to which we have referred that the court was justified in its finding of negligence on the part of the defendant under the provisions of the Motor Vehicle Act by reason of the same facts which would have made the driver's conduct negligent under the provisions of the ordinance, if the ordinance had been in force. This being so, the admission of the ordinance in evidence, though erroneous, was not prejudicial to the defendant. In the case next to be cited appellant contended that the court erred in admitting in evidence an ordinance of the city of Long Beach containing certain regulations concerning the method of driving a vehicle in a public street. The court found facts showing that the conduct in question violated not only the provisions of the ordinance, but those of the statute. Thereupon the Supreme Court said:

"In view of this finding it is not necessary to consider whether the * * * section 8 above referred to was superseded by the Motor Vehicle Act. It is to be noted that the court not only found that at the time of the accident the defendant was violating the said city ordinance, but also that he was violating the Motor Vehicle Act itself, in that 'he did not keep to the right of the center of the street intersection of said Third street and Atlantic avenue.' For this reason the admission of the ordinance, even if erroneous, would not be prejudicial." Pemberton v. Arny, 182 Pac. 964, 967.

The last point presented by appellant is that the damages awarded in this case are excessive. The evidence, which we will not take space to review, shows very serious injuries received by the plaintiff. The amount of the award is not great enough to raise any presumption that it was based on prejudice or passion, rather than sober judgment, and we are not able to say that it is grossly disproportionate to any reasonable limit of compensation warranted by the facts.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

49 Cal. App. 429

ROTHWELL et al. v. VAUGHN. (Civ. 3458.)

(District Court of Appeal, First District, Division 2, California. Sept. 30, 1920.)

1. Partnership ⟸242(5)—Finding sale of interest in partnership business took place on date of option held unsupported.

A finding by the trial court that a sale by defendant to plaintiff of his interest in a partnership business took place on a date different from that alleged in the complaint is unsupported by the evidence, where it appears that what was executed on the date found was merely an agreement or option to sell, and that the transfer, which was part of the same transaction, occurred on a subsequent date alleged in the complaint.

2. Partnership ⟸242(5)—Finding that partners, suing on a covenant of a predecessor in business had ceased to do business under name stated in contract not sustained.

In an action by partners, who had succeeded to defendant's interest in a business, on defendant's covenant to restrain from engaging in the same business, evidence *held* insufficient to sustain the trial court's finding that plaintiffs had ceased to do business under the firm name stated in the contract and had engaged in business under another name.

3. Partnership ⟸279—Remaining partner can enforce covenant with firm after dissolution.

After a partnership with which defendant had covenanted not to engage in business for a limited time was dissolved, under Civ. Code, § 2450, by the sale of one partner's interest, but the remaining partner and the purchaser of the interest remained in business as partners, the remaining partner could enforce the covenant against defendant.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

4. Injunction ⊂⊃128—Finding no solicitation of former customers held contrary to evidence.

In a suit to restrain the violation of defendant's covenant not to engage in business within a specified time, evidence by defendant himself that he had given former customers his card after engaging in the new business and sent them circulars, that several had seen his advertisement, and had come to his place of business, *held* to show that a finding by the trial court that defendant had not solicited former customers was contrary to the evidence.

5. Good will ⊂⊃6(4) — Covenant to refrain from business held not terminated.

Evidence that defendant, who had been employed by plaintiffs and covenanted not to engage in a competing business, requested release from his employment to engage in business in another city, whereupon the contract of employment was canceled, under Civ. Code, §§ 1698, 1699, by tearing off the signatures, but the contract containing the covenant was expressly reserved by plaintiffs, does not support the trial court's finding that the parties released each other of all covenants and obligations between themselves.

6. Partnership ⊂⊃64—Failure to file certificate as to fictitious firm name does not bar recovery on contract in partners' individual names.

Under Civ. Code, § 2468, prohibiting action on a contract under a fictitious or partnership name when a required certificate has not been filed, the failure to file the certificate does not prevent enforcement of a covenant by defendant not to engage in the business, made in the names of the partners' individual, and not in their fictitious firm, name.

7. Good will ⊂⊃6(4)—Mutual rescission of portion of contract is not breach, which terminates obligation.

Even if a contract for the employment of defendant by plaintiffs was a part of the agreement by which defendant sold his business to plaintiffs and agreed not to engage in competing business, a mutual rescission of the contract for employment at defendant's request was not a breach of the entire contract, which terminates his obligation to refrain from engaging in the business.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Chester L. Rothwell and another against Leon E. Vaughn to restrain defendant from practicing optometry in violation of his covenant not to do so. Judgment for defendant, and plaintiffs appeal. Reversed.

L. B. Stanton, of Los Angeles, for appellants.

Irvin C. Louis and R. M. Blodget, both of Los Angeles, for respondent.

NOURSE, J. Plaintiffs appeal from a judgment in favor of defendant in an action brought to restrain defendant from practicing the business or profession of optometry in the city of Los Angeles, in violation of a covenant of the defendant contained in the bill of sale of his interest in a certain partnership known as the Cahn-Vaughn Optical Company. On September 12, 1917, Henry Cahn entered into an agreement to sell his three-fourths interest in said partnership business to the plaintiff Rothwell and covenanted to refrain from engaging in such business in the city of Los Angeles for a period of five years thereafter. It was also agreed that the defendant Vaughn, who owned a one-quarter interest in the business, should be continued as a partner with the purchaser. During the period of the option to sell contained in this agreement negotiations were had with defendant Vaughn, whereby he agreed to sell his one-quarter interest in said business to plaintiff Rothwell and one John F. Rothwell for the sum of $1,371.48. On the 25th of October, 1917, Cahn executed and delivered his bill of sale for his three-quarter interest in the business, and on the same day defendant executed and delivered his bill of sale for his one-quarter interest in the business to the two Rothwells. In this bill of sale defendant covenanted with the purchasers that he would not enter into the business of optometry, except for the Rothwell Optical Company, in the city and in the county of Los Angeles for a period of five years thereafter. When the defendant entered the Cahn-Vaughn Optical Company, he transferred to the partnership a large number of prescriptions, together with the good will of his business, which he had theretofore been conducting in the city of Los Angeles. He continued actively in the business of the Cahn-Vaughn Optical Company, so that at the time of the transfers in October, 1917, the company had upwards of 4,000 prescriptions of patrons on its files, all of which were included in the two bills of sale. On the same day that the transfers were made the two Rothwells made a contract with defendant, whereby they agreed to employ him as an optometrist up to the 1st of September, 1918, at $40 per week. He continued in their employ up to the 1st day of April, 1918, when John F. Rothwell sold his interest in the business to the plaintiff Von Breton, and the plaintiff Rothwell purchased an undivided one-half interest in the business of Von Breton. These two continued to operate the business at two separate places in the city of Los Angeles—one at 718 Broadway, the original location of the partnership business; the other at 404 South Broadway, the location of the business formerly owned by Von Breton. At this time the defendant was detailed to the store at 404 South Broadway, without any change in the manner of his employment, and continued to be so employed there up to the 30th

of April, 1918, when, upon his own request, he was paid in full for his services, together with one month's pay in advance, and his employment ceased. Upon the last day, according to his own testimony, defendant approached the plaintiff Rothwell and asked to be relieved of his contract of employment, stating that he had an opportunity to engage in the same business in the city of Modesto and also at Oxnard. Acting upon this request, the plaintiff Rothwell canceled the contract of employment, by tearing the signatures off both copies of the document. At the same time he informed defendant that he intended to retain the bill of sale containing the covenant which is the basis of this action, and carefully placed that document in his safe. Some suggestion was made by plaintiff Rothwell that defendant might obtain employment in the city of Pasadena, or in the city of Long Beach; but nothing was said regarding his engaging in business in the city of Los Angeles, and no suggestion was made by either party that the covenant contained in the bill of sale be waived or canceled.

Immediately thereafter, and on the 6th day of May, 1918, defendant entered into the business of optometry in his own name in the city of Los Angeles, advertised the fact in the Los Angeles papers, and circularized former patrons of the Cahn-Vaughn Optical Company to give him their business. The evidence shows conclusively that defendant was very successful in his new enterprise, and obtained several of the former customers of the Cahn-Vaughn Optical Company, as well as those of the plaintiffs. The appeal is based upon the ground that the evidence is insufficient to support the findings. Appellants attack substantially all the findings made by the trial court, but consideration need be given to those only wherein the most glaring error appears, as it is not likely that the other errors complained of will occur upon a new trial of the case.

[1] Finding 2, to the effect that Cahn sold his interest in the Cahn-Vaughn Optical Company to the Rothwells on the 25th of September, 1917, rather than on the 25th of October, 1917, as alleged in the complaint, is not supported by the evidence. The instrument dated September 12, 1917, was merely an agreement or option to sell. The transfer did not take place until October 25, 1917, the same day upon which defendant sold his interest in the concern to the Rothwells, and without doubt the two transfers constituted one transaction—that is, the sale of the entire partnership interest to the Rothwells.

[2] Finding 4, which implies the dissolution of the Rothwell Optical Company and the formation of a new partnership, known as the Von Breton-Rothwell Optical Company, has no support in the evidence. The partnership of John F. Rothwell and Chester L. Rothwell was dissolved by operation of law through the sale of the former's interest. Section 2450, Civ. Code. But as to the dissolution of the Rothwell Optical Company—that is to say, the discontinuance of the firm name—the only evidence in the record is that of Chester Rothwell. When asked when the Rothwell Optical Company was dissolved he answered:

"It has never been dissolved; no. He [John F. Rothwell] simply sold his interest to Von Breton, and Von Breton, simply took it up where he dropped it."

[3] There is no evidence that the parties continued to do business under the name of Von Breton-Rothwell Optical Company, or that a partnership of that name was ever formed; and, if they did so, it would be wholly immaterial to the issues of the case. The respondent had covenanted with the two Rothwells that he would not engage in the same business in Los Angeles for his own benefit, or for the benefit of any person or firm other than the Rothwell Optical Company. If this firm was dissolved, then respondent was not entitled to engage in the business in Los Angeles for any one. Though the sale of the John Rothwell interest may not have conveyed the right to respondent's personal services under the employment contract, it certainly conveyed his rights under the covenant. In any event, Chester Rothwell, as one of the parties beneficially interested in the covenant, was entitled to enforce its obligation. He continued to pay respondent's salary after the sale to Von Breton, and did nothing to indicate an intention to waive the obligation of the covenant.

[4] Finding 5, to the effect that it is not true that respondent has solicited or is soliciting the former patrons or customers of appellants, as successors of the said Cahn-Vaughn Optical Company, is in direct conflict with the evidence of the respondent. When asked, "Did you do any business with the old customers of the Cahn-Vaughn Optical Company?" he answered:

"If such they be, I met different ones I had met at different places, and gave them a card, and sent them—some came in through the notice in the change of my address I put in the paper—I guess in probably three months I think a couple of dozen."

Again:

"When you went over to this place, you sent out a circular letter to a number of them? A. Yes, sir; I went through the telephone book, and any place I could get names, and sent out about 400."

[5] Finding 8, to the effect that on or about the 1st of April, 1918, the Rothwell Optical Company and the respondent settled between themselves all claims or demands of any nature existing between them, and then

and there each released the other from any and all claims, demands, obligations, covenants, and conditions, is not supported by the evidence. In the first place, it is undisputed that respondent continued in the employ of the appellant Rothwell until the 30th of April, 1918, and that no transaction of any kind was had between them on the 1st of April. The evidence as to what occurred on the 30th of April is confined to the testimony of Chester L. Rothwell and respondent, and is without substantial conflict. It is to the effect that on that date respondent came to Rothwell's office, in response to a suggestion made by respondent over the telephone that he desired to terminate his employment, and that he planned to enter into business either in the city of Modesto or Oxnard. Upon his own request Rothwell canceled the contract of employment, by tearing off the signatures to both the original contract which he had in his possession and the copy which was presented to him for that purpose by respondent. No suggestion was made by respondent at that or any other time that the covenant contained in the bill of sale should be waived or canceled. In fact, according to his own testimony he did not request a release from the covenant, and did not at any time suggest to Rothwell that he contemplated or might desire to enter into the business of an optometrist in the city of Los Angeles. He did testify that he handed his copy of the covenant to Rothwell with his employment contract, but that Rothwell returned it to him after canceling the employment contract, and told him to keep it, as he intended to keep the original in his files. Respondent also testified that he did not at that time contemplate going in business for himself in Los Angeles and made no suggestion to Rothwell that he might do so.

Section 1698 of the Civil Code provides that—

"A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."

But section 1699 of the same Code provides that—

"The destruction or cancellation of a written contract, or of the signature of the parties liable thereon, with intent to extinguish the obligation thereof, extinguishes it as to all the parties consenting to the act."

The latter method was adopted as to the contract of employment. Rothwell expressly stated that he intended to preserve the bill of sale with the covenant, and at no time expressed any intention to extinguish the obligation thereof in writing or otherwise. It must be held, therefore, that the covenant was still in full force and effect.

[6] As to finding 9, to the effect that the Rothwell Optical Company ceased to engage in business on the 1st of April, 1918, the evidence is plainly to the contrary, as has heretofore been pointed out. That portion of the finding which relates to the employment of respondent by Von Breton on March 1st finds no support in the evidence. That portion of this finding and of the one following relating to the failure of the parties to file with the county clerk of Los Angeles county a certificate of copartnership in accordance with section 2468, Civil Code, is supported by the evidence and the admissions of counsel, but is wholly unrelated to any of the issues of the case. The covenant contained in the bill of sale was made in the name of Chester L. Rothwell and John F. Rothwell as individuals "doing business under the firm name of Rothwell Optical Company." Respondent covenanted with these individuals that he would not for a period of five years thereafter engage in the business or profession of manufacturing optician or optometry for his own individual benefit, or for the benefit of any person, firm, or corporation other than said Rothwell Optical Company. The inhibitions of section 2468 run to the maintenance of an action upon or on account of "any contract or contracts made, or transactions had, under such fictitious name, or in their partnership name." As this contract was not made in the fictitious or partnership name, but was made in the individual names of the parties, it is clear that the section does not prohibit the parties maintaining an action of this nature. Spreckels v. Grace Darling Hosp. Ass'n, 28 Cal. App. 646, 648, 153 Pac. 718.

[7] In the argument, wholly inconsistent with their theory of the case in relation to this plea of abatement, counsel for respondent now insist that, inasmuch as the contract of employment was for personal services wherein respondent engaged himself in the employ of the two Rothwells, the sale by John F. Rothwell of his interest in the business to Von Breton ipso facto breached the contract. It is then argued that, as the contract of employment was made at the same time as the covenant, they constituted one entire agreement and the breach of the former relieved respondent from the obligation of the latter. But, assuming that the two contracts created one agreement, it does not follow that they were not severable. Respondent accepted payment of his salary until June 1, 1918. His contract of employment had but 3 months to run. The covenant ran for 4½ years. The parties could very well agree to cancel the employment contract without affecting the obligation of the covenant. Thus, if the alleged breach of April 1st was waived by respondent accepting salary in accordance with the employment contract for 2 months thereafter, he could not assign the breach as an excuse for his repudiation of the covenant. His testimony is

all to the effect that the employment was terminated solely upon his request as he felt he would do better for himself outside of Los Angeles. There was no suggestion that appellant Rothwell had breached his contract until after the litigation arose.

For these reasons the judgment must be reversed; and it is so ordered.

We concur: LANGDON, P. J.; BRITTAIN, J.

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FLY v. CLINE, Sheriff of Los Angeles County, et al. (Civ. 3214.)

(District Court of Appeal, Second District, Division 2, California. Sept. 29, 1920. Hearing Denied by Supreme Court Nov. 24, 1920.)

1. Judgment ⟸779(2)—Mortgages ⟸594(5)—Judgment lien held not to attach to land conveyed by judgment debtor before rendition of judgment.

Judgment lien did not attach to land conveyed by judgment debtor prior to rendition of judgment so as to give judgment creditor right of redemption against mortgage foreclosure sale purchaser under Code Civ. Proc. § 701, subd. 2, where record owner at time of rendition of judgment was not a party to the action and was an innocent purchaser in good faith, even though judgment debtor had conveyed land for purpose of defrauding creditors.

2. Vendor and purchaser ⟸242 — Purchaser for value presumed prima facie an innocent purchaser in good faith.

A purchaser for value is presumed prima facie to be innocent purchaser in good faith.

3. Fraudulent conveyances ⟸172(1)—Valid between parties.

A conveyance in fraud of creditors, though declared by statute to be void as to creditors, is valid as between the parties.

4. Fraudulent conveyances ⟸203—Bona fide purchaser from fraudulent grantee takes title purged of fraud.

A bona fide purchaser from the fraudulent grantee takes the title even against the creditors of the fraudulent grantor, purged of the anterior fraud that affected the title.

5. Vendor and purchaser ⟸239(4)—Innocent purchaser from grantee named in deed, intended as mortgage, gets good title.

Where a conveyance intended as security is absolute on its face, and the land is subsequently conveyed to an innocent third person, who pays the purchase money or renders a valuable consideration without notice of the true character of the conveyance, he gets good title under Civ. Code, §§ 2925, 2950, which cannot be disturbed by any claim that the original transaction was a mortgage, and not an absolute conveyance.

6. Judgment ⟸711—Mechanic's lien foreclosure decree not res adjudicata as to record owner not made party to action.

Mechanic's lien foreclosure decree in action to which record owner of land was not made a party was not res adjudicata in subsequent action between the lien claimant and such owner of record for her successors in title.

7. Contracts ⟸25—Agreement held merely an agreement to execute building contract.

Owner's agreement "to give" contractor a contract to construct apartment house "to have about 54 apartments of two and three rooms each and the cost not to exceed $45,000," with no definite agreement as to number of apartments or price to be paid, *held* not to empower contractor to do any work on premises; the agreement not being a building contract, but merely an agreement to execute a building contract.

8. Contracts ⟸25—When agreement to execute future contract is valid.

Where the minds of the parties have met respecting the terms and conditions of the more formal writing that is to be executed by them, and the agreed terms of the contract thereafter to be executed are certain and in all respects definitely understood and agreed upon in advance either orally or by informal writing, there is an obligatory contract dating from the making of the earlier agreement, but, unless the agreement to execute the future contract is definite and certain upon all the subjects to be embraced, so that nothing is left for future negotiation, it is nugatory.

9. Mechanics' liens ⟸132(13) — Contractor doing preliminary work not entitled to file claim within 60 days after completion of main contract.

Contractor who did work preparatory to erection of building, such as grading, clearing of lot, removing of trees, etc., under an agreement with owner claimed by him to be a building contract, was not entitled, under Code Civ. Proc. § 1187, to 60 days after completion of construction of building by other contractor under another contract in which to file claim, but was required to file claim within statutory period after completion of work he himself performed.

10. Mechanics' liens ⟸132(11)—Time for filing claim not extended by existence of another and distinct contract unperformed.

Where labor or materials are furnished under separate building contracts, even though such contracts are between the same persons and relate to the same building or employment, the contracts cannot be tacked together so as to enlarge the time for filing lien for what was done or furnished under either, but claim of lien must be filed for what was done or furnished under each contract within statutory period of its completion.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Consolidated actions by Milton A. Fly against John C. Cline, as Sheriff of Los An-

geles County, Cal., and others. From judgment rendered, plaintiff appeals. Affirmed.

Wm. Lewis, of Los Angeles, for appellant.
R. L. Horton, of Los Angeles, for respondents.

FINLAYSON, P. J. Several actions in the superior court were consolidated and tried as one. The trial resulted in a judgment adverse to Milton A. Fly, the appellant. The controversy presents the question as to whether appellant had the right to redeem the property, a lot in the city of Los Angeles, from a redemption previously made by the Hammond Lumber Company.

The facts necessary to an understandng of the questions presented by the appeal are these:

On February 26, 1913, Della Ingerson, the then owner of the premises. mortgaged the property to the Security Trust & Savings Bank to secure her promissory note for $2,500. Desiring to erect an apartment house on the premises, Mrs. Ingerson, on April 28, 1913, entered into the following written agreement with appellant:

"Los Angeles, Cal., April 28th, 1913. Memorandum of agreement made and entered into by and between Mrs. Della Ingerson, party of the first part, and Milton A. Fly, party of the second part, both of Los Angeles, California. The party of the first part agrees to give to the party of the second part a contract for the construction of one brick apartment house to be located at 230 South Beaudry avenue, fourth lot north of Third street, east side of Beaudry avenue, Los Angeles, California, being lot 15, block 8 of the Woolen Mill tract. Said apartment house to have about 54 apartments of two and three rooms each and the cost not to exceed $45,000. The party of the first part hereby authorizes the party of the second part to order blueprint plans and specifications for the party of the first part, and also to arrange for a building loan at 5½ per cent. or 6 per cent., the lot to be clear of incumbrance. This agreement signed in duplicate this 28th day of April, 1913. Mrs. Della Ingerson. Milton A. Fly."

About three months later plans for an apartment house, to cost about $65,000, were prepared by an architect.

On November 6, 1913, Mrs. Ingerson executed a second mortgage on the property to Watson B. Burt, as mortgagee, to secure her promissory note, of even date, for $45,000. This mortgage, hereafter referred to as the Burt mortgage, was recorded November 27, 1913, and later was assigned to the Hammond Lumber Company.

On December 29, 1913, Mrs. Ingerson entered into a building contract with the Dutro-Wren Construction Company, as contractor, for the construction of an apartment house upon the premises. By this contract, which was a formal written building contract, the contractor, the Dutro-Wren Construction Company, agreed to construct on the lot, pursuant to the previously prepared plans, a three-story, class C, brick apartment house, and Mrs. Ingerson agreed to pay therefor the sum of $65,000. Fly was not a party to nor mentioned in this building contract. Work under this contract was commenced by the Dutro-Wren Construction Company about January 19, 1914, and was continued by the contractor until October 13, 1914, on which day work on the apartment house ceased, and was not resumed until more than 30 days thereafter.

On March 2, 1914, Mrs. Ingerson executed a grant deed to the premises to her attorney, George H. Woodruff. This deed to Woodruff was recorded in the office of the county recorder on the day of its execution. On December 9, 1914, Woodruff and wife executed to Ada Webster, the daughter of Mrs. Ingerson, a quitclaim deed to the premises. This deed was recorded December 10, 1914. One of the claims made by appellant is that Mrs. Ingerson's deed to Woodruff and the latter's deed to Mrs. Webster were made to hinder, delay, and defraud Mrs. Ingerson's creditors; or, if not made for that purpose, then that the deed to Woodruff was given as security, to secure any indebtedness that thereafter might become due him from his client, Mrs. Ingerson, and that therefore it was but a mortgage.

On February 24, 1916, Mrs. Webster, who, on the face of the records in the county recorder's office, was the then absolute owner of the property, conveyed it, for a valuable consideration, to W. H. Elliott, by grant deed recorded February 25, 1916; and Elliott and wife, for a valuable consideration, by a grant deed bearing date February 25, 1916, conveyed the property to the Hammond Lumber Company, which corporation now claims to be the owner of the premises.

On December 5, 1914, Fly, claiming that he had performed work in the construction of the apartment house under his memorandum agreement with Mrs. Ingerson of date April 28, 1913, a copy of which is set forth supra, filed in the office of the county recorder a mechanic's lien claim for $4,414.38. On December 29, 1914, he commenced an action in the superior court to foreclose his alleged mechanic's lien. He made Mrs. Ingerson and her immediate grantee, Woodruff, parties defendant; but Mrs. Webster, though then appearing of record as the sole owner, was not made a party to the action. Because Mrs. Webster was not made a party to Fly's action to foreclose his alleged mechanic's lien, the decree in that action is not res adjudicata as to her or as to either of her successors in title—Elliott and the Hammond Lumber Company. On February 1, 1917, a foreclosure decree was entered in that action, whereby the court declared that Fly had a mechanic's lien on the

property for $4,414.38, and decreed that the lien be enforced by sale of the premises.

On June 1, 1915, the Security Trust & Savings Bank, the holder of the first mortgage—the mortgage for $2,500—commenced a foreclosure action in the superior court, making parties defendant Mrs. Ingerson, the Dutro-Wren Construction Company, the Hammond Lumber Company, Ada Webster, and a number of mechanic's lien claimants. This foreclosure suit resulted in a decree whereby it was adjudged, among other things, that $3,068.75 was due the plaintiff in that action, the Security Trust & Savings Bank, on the $2,500 mortgage that Mrs. Ingerson had executed to it February 26, 1913; that $45,000, with interest, was due the Hammond Lumber Company on the Burt mortgage that had been assigned to it; that the premises be sold; and that the proceeds of the sale, after payment of sheriff's fees, etc., be applied, first to the payment of the amount due the Security Trust & Savings Bank on the mortgage held by it, and then, if there should be any surplus, to the payment of the Hammond Lumber Company's claim for $45,000, and interest, due on the Burt mortgage. By this decree the court made no attempt to pass upon the validity of Fly's claim of lien. That is a matter that was not passed upon or determined.

On March 22, 1916, at the sheriff's sale under the foreclosure decree in the action thus brought by the Security Trust & Savings Bank to foreclose the mortgage held by it, the property was sold by the sheriff to the judgment creditor, the Security Trust & Savings Bank, for $3,195.19, which, after paying the sheriff's fees and the amount due the judgment creditor, left no surplus whatever. Thereupon a certificate of sale was executed and delivered to the purchaser.

The next day, March 23, 1916, the Hammond Lumber Company, by whom the $45,000 mortgage was held, and who, in the foreclosure action that had been brought by the Security Trust & Savings Bank to foreclose its $2,500 mortgage, had been adjudged to be the holder of the $45,000 mortgage, claiming the rights of a redemptioner, paid the purchaser at the sheriff's sale, the Security Trust & Savings Bank, the amount that it had paid the sheriff for the property, $3,195.19, with interest thereon at 1 per cent. per month. At the same time the Hammond Lumber Company gave the sheriff written notice of redemption, accompanied by a copy of the docket of the judgment in the mortgage foreclosure action wherein the court had adjudged the Hammond Lumber Company to be the holder of the $45,000 mortgage. The Hammond Lumber Company also presented to the sheriff an affidavit showing the amount that it claimed to be due to it on the "judgment lien" which it claims was created by the docketing of the decree in the mortgage foreclosure action. On March 24, 1916, the sheriff executed and delivered to the Hammond Lumber Company a certificate of redemption. Thereafter, on the expiration of a year, the sheriff executed a sheriff's deed to the Hammond Lumber Company, and, as we have said, that corporation now claims to be the absolute owner of the property.

In addition to the action that he had commenced on December 29, 1914, to foreclose his alleged mechanic's lien, Fly, on February 16, 1916, brought an action of debt against Mrs. Ingerson to recover for work and labor that he claims to have performed in the construction of the apartment house under the written memorandum agreement that he and Mrs. Ingerson had entered into on April 28, 1913. The sole party defendant in that action was Mrs. Ingerson, who did not appear, and on March 3, 1916, a default judgment was entered against her by the clerk for $4,414.38.

On May 22, 1916, Fly, claiming that the Hammond Lumber Company's redemption was fatally defective in certain particulars which we have not deemed it necessary to mention, and that, by reason of such defects, that company had not acquired any right as a "redemptioner," but that its sole right was that of an equitable assignee of such right to the property as the Security Trust & Savings Bank had acquired as the original purchaser at the sheriff's sale, undertook to redeem the property by tendering to the sheriff, for the Hammond Lumber Company, the amount that the latter had paid the Security Trust & Savings Bank, viz. $3,325.67, with interest thereon at 2 per cent. per month, and no more. This attempted redemption by Fly was based on the mechanic's lien that he claimed to have acquired by the filing of his mechanic's lien claim in the county recorder's office on December 5, 1914, and also on the judgment lien that he claimed to have acquired by the docketing of the personal judgment against Mrs. Ingerson in the action of debt that he had brought against her. The sheriff, treating the Hammond Lumber Company as one who had become a "redemptioner," with all the statutory rights of a redemptioner, refused to receive the tendered sum of $3,325.67, with interest thereon at 2 per cent. per month, on the ground that it was not acompanied by the amount due on the Burt mortgage held by the Hammond Lumber Company, namely, $45,000 and interest thereon.

On March 21, 1917, a judgment, purporting to be a judgment foreclosing appellant's alleged mechanic's lien, having been entered on February 1, 1917, and docketed February 19, 1917, appellant again attempted to redeem the property by again tendering to the sheriff, for the Hammond Lumber Company, the amount which the latter had paid the original purchaser at the sheriff's sale. Fly based

this second attempted redemption on his alleged mechanic's lien and on the decree foreclosing the same, docketed February 19, 1917. Again the sheriff refused Fly's tender of payment. This refusal was on the same ground as before, namely, that the amount tendered should have included the sum due the Hammond Lumber Company on the Burt mortgage.

From these facts various propositions are advanced and argued. "The whole contention in this court," says appellant in his closing brief, "is relegated to the question of the sufficiency of the tenders of redemption made to the sheriff by appellant, Milton A. Fly, and respondent Hammond Lumber Company, and their respective rights as such redemptioners."

Under the view we take of the case, it will not be necessary to consider appellant's claim that the Hammond Lumber Company did not acquire the rights of a "redemptioner," and that it is only an equitable assignee of the rights acquired by the Security Trust & Savings Bank as the original purchaser at the sheriff's sale. This is so for the reason that, as we view the case, appellant himself never became vested with the rights of a redemptioner. And if, as we hold, appellant's attempted redemptions were without authority of law and abortive, then, for that reason alone, the judgment must be affirmed.

For the purpose of this appeal, we shall assume that the possessor of a mechanic's lien has the same right to redeem as has the holder of a mortgage lien, although the language of subdivision 2 of section 701 of the Code of Civil Procedure would seem to confine the right of redemption to "a creditor having a lien by judgment or mortgage." This assumption that the possessor of a mechanic's lien may exercise the right of redemption finds some support in the fact that subdivision 1 of section 705 makes reference to a redemption upon "a mortgage or other lien." If we assume, for the purposes of this appeal only, that the possessor of a mechanic's lien is entitled under our Code to redeem property that has been sold at sheriff's sale, then, in order to entitle appellant to invoke the rights possessed by a redemptioner, it must appear that he had either: (1) A lien by judgment; or (2) a mechanic's lien. No other form of lien is claimed by him. In our opinion, appellant never acquired either of such liens.

[1] Appellant did not acquire a judgment lien. The personal judgment against Mrs. Ingerson, entered March 3, 1916, in favor of appellant, in the action of debt that he had commenced against her on February 16, 1916, did not create a judgment lien on the property in controversy, for the reason that, when that judgment was docketed, March 9, 1916, the title to the property was not in Mrs. Ingerson, the judgment debtor and sole party defendant in that action, but was in the Hammond Lumber Company under its deed from Elliott and wife, of date February 25, 1916. The decree that was entered in the suit that Fly brought to foreclose his alleged mechanic's lien was not entered until February 1, 1917, long after the Hammond Lumber Company had become the record owner under its deed from Elliott, who, it will be remembered, deraigned title from Mrs. Webster, who, in her turn, was the grantee of Woodruff, to whom Mrs. Ingerson, the original owner, had conveyed the property by deed dated March 2, 1914. At the time when Fly brought his action to foreclose his alleged mechanic's lien, December 29, 1914, the record title stood in Mrs. Webster, under the deed to her from Woodruff and wife, dated December 9, 1914, and recorded December 10, 1914. Mrs. Webster, though appearing of record as the owner of the property at the time when appellant brought his action to foreclose his alleged mechanic's lien, was not made a party to that action. Therefore neither she nor either of her successors in title is bound by that decree. Unless, therefore, it can successfully be claimed that at the date of the docketing of one at least of these two judgments in favor of Fly Mrs. Ingerson was the owner of the property, or at least had an interest therein to which a judment lien could attach, there can be no basis for any claim that appellant ever possessed a redemptioner's status as a creditor having a lien by judgment.

To support his claim that at the times when he sought to redeem the property from the sheriff's sale Mrs. Ingerson was the true owner of the property, and that therefore he had a judgment lien when he thus sought to effect a redemption, appellant contends that the deed from Mrs. Ingerson to Woodruff, and likewise the deed from Woodruff and wife to Mrs. Webster, were made to hinder, delay, and defraud the creditors of Mrs. Ingerson, or that, if those deeds were not made for that purpose, then the deed to Woodruff was made as security for such indebtedness, if any, as might become due to him from Mrs. Ingerson during such time as he might act as her attorney, and that therefore the deed to Woodruff was but a mortgage. Neither of these contentions, if borne out by the evidence, could aid appellant; for the respondent Hammond Lumber Company, and its immediate grantor, W. H. Elliott, were both innocent purchasers. As to each of these grantees, therefore, the title, as it appeared of record at the dates of the respective deeds to them, must be treated, in so far as their rights are concerned, as the true title to the property; that is, as to the Hammond Lumber Company and its immediate grantors, W. H. Elliott and wife, the record chain of title must be taken as correct, and, as to each of them, Mrs. Webster must be regarded as the only true legal and equitable owner from the date of Woodruff's deed to her, De-

cember 9, 1914, down to the date of her conveyance to Elliott, February 24, 1916. This is so because the Hammond Lumber Company and W. H. Elliott were purchasers for value without notice. It appears from the evidence that both Elliott and the Hammond Lumber Company gave a valuable consideration for the property.

[2] A purchaser for value is presumed prima facie to be an innocent purchaser in good faith. Williams v. Borgwardt, 119 Cal. 80, 51 Pac. 15; Morrow v. Graves, 77 Cal. 218, 19 Pac. 489. There is nothing in the evidence to rebut this presumption.

[3, 4] If it be true that, as claimed by appellant, the deed from Mrs. Ingerson to Woodruff and the deed from Woodruff and wife to Mrs. Webster were made to hinder, delay and defraud Mrs. Ingerson's creditors, each deed, though void as to such creditors, was good as between the parties thereto; and Elliott and the Hammond Lumber Company, as innocent purchasers for value, took the title discharged of any fraud with which it may have been infected. It is the settled doctrine that a conveyance in fraud of creditors, although declared by statute to be void as to them, is, nevertheless, valid as between the parties; and a bona fide purchaser from the fraudulent grantee takes the title, even against the creditors of the fraudulent grantor, purged of the anterior fraud that had affected the title. Paige v. O'Neil, 12 Cal. 484; Morrow v. Graves, supra; Williams v. Borgwardt, supra; Denike v. Santa Clara etc. Soc., 9 Cal. App. 229, 232, 98 Pac. 687.

[5] If, as claimed by appellant, the deed to Woodruff, though absolute in form, was intended as a mortgage given to secure a possible future indebtedness from Mrs. Ingerson to Woodruff, the result will be the same as if the deed were, in fact, what on its face it purported to be—an absolute conveyance. For the rule is that, where a conveyance intended as security is absolute on its face, and the land is subsequently conveyed to an innocent third person, who pays the purchase money, or renders a valuable consideration, without notice of the true character of the conveyance, his title cannot be disturbed by any claim that the original transaction was a mortgage, and not an absolute conveyance. Such purchaser is protected by the provisions of sections 2925 and 2950 of the Civil Code, and becomes the real owner of the property. Pico v. Gallardo, 52 Cal. 206; Carpenter v. Lewis, 119 Cal. 18, 50 Pac. 925.

For these reasons we conclude that, at the time when the clerk docketed the personal judgment against Mrs. Ingerson in Fly's action of debt against her, and likewise at the time when the decree purporting to foreclose Fly's mechanic's lien was docketed, the title to the property was not in the judgment debtor, Mrs. Ingerson, or, at any rate, so far as the rights of respondent Hammond Lumber Company are concerned, the title cannot be regarded as being in the judgment debtor at those times, nor at any time since then, but must be taken to have been vested at each of those times in the person in whom it appeared on the face of the recorded chain of title. We think it clear, therefore, that appellant never had the status of a redemptioner having a lien by judgment.

[6] Appellant was not entitled to redeem as the possessor of a mechanic's lien. The only judgment to which our attention has been called that purports to establish appellant's status as a mechanic's lien claimant is that given and made in the action brought by him to foreclose his alleged lien. The then record owner of the title was Mrs. Webster, who, as we have seen, must be regarded as the true owner at that time, in so far as the respondent Hammond Lumber Company's rights are affected. She was not made a party to appellant's action to foreclose his alleged mechanic's lien. The foreclosure decree in that action is therefore not res adjudicata in any action between appellant and Mrs. Webster, or between appellant and Mrs. Webster's successor in title, the Hammond Lumber Company. For this reason the court below, if the evidence adduced before it warranted, was justified in finding, as it did, that appellant never had a mechanic's lien, anything in the decree in the action that appellant had brought to foreclose his alleged mechanic's lien to the contrary notwithstanding.

[7] The finding that appellant never acquired a lien under the Mechanic's Lien Law is amply supported by the evidence. Appellant testified that the only contract he ever had with the owner, Mrs. Ingerson, to do any work on the building was the written memorandum agreement of April 28, 1913, a copy of which is set forth supra; and this was the only contract of employment relied upon by appellant in the claim of lien that he filed in the recorder's office. By this memorandum agreement of April 28, 1913, Mrs. Ingerson did not employ appellant to do any work on the proposed apartment house or to furnish any material whatever. Its language, so far as pertinent, is:

"The party of the first part [Mrs. Ingerson] agrees to give the party of the second part [appellant] a contract for the construction of one brick apartment house. * * * Said apartment house to have about 54 apartments of two and three rooms each, and the cost not to exceed $45,000."

This agreement was not a contract by appellant to construct the apartment house for which plans were subsequently drawn and which later was erected upon the premises; nor was it a contract on the part of the then owner, Mrs. Ingerson, employing appellant to construct a definite and certain structure.

It was nothing more than an agreement on the part of Mrs. Ingerson to thereafter enter into and execute a building contract with appellant. To employ the language of the instrument itself, it was an agreement on Mrs. Ingerson's part "to give" to appellant a contract for the construction of a brick apartment house. It was not a building contract; only an agreement to execute a building contract.

[8] But, says appellant, an agreement to make and execute a certain written contract, the terms of which are mutually understood and agreed upon, is in all respects as valid and obligatory as would be the contract which it was agreed should be executed. The vice of appellant's contention is that the principle invoked by him, though unquestionably sound, is not applicable here, for the reason that the memorandum agreement of April 28, 1913, is fatally uncertain respecting the terms and conditions of the proposed building contract, particularly as to the structural details of the proposed apartment house. It may be conceded that, where the minds of the parties have met respecting the terms and conditions of the more formal writing that is to be executed by them, and the agreed terms of the contract thereafter to be executed are certain and in all respects definitely understood and agreed upon in advance, either orally or by informal writing, there is in such case an obligatory contract dating from the making of the earlier agreement. 13 C. J. p. 290 et seq. But it also is elementary law that, unless the agreement to execute the future contract be definite and certain upon all the subjects to be embraced, so that nothing is left for future negotiation, it is nugatory. St. Louis & S. F. R. Co. v. Gorman, 79 Kan. 643, 100 Pac. 647, 28 L. R. A. (N. S.) 637. In the instant case the memorandum agreement of April 28, 1913, is fatally indefinite and uncertain as to essential structural particulars and likewise as to the price to be paid for the erection of the building. At the date of its execution, April 28, 1913, no plans or specifications had been prepared. The agreement does not state whether the proposed apartment house shall be a structure of one story or of many stories. It does not state how many separate apartments the proposed apartment house shall contain. The language of the instrument is: "Said apartment house to have about 54 apartments of two and three rooms each." How many of the apartments were to consist of two and how many of three rooms is a matter that the parties left undetermined, and therefore a subject for future negotiation. Nor was there any definite meeting of minds as to the contract price of the proposed building. The only agreement respecting the cost of the structure was that "the cost [is] not to exceed $45,000." But whether the cost was to be $45,000 or less, and, if less, how much less, was left in nubibus. As a matter of fact, the building that the owner finally determined to erect, and for which plans subsequently were drawn, was a structure that it was estimated would cost $65,000. This alone might suffice to show that when appellant and Mrs. Ingerson made their memorandum agreement of April 28, 1913, their minds had not met as to the exact size and character of the apartment house that was to be built. Clearly this agreement of April 28, 1913, considered as a construction contract, was fatally uncertain, and no right as a building contractor could possibly vest thereby in appellant. It cannot be construed as an agreement by the owner employing appellant to do any work on her premises or on the apartment house that she contemplated building, but for which no definite plans had as yet matured.

[9, 10] Moreover, if appellant was ever entitled to a lien for any amount whatever, his claim of lien was not filed for record within the time provided by statute. It is not claimed that he furnished any material on the building; and there is ample evidence to support the court's finding that he never performed any labor or bestowed any skill or other necessary services contributing to the construction of the apartment house after the contract for its erection was made by the owner with the Dutro-Wren Construction Company. O. W. Dutro, who testified that he had complete supervision of the construction of the apartment house under the contract that the Dutro-Wren Construction Company had made with Mrs. Ingerson, and that he was on the work at all times after its commencement, testified that he never saw appellant do any work on the building or in any wise superintend its construction. This testimony was corroborated by that of a number of other witnesses. Appellant's reply to this is that the evidence shows that he did some work in connection with the grading of the lot and the removal of the trees—work which he says was of the nature of necessary preparatory work performed prior to the execution of the contract with the Dutro-Wren Construction Company for the erection of the apartment house. Even so, appellant must fail in his claim that he acquired a mechanic's lien, for he did not file his claim of lien for record until long after the expiration of 60 days from the completion of such preparatory work. It may be conceded that, if preparatory work of the nature of that which appellant claims to have performed be included in the building contract, the claim of lien may be filed for record, under subdivision 1187 of the Code of Civil Procedure as it stood at the time this work was completed, within 60 days after the completion of the building contract, if filed by the original contractor, or within 30 days after such completion, if filed by a subcontractor, materialman, or laborer. But here the preparatory work

of grading and clearing the lot, etc., was not included in the contract that the owner made with the contractor for the erection of the apartment house—the contract with the Dutro-Wren Construction Company. The work of grading and clearing the lot, removing the trees, etc., had been wholly completed, under a contract made with one Hicks, some time before the owner made her contract with the Dutro-Wren Construction Company. Whatever the contract with Hicks for this preparatory work may have been, the work thereunder was performed under a contract entirely separate from and independent of the contract that subsequently was made with the Dutro-Wren Construction Company. Where labor or materials are furnished under separate building contracts, even though such contracts are between the same persons and relate to the same building or employment, the contracts cannot be tacked together so as to enlarge the time for filing a lien for what was done or furnished under either. The claim of lien must be filed for what was done or furnished under each contract, within the statutory period after its completion.

For the reasons already given, it must be held that the memorandum agreement of April 28, 1913, because of its uncertainty and incompleteness as to almost all essential structural matters, as well as the cost of construction, cannot be regarded as a contract employing appellant to do any work of any kind upon an apartment house the plan of which then lay in the womb of the future. The preparatory work that appellant claims to have done was not provided for by the contract that Mrs. Ingerson made with the Dutro-Wren Construction Company. It was done under a separate and distinct contract—a contract that was fully completed on November 5, 1913, on which day, according to appellant's testimony, the work of grading the lot, removing the trees, etc., was finished. When, therefore, the contract for such preparatory work was completed, all the laborers who performed any labor thereunder should have filed their lien claims not later than 30 days after its completion, i. e., within 30 days after November 5, 1913; and the original contractor should have filed his lien claim within 60 days thereafter. Appellant did not file his claim of lien in the recorder's office until December 5, 1914—13 months after the completion of the contract for the work that he designates as necessary preparatory work.

For the foregoing reasons, we are satisfied that, when appellant attempted to redeem the property, and, for that purpose, tendered to the sheriff the amount that the respondent Hammond Lumber Company had paid to the original purchaser at the sheriff's sale, with interest thereon at 2 per cent. per month, he had neither a judgment lien nor a mechanic's lien, and therefore was not a "redemptioner," and consequently not entitled to redeem the property, regardless of whether the Hammond Lumber Company had acquired its interest as a redemptioner or only as an equitable assignee of the Security Trust & Savings Bank.

Judgment affirmed.

We concur: THOMAS, J.; WELLER, J.

184 Cal. 307

In re CHANQUET'S ESTATE. (S. F. 9403.)

(Supreme Court of California. Nov. 15, 1920.)

1. Wills ⊂⊃820(1)—Testator intended that debts, etc., should be charged on half of community property subject to his disposition.

Testator's intention as shown by his will *held* to have been that the disbursements specified in subdivision 13, providing for his wife a life estate in the residue after payment of debts, costs of last illness and burial, cost of administration, etc., should be charged solely upon the half of the community property subject to his testamentary disposition under Civ. Code, § 1402, the other half going to the widow free from any deduction on account of any such charges, it being the court's duty, under Code Civ. Proc. § 1560, to give effect to such intention apparent on the face of the will, testator's half of the community property being sufficient.

2. Husband and wife ⊂⊃276(3)—Community property in absence of contrary intent equally subject to debts.

In the absence of expression of contrary intent, the entire community property of testator and his wife would be equally subject to debts, the family allowance, and expenses of administration, under Civ. Code, §§ 1359, 1402.

In Bank.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

In the matter of the estate of Valentin Chanquet. From decree ordering distribution, the widow appeals. Decree reversed, and matter remanded.

Charles A. Christin, of San Francisco (Hutchinson, Van Fleet & Christin, of San Francisco, of counsel), for appellant.

Max W. Koenig and Herbert D. Wise, both of Oakland, for respondent.

ANGELLOTTI, C. J. This is an appeal by Sophie Chanquet, the widow of deceased, from the decree of distribution made in the matter of his estate.

The sole question presented is whether the superior court erred in charging debts, expenses of administration, expenses of last illness, etc., paid by the executor of the will, and certain legacies, against the estate generally (exclusive of certain specific bequests), including the widow's share in the community property, rather than against the husband's one-half of the community property only.

By his will deceased first gave to certain brothers his interest in the saloon and liquor store business carried on by him and them in Oakland and San Francisco, declaring the same to be his separate property. He then gave a monthly allowance of $30 to his mother for her life, and four general legacies aggregating $1,450. (The mother died before distribution.) Then followed the subdivision numbered "Thirteenth," in which he stated that, there being some question as to what portion of the property other than the saloon property, was community property, he thereby declared that all of his property, except his saloon property interest, is community property, and proceeded as follows:

"And it is my will that my wife shall take her half of said community property (but not including my said partnership interests in the said saloon and liquor stores * * *) in lieu of all other interest in and to my property and estate, other than as I hereinafter provided for her, to wit:

"I hereby give, bequeath, and devise unto my said wife, Sophie Chanquet, the use and enjoyment of a life estate in and to all residuum of my property and estate (my half of the community property), after paying and discharging all my debts, the cost of my last ill-

ness and burial, the cost of administration of my estate, the payment of the specific legacies and bequests hereinbefore provided for, to be hers to enjoy and possess during the period of her natural life, and upon her death I hereby give, bequeath and devise residuum of my said estate, share and share alike, unto" certain brothers and sisters.

The executor had received in cash $30,689.47, constituting community assets, from which he had disbursed for debts, expenses of administration, last sickness, funeral expenses, etc., $10,889.63, leaving a balance in cash for distribution of $19,799.84. The superior court concluded that out of this general balance the legacies, aggregating $1,450, should be paid, leaving $18,349.84 in cash for distribution, together with other personal property and the real property on hand, one half to go to the widow as her share of the community property, and the other half to the brothers and sisters of deceased, "subject to the use and enjoyment of a life estate therein and thereto to Sophie Chanquet," the widow.

The widow's claim here is that only a small part of the amount of expenditures by the executor and the legacies, aggregating $12,339.63, viz. $1,468.92, should have been deducted from the total community assets, and that the remainder, $10,870.71, for expenditures specified in the thirteenth subdivision, should have been deducted only from the husband's half of the community property, given to the brothers and sisters subject to a life estate in her. The result would be that she would receive absolutely as her one-half of the residue of money on hand $14,610.27, instead of $9,174.92, while the balance of cash for distribution to the brothers and sisters subject to a life estate in her would be only $3,739.56, instead of $9,174.92.

Appellant's claim is based on the language of subdivision 13 of the will as indicating the intention of the testator that the disbursements specified therein should be charged solely upon the one half of the community property which was subject to his testamentary disposition (Civ. Code, § 1402), the part which for convenience we may here designate as the husband's half of the community property, and that the other half should go to the widow free from any deduction on account of any of such charges. Of course, if such intention is apparent on the face of the will, it should be given effect, the husband's half being fully sufficient to pay the same and leave a balance. Code Civ. Proc. § 1560.

[1] We are of opinion that appellant's claim as to the intention of the testator, as shown by the provision of his will, is well based. After making it clear that he desires his wife to take absolutely her half of the community property, he proceeds to deal with what he calls "all residuum of my property and estate," declaring such residuum to be "my half of the community property," and it is a life estate in this "residuum" that he gives, bequeaths, and devises to his wife "after paying and discharging all my debts, the cost of my last illness and burial, the cost of administration of my estate, the payment of the specific legacies and bequests hereinbefore provided for," with remainder over to his brothers and sisters. The words "after paying and discharging all my debts," etc., are such, located as they are, as to indicate, when taken in connection with what he had previously said about the wife's half of the community property, that it was the intention that such payment was to be made from the residuum with which he was then dealing. A most potent consideration in this behalf is to be found in the fact that included in the payments therein provided for are the legacies and bequests to others, which it cannot fairly be assumed were intended by the testator to be imposed in whole or in part upon the wife's half of the community property, over which the husband had no power of testamentary disposition, especially in view of the fact that the intention that the wife shall have her half of the community property is clearly and emphatically expressed. As to the legacies and bequests the intention must have been that the payments were to be made from his half of the community property. The provision for the payment of these legacies and bequests is the same as the provisions for the other specified payments, i. e., all such payments, including those of legacies and bequests, were to be made from the same source. This intended source, we think, must be held to be the "residuum" with which he was then dealing, viz. his half of the community property.

[2] Of course, it is true that, in the absence of expression of contrary intent, the entire community property would be equally subject to "debts, the family allowance and expenses of administration." Civ. Code, §§ 1402 and 1359. It is only as to the matters specified in subdivision 13 that any different intention is here expressed. We say this in view of the suggestion in respondent's brief that certain items of disbursement for family allowance and federal income tax are not included in the specifications of subdivision 13 of the will. This matter has not been argued in the briefs, and may properly be left for adjustment in the superior court when the matter of distribution is again taken up.

The decree of distribution is reversed, and the matter remanded for proceedings not inconsistent with the views herein expressed.

We concur: OLNEY, J.; SHAW, J.; WILBUR, J.; SLOANE, J.; LAWLOR, J.; LENNON, J.

184 Cal. 327

HART v. FORGEUS. (S. F. 9252.)

(Supreme Court of California. Nov. 17, 1920.)

1. Pleading ⟸335 — Demurrer to complaint with accompanying papers regarded as filed when improperly withheld by clerk.

Where demurrer to the complaint, demand for change of venue, affidavit of merits, and notice of motion to be heard on stated date were sent to the county clerk with a check sufficient for filing fee but not sufficient for calendar fee, the papers, save possibly the notice of motion, would be regarded as filed, though withheld by the clerk for failure to send the calendar fee.

2. Appeal and error ⟸912—Appellate court presumes trial court refusing change of venue found lack of due diligence.

Where the order denying change of venue was general, not indicating any particular ground, the appellate court presumes the trial court found against the use of due diligence in the making of the motion.

3. Venue ⟸61—Application for change held not prosecuted with diligence.

Where defendant, on March 26, sent to the clerk, without calendar fee, notice of motion to be made April 4, for change of venue to county of his residence, and received notice prior to April 4 that it could not be heard on that motion, but did nothing until June 12 when he paid the calendar fee, and on June 16 gave notice that the motion would be made June 20, there was no abuse of discretion in refusing the change, as such motion must be prosecuted with diligence.

4. Venue ⟸66—Affidavit of merits with demand for change should show full and fair disclosure by defendant.

Defendant's affidavit of merits with application for change of venue must show that the statement of the facts of the case to his counsel was full and fair, but an objection that a defendant's affidavit was not sufficient in alleging that "he has stated all of the facts" appears to be without merit.

In Bank.

Appeal from Superior Court, Alameda County; E. R. Robinson, Judge.

Action by Fred B. Hart against J. W. Forgeus. From an order refusing change of venue, defendant appeals. Affirmed.

Altman & Goldman and C. H. Sooy, all of San Francisco, for appellant.

John J. Allen and Fred B. Hart, both of Oakland, for respondent.

ANGELLOTTI, C. J. This is an appeal by defendant from an order of the superior court refusing to change the place of trial of the action from the superior court of Alameda county to that of Santa Cruz county.

The action is one for the recovery of money. It was commenced in Alameda county on February 28, 1919, and on March 11 defendant, who was a resident of Santa Cruz county, was personally served in the city and county of San Francisco. On March 26, 1919, defendant's attorneys, whose offices were in San Francisco, sent by mail to the county clerk of Alameda county, having first served the same, a demurrer to the complaint, a demand in writing that the trial be had in the proper county, and an affidavit of merits, etc., together with a notice of motion to be made April 4, 1919, for change of place of trial. These papers were accompanied by a check for $3, which was sufficient in amount to entitle them to be filed, but did not include a calendar fee of $2. The papers were received by the clerk on March 27, 1919, and he filed the demurrer, but failed to file the other papers because of the failure of the defendant to forward the claimed fee of $2 for placing the motion on the calendar, retaining such papers in his custody. He forthwith transmitted to defendant's attorneys his receipt for $3, and advised them in writing that there was a fee of $2 due for placing motion for change of venue on the calendar. The motion was not placed on the calendar for April 4, 1919, and was not called. Nothing further was done in the matter until June 12, 1919, when defendant paid the calendar fee, and the papers were then marked filed and the matter was put on the motion calendar for June 20, 1919. On or about June 16, 1919, defendant's attorneys notified plaintiff's attorneys that the motion would be on the calendar on June 20, 1919. It was brought on for hearing on the last-named day, and on August 8, 1919, was denied; the order of denial being general and not indicating the particular ground or grounds on which the court based its conclusion.

[1] We think the papers in the matter of the change of place of trial, with the possible exception of the notice of motion, should be regarded as having been filed when received by the clerk, for, accompanied by the requisite fee for such filing, it was his official duty to then file them. The only objections to the granting of the motion that appear to us to present any debatable question are: First, that the moving party did not act with due diligence in making his motion; and, second, that the affidavit of merits was defective.

[2, 3] Regardless of any conclusion we might reach upon the second of these objections, we are of the opinion that the order of the superior court must be sustained upon the first. In accord with the well-settled rule, we must assume in support of the order that the superior court concluded that defendant did not act with due diligence in making his motion and that the motion should be denied for that reason. We cannot say that there was any abuse of discretion on the part of the superior court in so disposing of the mat-

ter. Nothing whatever was done by defendant in the matter of bringing his application by motion to the attention of the court between the time when he was fully advised that it would not be heard upon his first notice, some time prior to April 4, 1919, and June 12, 1919, when he paid the calendar fee, following this June 16, 1919, with his notice that the motion would be made June 20, 1919. No explanation whatever of the delay was attempted. Under these circumstances, the matter appears to be controlled by what has been said in former decisions of this court. "It has always been held that such motions, being dilatory, must be prosecuted with diligence" (Cook v. Pendergast, 61 Cal. 72, 79), and a defendant may not safely rest upon his affidavit of merits and demand filed at the time he answers or demurs. He is bound, at the peril of being held to have waived his right in the matter of change of place of trial, to proceed diligently in the matter of bringing this application to the attention of the court. In Smith v. Pelton Water Wheel Co., 151 Cal. 399, 90 Pac. 932, 1135, this court, after quoting from Cook v. Pendergast, supra, as above set forth, said:

"The rule is uniform that an application for a change of venue on this ground should be made at the earliest opportunity [citing cases]. And if it is made afterwards the applicant must 'explain any seeming lack of diligence on his part.'"

In Smith v. Pelton Water Wheel Co., supra, it was held that while upon the facts the court might have, in its discretion, granted the motion, it "had the power in its discretion to refuse it because of the lack of diligence displayed by the defendant in prosecuting it," and that it must be presumed, "in view of the decision of the lower court, that it was of the opinion that the right had been lost by laches and that it denied the motion upon that ground." In Pascoe v. Baker, 158 Cal. 232, 110 Pac. 815, the rule of diligence was again recognized. The delay there, as here, was for a few days over two months, and the trial court granted the motion. This court said the matter of undue delay was for the trial court upon the facts of the particular case, and that it could not be held there was an abuse of discretion in holding that there had not been a lack of diligence. In this case the trial court held the other way; but, as in that case, we do not see how we may fairly hold that there was any abuse of the discretion committed to the trial court. Clearly defendant did not move as promptly as he could have done, and, as we have already said, there was no explanation whatever of the delay in bringing the matter to the attention of the trial court.

[4] This case was ordered heard in this court after decision by the District Court of Appeal of the First Appellate District because of our doubt of the correctness of the opinion with regard to the question of the sufficiency of the affidavit of merits. The affidavit was held fatally defective in that it failed to state that the defendant had "fully and fairly stated the facts of the case" to his counsel. It did say that "he has stated all of the facts in the above-entitled action to" one of his attorneys, naming him. While we have said that such an affidavit "must show that the defendant has fully and fairly stated the facts of the case to his counsel" (Nickerson v. California Raisin Co., 61 Cal. 268), this was said with reference to an affidavit which stated that defendant "has fully and fairly stated the said defendant's defense in this action," etc., instead of the facts in the case. Of course, the statement by a defendant of the facts of the case to his counsel, as he understands those facts to be, should be full and fair; but it seems to us that when he says that "he has stated all of the facts" of the case to his counsel, he necessarily implies a full and fair statement according to his conception of the case. This objection appears to us to be wanting in substantial merit. But for the reason previously discussed, the order must be affirmed.

The order appealed from is affirmed.

We concur: OLNEY, J.; SHAW, J.; SLOANE, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

184 Cal. 357

BAKER v. SOUTHERN PAC. CO. et al. (L. A. 5377.)

(Supreme Court of California Nov. 19, 1920. Rehearing Denied Dec. 16, 1920.)

1. Appeal and error ⟸1051(1)—Admission of evidence of fact, amply shown by other evidence, harmless.

Any error in admission of evidence to show a train was engaged in interstate commerce was harmless; the fact being amply shown by other evidence.

2. Commerce ⟸27(4)—Train carrying mail held engaged in "interstate commerce."

Relative to injury of a locomotive fireman being within the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), the train on which he was working at the time was engaged in interstate commerce, because it was carrying mail coming from and destined to points outside the state.

[Ed. Note.—For other definitions see Words and Phrases, First and Second Series, Interstate Commerce.]

3. Master and servant ⟸278(18) — Evidence held not to show negligence of locomotive engineer as to fireman within federal act.

Evidence in action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), by locomotive fireman for injury

from jumping from train prior to collision of engine with trailer of stalled truck, *held* to show no negligence of engineer in releasing air brakes 1,000 feet from crossing, after coming around curve, whereby brakes could not be effectively used in time to prevent collision.

4. Damages ⟸173(2)—That injured railroad fireman was in line of promotion may be shown.

Testimony that the injured fireman was in line of promotion with only one person ahead of him, to be engineer at an increased salary, is proper with reference to reasonable future expectations.

In Bank.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Walter C. Baker against the Southern Pacific Company and another. Judgment for plaintiff, and the named defendant appeals. Reversed.

Henry T. Gage and W. I. Gilbert, both of Los Angeles, for appellant.

C. P. Johnson, of Los Angeles, for respondent.

H. T. Morrow, of Los Angeles, for defendant Atlas Mixed Mortar Co.

LAWLOR, J. This is an appeal by the defendant, Southern Pacific Company, a corporation, from a judgment for $10,000 against said defendant and in favor of the plaintiff, Walter C. Baker, in an action to recover damages for personal injuries alleged to have been sustained as the result of the negligence of an engineer of said defendant in operating a steam locomotive.

It appears that on September 9, 1915, the respondent Baker was in the employ of appellant as a fireman. On that day the respondent was discharging his duties as such fireman on a passenger train running between Shorb, Los Angeles county, and the city of Los Angeles. About one mile east of Eastlake Park there was a grade crossing where the tracks intersected a wagon road. Just prior to the arrival of the train at this crossing a motortruck, with a trailer in tow loaded with empty cans, had crossed the railroad. The truck became temporarily "stalled" immediately after crossing and stopped, thus leaving the trailer standing on the tracks. The truck driver thereupon descended and examined his machine, but before he could repair the trouble and move on, he heard the whistle of the approaching train and started up the track in that direction to try to stop it. Silas M. Collins, the engineer, testified that about 2,500 feet from the crossing the train swung into a curve, and that the trailer could not be seen from the locomotive until the engine finished rounding the curve, 700 feet from the crossing. At any rate, as the train entered upon this curve the engineer applied his air brakes, and later released them on coming into the straight-line track, as he testified, about 900 feet from the crossing. This release temporarily reduced the air pressure to a point where several seconds were required in order to recharge the tanks before enough air would be available quickly to stop the train. The engineer further testified that he first saw the trailer about 700 feet away, and did not at that time notice it was "standing still"; that about 500 or 600 feet from the crossing he saw the truck driver "standing right near the trailer, waving his hands in a violent manner"; and that he immediately "made an emergency application of the brakes as well as I could under the circumstances," but that, realizing the brakes, due to the reduced air pressure could not stop the train before the locomotive would strike the trailer, and thinking—as also did respondent, according to his testimony—that the cans on the trailer contained "something explosive and highly inflammable," he and the respondent jumped from the engine, which resulted in the injuries to respondent for which he now seeks damages.

The Atlas Mixed Mortar Company, a corporation, the owner of the truck and trailer, was made a party defendant to this action, but the verdict of the jury was in favor of this defendant, and the respondent has not appealed from that portion of the judgment.

[1, 2] 1. The respondent seeks to recover under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), and alleges in his complaint that at the time of the accident "he was employed by defendant * * * on an interstate commerce train." In this connection appellant now assigns error to the admission, over appellant's objection, of respondent's testimony that on previous occasions, while he was working on this train, he had noticed that it carried interstate freight, and of the testimony of Robert W. Coleman and I. B. Gotfredson, conductors of the train, as to the interstate or intrastate character of the passenger traffic which it customarily carried. With regard to the testimony of the two last-named witnesses, it may be observed that it was very indefinite, and that the substance of their answers to the questions propounded by respondent's counsel as to whether or not they had ever taken up any interstate tickets on this train was that they could not remember. But, assuming that, as appellant claims, all this testimony was "incompetent, irrelevant, and immaterial, and did not tend to prove or disprove the issue as to interstate commerce on the day of the accident," we cannot see how its admission prejudiced appellant. From the verdict it must be implied that the jury found the train upon which respondent was working at the time of the ac-

cident was engaged in interstate commerce. This finding is amply supported by the testimony of Frank E. Page, who was employed as a railway postal clerk on the train, that it was carrying registered letters coming from and destined to points outside of the state. Zenz v. Ind. Acc. Comm., 176 Cal. 304, 168 Pac. 364, L. R. A. 1913D, 423, citing Lynch v. B. & M. R. R. Co., 227 Mass. 123, 116 N. E. 401, L. R. A. 1918D, 419.

[3] 2. We shall next consider appellant's contention that the jury was not warranted "in concluding that the engineer was guilty of negligence." In order that the circumstances under which respondent was injured may clearly appear, it will be proper briefly to describe the scene of the accident. The train was running from Shorb, a station about seven miles east of Los Angeles, into that city. There was a "down grade" of about two miles of track from Shorb to the crossing where the accident occurred. In summarizing the evidence we shall, for convenience, use the letter A to indicate the crossing where the trailer was stalled, B the place at which the train entered upon the curve, east of the crossing, C the point at which the engineer released the air, and D the point at which he applied the emergency brakes.

The respondent testified that it was about 600 feet from B to C, 400 or 500 feet from C to D, and 600 feet from D to A; that from C to A there were "no trees or houses or anything to obstruct the view in the right of way, nor close enough to the right of way to obstruct the view. There are trees on the outside of the right of way, but that does not obstruct the view. The line of vision from C to A does not come enough outside of the right of way to reach any trees." He further stated that the engineer had a clear view from C to A, but that he himself, because of the curve in the tracks and his position on the opposite side of the locomotive from the engineer, could not see the crossing from C; that the speed of the train at B was about 45 miles, and at C 30 to 35 miles per hour; that "B was at least a mile inside * * * of the Los Angeles yards"; that if the air had not been released at C it would have been possible to bring the train to a full stop within 300 or 400 feet, but that, the air having been released at C, the pressure was thereby so decreased that after the brakes were set at D "the train would run probably 600 or 700 feet before coming to a stop"; that the equipment and appliances on the engine were "in perfect working order"; that when the engineer released the air at C "it would take about a couple of minutes to recharge so that he would have more air," but that at the speed at which the train was moving at C it would travel thence to A in about 10 seconds; that he had nothing to do with regulating the speed of the train; that after the engineer had released the air "there was nothing that he could have done to avoid the accident up at A that he did not do"; that he did not know whether the engineer actually saw the stalled trailer before applying the "emergency"; that when he himself saw the trailer he thought the cans contained dynamite or giant powder and also "figured there might be a derailment"; that he did not see the truck driver waving his hands until he was just leaving the engine, when it was too late to get back; that before he left the locomotive the engineer reversed the engine; and that if the latter had not released the air at C, "where he could have seen the obstruction, he could have brought the train to a stop before reaching A." On cross-examination he testified that, if the truck had not been "stalled" at the crossing, it would have been proper to release the air at C.

Richard W. Kelly, an engineer, testified that if the emergency brakes were applied to a train composed of a locomotive and six cars traveling at a speed of 45 miles an hour on a level track, the train would run 750 feet before coming to a stop; that "the more cars you have the quicker the stop"; that "under practical conditions" if an engineer brought his train, of a locomotive and three cars, to a stop within 750 feet, he would think it "a very fair stop"; and that a train of an engine and three cars "going at 35 miles an hour under these circumstances wouldn't go over 650 feet" after an emergency application of the brakes.

W. H. Whalen, superintendent of appellant's Los Angeles division, testified that the point A was "within the yard limits as outlined by the limit board," although "not the actual operating yard."

Joe Esposito, the truck driver, stated that when he first saw the train it was about 700 or 800 feet away, "and I say that at that time the whole engine was not in view, just a part of it."

J. F. Garrett, who had just crossed the railroad tracks at A when the accident occurred, testified that he saw the train about 850 or 900 feet away, going about 20 miles an hour.

Charles T. Phelps, train baggageman, testified that he "heard the air go on at D at the distance of from 400 to 600 feet from the scene of the collision."

The engineer stated that his speed limit at B was 50 miles per hour; that the release of the air left the engine "for a period of time without an emergency feed"; that it was approximately 2,500 feet from B to A, 900 feet from C to A, and 600 feet from D to A; that he could not have seen the trailer until he was within 700 feet of the crossing; and that "I did not apply my emergency immediately upon seeing the trailer across the tracks because I did not know but it was

moving, when I first saw it. Going around the curve you get a kind of vision of things, things are changing in relation to one another, changing positions, you know, so when I first saw it, I didn't know they were stalled there * * * because I was going around a curve." He further stated that at C the train was moving at about 20 miles an hour; that at no point between Shorb and Los Angeles was he traveling 45 miles an hour; that from C he could not see either the truck or the trailer "on account of the curve and the trees outside of the right of way"; that between C and D he did not have time to recharge the air or get "the braking power back to full capacity"; that about 40 feet from the crossing there was "a block-signal pole," the upper half of which he could see as he approached it, about 1,000 feet from A; that if at C he had received the signal "Stop," he could have stopped before reaching A; that he did not remember whether, at the time he first saw the signal pole, the crossing was visible; that "the trailer was a pretty high rig * * * so that the upper half of the trailer was about 10½ feet above the roadway"; that if the brakes had not been released at C he could have made a further application of the air already in the brake cylinders and stopped the train before reaching A; and, as to the various distances between the points indicated, that his estimates were "just a matter of guess, and they might be 150 or 200 feet either way." The evidence showed that it was his duty, under ordinary circumstances, to apply the air brakes at the point where he did apply them and to release the air as he did.

Gotfredson testified that for some time prior to the accident he had been sitting in the smoking car, one car removed from the engine and tender; that he was looking out of the window in the direction in which the train was moving; that as soon as he saw the trailer on the tracks he "reached up and caught the emergency, but he [the engineer] had already used all the air then. We were about 1,000 feet from the track at that time, maybe a little bit more * * * while we was rounding the curve. * * * The truck and trailer was plain so I could see it." On cross-examination he stated when he first saw the trailer the train was moving at about 25 miles an hour, and that after the air was released at C the engineer could not have stopped the train before reaching A.

Is there sufficient evidence to support the implied finding that the engineer was guilty of negligence in releasing the air at C? Under the rule of conflict we shall assume, as established, that the distance between C and A was 1,000 feet; that the speed of the train at C was 35 miles per hour; that the trees along the right of way did not obstruct "the line of vision" between C and A; that the trailer was visible from C; that, as respondent testified, the train could have been stopped within 300 or 400 feet (although another witness for respondent fixed it at 750 feet); and that if the air had not been released at C the train could have been stopped before reaching A.

But, as tending to negative negligence on the part of the engineer, is his testimony that, due to the angle at which the train, in rounding the curve, was approaching the crossing, several seconds elapsed after he first saw the trailer before he could realize that it was not going to proceed on its way and clear the tracks, and that after applying the emergency, "I had put all the mechanical parts of the engine into application to stop the train that I could put into action, and there was nothing else that I could do to stop the train that I had not done." This testimony was not controverted. In fact the respondent, as already shown, stated that after the air was released at C nothing was left undone by the engineer to avert the accident; that if the truck had not been stalled at A it would have been proper to release the air at C; that from his side of the engine at C he could not see the trailer, and that he saw it for the first time from D; and that "on a curve an engine rocks a great deal, and you can't distinguish things like you can standing still, on account of the motion of the engine." Moreover, as indicated above, under ordinary circumstances, the setting of the brakes at B and the release of the air at C were proper; indeed, it would have been the duty of the engineer, in the absence of some special circumstance which required him to act differently, to release the air on completing the curve.

The position of respondent is that the proximate cause of the injury was the release of the air by the engineer at C. Appellant contends, on the other hand, "that there was no testimony offered which would tend to show there were any acts of negligence on the part of the defendant * * * which contributed directly and proximately to the injury."

It is conceded in appellant's brief that the respondent, in jumping from the locomotive, "had the right to act upon the appearance of danger"; no claim is made that the injuries received by respondent were due to contributory negligence.

"The question of negligence is a question of fact for the jury, and the determination of the jury upon such question of fact will be deemed conclusive upon appeal, where there is any substantial evidence to support it." Imperial V. & M. Co. v. So. Pac. Co., 15 Cal. App. 385, 114 Pac. 1003.

It is clear from the facts assumed to be true that the trailer could have been seen before the engineer released the air, and that if he had appreciated the danger of a collision the accident could have been avert-

ed. On the other hand, it cannot be questioned that, due to the motion of the engine and the angle at which the train was approaching the crossing, it would have been difficult to realize that the trailer was stalled. As has been noted, respondent concedes that after the air was released the engineer did all that could be done to stop the train. And in measuring the conduct of the engineer it must be kept in mind "that a railroad track is in and of itself a sign of danger, and that one approaching such track with intent to cross it is bound to exercise his faculties of sight and hearing in order to ascertain whether a train is approaching." Loftus v. Pac. Elec. Ry., 166 Cal. 464, 467, 137 Pac. 34, 35. This the engineer had a right to assume in the operation of the train, and upon this theory the natural assumption would be that the trailer was moving. In this connection the fact that the trailer was 1,000 feet away should not be overlooked. As we have said, respondent's testimony is that up to the time the air was released he could not, from his side of the engine, see the trailer, and there is no suggestion that the engineer actually saw it or had any intimation that there was any obstruction on the track before he released the air. We do not think it can be said that the engineer should have realized that the trailer was stalled at the time he released the air. The engine had not yet completed the curve, and, viewing the entire situation at that distance, a reasonable conclusion would be, assuming the engineer saw the trailer, that it would be out of the way before the train reached the crossing. In any event, there was before the jury no substantial evidence upon which it could be found that the engineer acted negligently in releasing the air. Any finding to the contrary must necessarily rest upon conjecture.

[4] 3. In view of this conclusion it will not be necessary to discuss appellant's contentions "that upon the undisputed testimony the respondent assumed the risk, if any there was, in the speed of the train at this particular point," and that the amount of the verdict constituted excessive damages. It will be proper, however, to consider appellant's assignment of error in the admission of respondent's testimony that firemen were usually promoted to be engineers at an increased salary, that he was twice "out for promotion," that there was only one man ahead of him on the seniority list, and that this man and the man under him on the list had been promoted since the accident. The claim is that this testimony was "too remote." The complaint laid the foundation for special damage on this account. Galveston, etc., Ry. Co. v. Ford (Tex. Civ. App.) 46 S. W. 77, was a case where the dependents of a deceased fireman sued to recover damages for his death alleged to have been caused by the negligence of the defendant railway company and its employés. With regard to the testimony of a witness that the decedent "was in the line of promotion to the position of locomotive engineer," the court said:

> "This was proper testimony in reference to his reasonable future expectations, which the authorities agree are a proper element of damages in this class of cases."

It needs no argument to bring the facts of this case within the rule thus announced. Appellant's contention cannot be sustained.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; WILBUR, J.; LENNON, J.; SLOANE, J.

184 Cal. 305

In re ROBERTSON'S ESTATE. (S. F. 9377.)

(Supreme Court of California. Nov. 15, 1920.)

Wills ⇐624 — Gifts of residue held not contingent.

Under a will giving testator's personal property and income from the rent of a ranch for three years to his wife if she survived him, otherwise all testator's property to be distributed as provided in the next section, which section gave the residue of the estate to the children, the distribution of the residue was not conditional on the testator's surviving his wife, but was an absolute gift, and the provision containing the condition related only to the property previously given to the wife.

In Bank.

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

In the matter of the estate of John Robertson, deceased. From the decree of final distribution, the widow of deceased, Grace Robertson, appeals in so far as that decree distributed to the children the real property of deceased. Decree affirmed.

W. F. Cowan, of Santa Rosa, for appellant.

J. R. Leppo and Kellogg & Kyle, both of Santa Rosa, W. H. Early, of Petaluma, and G. Scott, of Santa Ana, for respondents.

ANGELLOTTI, C. J. This is an appeal by Grace Robertson, the widow of deceased, from the decree of final distribution given in the estate, in so far as it distributes to the children of deceased all of the real property of the deceased, subject only to a provision in her favor for the rents of one parcel thereof for a period of three years. Her claim in this behalf is based upon the theory that as to the realty deceased died intestate, and that she, as surviving wife, has succeeded to an interest therein. All of the prop-

erty was separate property of the husband.

The will of deceased, in so far as is material to the controversy, is as follows:

"First. I hereby will, devise and bequeath unto my beloved wife, Grace Robertson, all personal property, including any money in banks that I may possess at the time of my death, and in addition thereto, I direct that my ranch be rented for three successive years after my death and she paid at the rate of $500.00 per year from said rental for a period of three successive years, provided, however, if agreeable to all parties, my sons and daughters may make other provisions for said payments, this to be in case she survive me; in case she does not survive me I then desire all my property to be distributed as in the next section herein.

"Second. I hereby will, devise and bequeath all of the rest and residue of my property in the following manner, to wit:

"First. To my son John Robertson, Jr., the sum of $1,000, and thereafter all the rest and residue of my property be the same real, personal or mixed and wheresoever situated share and share alike to my sons and daughters" [naming them].

"I make no bequest to the children of my wife by her former marriage. * * *"

The wife having survived the deceased, the superior court distributed all personal property to her and also gave her the rents of the ranch for a period of three years, and distributed the residue as provided in the second subdivision of the will. The claim of the surviving wife, to the effect that deceased died intestate as to the residue, is based on the theory that by reason of the sentence, "In case she does not survive me then I desire all my property to be distributed as in the next section herein," contained in the subdivision denominated "First," the disposing provisions of the subdivision denominated "Second" were to have effect only in the event that the wife predeceased her husband, with the result that, as she survived deceased, there was no disposition of the residue, and consequently intestacy in regard thereto.

It seems to us that this claim is entirely destitute of merit. The intention of the testator as expressed in the will is so clear as to not present a debatable question. He desired his wife to have, if she survived him, the personal property and rents of the ranch for three years, as specified in the subdivision denominated "First," and in that event he desired "all the rest and residue" to go to his sons and daughters as specified in the subdivision denominated "Second." By the latter subdivision he says, "I hereby will, devise and bequeath all of the rest and residue of my property in the following manner, to wit," an absolute disposition of the "rest and residue" remaining after the prior disposition to the wife. If the wife did not survive him, he desired the portion of the estate given to her to go in the same manner as the "rest and residue" was to go if she survived him, and it was to accomplish this and to prevent intestacy as to the portion given to the wife, that he inserted at the end of subdivision "First" the words, "In case she does not survive me then I desire all my property to be distributed as in the next section herein." This was manifestly a provision designed to have effect only in the event of the wife's dying before him, a simple statement that if she did not survive him, he desired "all" his property to go in the same manner "as" the "rest and residue" was to go if she survived him. In view of the fact that she did survive him, the will is to be construed entirely without regard to this provision.

The record shows that an appeal was also taken from the decree by the executors of the will, but the same has not been prosecuted, and no brief has been filed thereon.

The appeal taken by the executors is dismissed. On the appeal by the widow the decree of distribution is affirmed.

We concur: SHAW, J.; OLNEY, J.; LENNON, J.; WILBUR, J.; SLOANE, J.; LAWLOR, J.

184 Cal. 315

MICHELIN TIRE CO. v. BENTEL et al.

SAME v. BENTEL.

(L. A. 5050, 5051.)

(Supreme Court of California. Nov. 16, 1920.)

1. **Principal and surety ⇐99—Change in contract releases sureties.**

Under the express provisions of Civ. Code, §§ 2840, 2819, 2844, sureties may insist upon the exact terms of their contract, and any change therein without their consent releases them from liability.

2. **Attachment ⇐337—Amending complaint to state new cause of action releases undertaking to pay judgment on original complaint.**

Sureties on an undertaking to release attachment, agreeing to pay any judgment secured by plaintiff, were released from their undertaking where the complaint was later amended, without their consent, to state a new cause of action on assigned claims, which plaintiff did not own when the undertaking was executed.

3. **Principal and surety ⇐128(1)—Change in contract with surety's consent does not release him.**

A surety is not exonerated from liability by a change in the contract between the principal and creditor which is made with his consent.

4. Attachment ⊂337—Surety's consent to amendment of complaint not agreement to be liable for debt set up in amended complaint.

A stipulation of a surety on undertaking to release attachment, permitting plaintiff to prosecute a claim thereafter assigned to it in the original action without prejudice to any rights which the defendants may have against plaintiff, etc., was not a consent that the sureties' agreement should be altered so as to cover the new debt set up in the amended complaint.

5. Attachment ⊂251—Order discharging attachment conclusive on undertaking given to secure its release.

Where plaintiff attached property and amended its complaint to declare upon causes of action subsequently assigned to it, an order, discharging the attachment because defendants were not indebted to plaintiff at time alleged in attachment affidavit, is an adjudication that the stipulation permitting amendment of complaint did not renew the attachment, and plaintiff cannot assert to contrary when attempting to enforce an undertaking given to secure attachment's release.

6. Guaranty ⊂53(1)—Release by changing cause of action.

An instrument, guaranteeing payment of any judgment that may be obtained, is released where the complaint is subsequently amended to declare upon an assigned cause of action not owned by plaintiff at the time the guaranty was executed.

In Bank.

Appeals from Superior Court of Los Angeles County; Grant Jackson, Judge.

Two actions by the Michelin Tire Company against George R. Bentel, James V. Baldwin, and A. J. W. Keating, and against George R. Bentel. Judgment for defendants in both actions, and plaintiff appeals. Affirmed.

Ward Chapman and L. M. Chapman, both of Los Angeles, for appellant.

H. C. Millsap, of Los Angeles, for respondents.

SHAW, J. The above-entitled actions were tried together upon the same evidence. The judgment in each case was for the defendants and the plaintiff has appealed therefrom. They are presented upon the same transcript. Case No. 5050 is upon an undertaking to release an attachment. Case No. 5051 is upon the individual guaranty of Bentel covering the same claim. We will consider them in numerical order.

L. A. No. 5050.

This is an action upon an undertaking executed by the defendants under the following circumstances: On January 17, 1912, the plaintiff, Michelin Tire Company, a California corporation, began an action to recover money against Coleman & Bentel Company, a corporation, in the superior court. A writ of attachment was duly issued therein. By virtue thereof the sheriff, on or before January 25, 1912, levied upon personal property belonging to Coleman & Bentel Company, and took it into his custody. It was then agreed between the parties that if the undertaking sued on herein were executed, together with a certain bond of George R. Bentel, the plaintiff would release the property from the levy, and would not have the writ levied on any other property. Thereupon the undertaking was executed. Therein the said Baldwin Keating, and Bentel undertook and promised that "in case the plaintiff recovers judgment in said action, defendant will pay to plaintiff the amount of the judgment to be recovered in said action, or that in default thereof, the said sureties will, on demand, pay to plaintiff the amount of said judgment so recovered," not exceeding $15,000, the amount of the undertaking. In consideration thereof the property was released, and no further levy was made under the writ.

The theory of the defense is that the undertaking of the sureties was for the payment of any judgment that might be rendered in the action pending at the time it was executed; that afterward, and without their consent, an amended complaint was filed, which set forth a new and different cause of action; that the cause then proceeded upon said new cause of action; that the judgment recovered was upon said new cause of action and not upon the cause of action averred in the original complaint. Upon this the claim is that, as the contract they made as sureties was thereby altered, they are exonerated. Civ. Code, §§ 2840, 2819, 2844.

For the better understanding of the question raised it is necessary to state at some length the facts preceding the attachment suit, together with the pleadings and judgment therein.

Two corporations were in existence, both named "Michelin Tire Company," one, plaintiff herein, organized under the laws of California, the other organized under the laws of New Jersey. The California corporation was formed by the stockholders of the New Jersey company for the purpose of acting as agent for the latter company in carrying on and facilitating its California business. The New Jersey corporation was a manufacturer of automobile tires and accessories in New Jersey. It had appointed Coleman & Bentel Company its agent in Los Angeles to sell its goods at that place, under a contract whereby the agent agreed to make to the principal monthly remittances of the amounts received for goods of the principal sold by the agent. From time to time goods were shipped by the New Jersey corporation to Coleman & Bentel Company, some directly to it, and some through the medium of the California Michel-

in Tire Company as its agent, all to be sold in its behalf by said Coleman & Bentel Company. From these sales a debt amounting to a sum over $20,000 accrued from Coleman & Bentel Company to said New Jersey Corporation. The attachment suit was begun by the California corporation on January 17, 1912, as above stated. The complaint then filed alleged that defendant Coleman & Bentel Company had entered into a contract with the said Michelin Tire Company of California whereby said tire company agreed to supply said defendant with automobile tires and accessories to be sold by the said defendant as the exclusive agent of said plaintiff, the title to said tires to remain in the plaintiff until sold and paid for, and that said defendant should remit to plaintiff each month the amount due to said plaintiff under said agency on account of such sales, and that under said contract there existed a mutual, open, and current account between the plaintiff and defendant upon which there had become due to the plaintiff from said defendant the sum of $22,366.19, which remained unpaid and for which judgment was demanded in favor of said plaintiff against said defendant. Bentel was also a party to said suit, and with respect to him it alleged that he was the holder of 25,000 shares of stock of said Coleman & Bentel Company, and by reason thereof was liable for a certain portion of said indebtedness, for which judgment was asked against him. It was the action upon this complaint that was pending at the time the undertaking herein sued on was executed, and, of course, it was to this action that the undertaking referred, and it was the judgment in this action which the sureties therein undertook and promised to pay.

In truth and in fact the Michelin Tire Company of California had not made any contract with or sold or consigned any goods to Coleman & Bentel Company, the latter had not sold any goods for or on behalf of the former, and was in no wise indebted to it in any sum whatever. The Coleman & Bentel Company had, however, sold tires as agent for the Michelin Tire Company of New Jersey, and had become and was indebted to it therefor as before stated. Some time between the execution of this undertaking and the 2d day of April, 1912, it was discovered by the plaintiff, or its attorneys, that a mistake had been made, and that the goods sold by the Coleman & Bentel Company were wholly for the account of and under a contract with the Michelin Tire Company of New Jersey, and that said company was the real creditor to whom said debt was due and with whom the account had accrued. On April 2, 1912, the Michelin Tire Company of New Jersey transferred and assigned to the Michelin Tire Company of California all of its claims as aforesaid against said Coleman & Bentel Company.

An answer to the original complaint was filed in March, 1912, taking issue on the material allegations of the said complaint. These issues never came to trial. They were disposed of in the following manner: In May, 1912, after the aforesaid assignment by the New Jersey corporation to the plaintiff, the attorneys of the plaintiff informed the defendants' attorneys that plaintiff had no cause of action against said defendants at the time the action was begun, and that it could not recover in the action. No lawful course was then open to the plaintiff, except to dismiss the action and begin a new action on the claim assigned to it by the New Jersey corporation. Apparently for the purpose of avoiding such dismissal, a stipulation was then made between the parties. It recited that said plaintiff held no claim against said defendant when the action was begun, but that it had, on April 2, 1912, acquired by assignment the claim of the New Jersey corporation against defendants, and that by reason of these facts it would be necessary to dismiss the action, unless the defendants would permit the plaintiff to file an amended complaint and would waive the objection that said plaintiff was not the owner of the claim, or any claim, against defendants at the time the action was begun. Following this recital was an agreement declaring that the plaintiff was not the owner of the claim sued on at the time the action was begun, and that defendants were not, nor was either of them, indebted to plaintiff at that time in any sum whatever; that on April 2, 1912, the plaintiff acquired by assignment the claim of the New Jersey corporation against the defendants, and was then the owner thereof, and further agreeing that the plaintiff might file an amended complaint upon the aforesaid assigned claim of the New Jersey corporation, and that the objection that the plaintiff was not the owner of the claim at the time of the commencement of the action "shall be for the purposes of the further prosecution of this action waived, in consideration of, and subject to the conditions" expressed in the stipulation, and that no objection to the prosecution of the action would be made by the defendants on the ground that plaintiff was not the owner of the claim when the action was begun. It further declared that the plaintiff waived all costs accrued up to that time. The conditions referred to were that if the defendants, or either of them, desired to sue the plaintiff for damages on account of the beginning of the action, or any proceedings theretofore taken therein, the facts declared in the stipulation should be admitted as true in such action, and that with respect to such action the action then pending should be treated as having been dismissed at the date of the stipulation, and that the consent of the defendants to the further prosecution of the claim as then held by assignment should be

without prejudice to any rights of the defendants, or either of them, against said plaintiff.

Thereupon the plaintiff filed an amended complaint, wherein it alleged the accrual of the indebtedness from the defendant Coleman & Bentel Company to the New Jersey corporation for goods sold under the agency above mentioned; its assignment on April 2, 1912, to the plaintiff; its nonpayment, together with the holding by Bentel of a certain portion of the stock in the defendant corporation; and his liability as such stockholder. Judgment was asked against the defendant for the full amount of the claim, and against Bentel for his proportion thereof. In the meantime, however, about $2,000 had been paid on the New Jersey corporation claim, and the amount of the judgment asked was less than in the former complaint by reason of such payment. Upon the trial of the action judgment was given in favor of the plaintiff for the amount found due to the New Jersey corporation and assigned to the plaintiff, as above stated.

[1] There is no escape from the principle declared in the sections of the Civil Code, above cited, that sureties have the right to stand upon the very terms of their contract, and that if it is changed without their knowledge or consent they are released from liability. It has been frequently stated in our decisions, and it applies to all contracts of suretyship. First Cong. Ch. v. Lowrey, 175 Cal. 126, 165 Pac. 440; Bridge v. Conn., etc., Co., 167 Cal. 782, 141 Pac. 375; Cadenasso v. Antonelle, 127 Cal. 386, 59 Pac. 765; Tally v. Parsons, 131 Cal. 518, 63 Pac. 833; Glenn Co. v. Jones, 146 Cal. 520, 80 Pac. 695, 2 Ann. Cas. 764. It applies to undertakings to release attachments. 6 Cor. Jur. 347. In Cassidy v. Saline Co. Bank, 7 Ind. T. 567, 104 S. W. 838, the court, in discussing this question, said:

"The surety upon a bond given by the defendant to dissolve an attachment takes his obligation with reference to the cause as it then stands; and, should the plaintiff afterward so change his pleadings as to make virtually a new action, how can it be said that the surety would have obligated himself under such new order of things? He may have been satisfied that the plaintiff could not recover in the action, and may therefore have been willing to give the defendant present relief by signing as his bondsman, though he would not have signed had the suit been well grounded"—citing Waples on Attachment, § 774, and Shinn on Attachment, § 306.

Accordingly it was held that an amendment of the complaint changing it from an action by a partnership on account, to which an answer had been filed denying the liability and the partnership, to an action upon a judgment rendered in another state upon the same account, which, of course, cut off the defenses previously pleaded, changed the conditions of the surety's contract, and having been made without his consent, released him from liability. In Quillen v. Arnold, 12 Nev. 244, it was said, per Beatty, J., that although the power to allow amendments "may be and is very liberally exercised, and very properly so, as between the parties to the action in furtherance of justice, it cannot be exercised with the effect of changing the rights and liabilities of third parties." The decision was that an action upon a complaint by John Donahue and Miles Quillen to recover a debt due them on account for goods sold by them as partners, was changed by an amendment alleging a debt due to Miles Quillen as surviving partner of a firm composed of Edward Donahue and Miles Quillen, and also a debt due to Quillen for goods sold by him after the death of the partner, although the goods and sales referred to in the original complaint were the same as those mentioned in the amended complaint, and consequently, that the sureties on a bond to release an attachment given prior to the amendment were released from liability thereon by such amendment without their consent. Similar rulings will be found in Prince v. Clark, 127 Mass. 600; Freeman v. Creech, 112 Mass. 180; Bean v. Parker, 17 Mass. 603; Andre v. Fitzhugh, 18 Mich. 100; Fullerton v. Campbell, 25 Pa. 345; Fish v. Barbour, 43 Mich. 26, 4 N. W. 502; and Mathews Consolidated Slate Co. v. Sweeney, 219 Mass. 285, 106 N. E. 975.

[2] Applying this principle to the present case, there can be no doubt that the defendants Baldwin and Keating are released from liability on the undertaking. It is conceded that they did not consent to the amendment of the complaint. They were bound only to pay any judgment that could be rendered in the action upon the complaint as it stood when they executed the undertaking. To that action the defendants therein had a perfect defense; that is, that Coleman & Bentel Company had not made the contract with the Michelin Tire Company of California which was alleged in that complaint, and were not indebted to said plaintiff. The sureties on the undertaking were then entitled to the full benefit of that defense, and if no amendment had been made there would have been no judgment for them to pay. This condition of the case was a part of the contract. By the change in the cause of action this defense was taken away, if plaintiff's contention were correct. The plaintiff could not have recovered on the cause of action set up in the amended complaint in an action begun on January 17, 1912, for at that time it was not the owner of the claim. The undertaking they executed did not refer to or embrace that cause of action, and they cannot be held liable for a judgment rendered upon it. The judgment in their favor was correct.

[3] A different question is presented with respect to the liability of the defendant Ben-

tel. He was a party to the action in which the attachment was issued and judgment was asked therein against him on account of his liability as a stockholder. He joined with the other defendant in the answer filed in March, 1912, and they were both represented by the same attorney. The stipulation above mentioned, agreeing to the continuation of the action upon the amended complaint and waiving the objection that the plaintiff was not the owner thereof when the action was begun, was signed by the attorney for both defendants, including Bentel. Consequently it cannot be claimed that he did not consent to the change in the cause of action. A surety is not exonerated from liability by a change in the contract between the principal and the creditor which is made with his consent. It follows that Bentel was not discharged from liability on the undertaking by reason of such change in the cause of action, if his consent to such amendment can be construed to be an agreement that his previous undertaking should apply to the new action thus authorized.

[4] We do not think the stipulation signed by his attorney can be so construed. The undertaking he signed, as we have said, was, in effect, an agreement that upon the defendants' default in so doing he would pay the judgment that might be rendered in the original action on the cause of action stated in the original complaint. It did not bind him to pay a judgment rendered on any other cause of action substituted afterwards for the cause of action sued on. His consent as a party to continue the action upon the newly alleged cause of action is not equivalent to an agreement by him that his original undertaking covering the old debt should be altered so as to cover the different debt set up in the amended complaint. He might have been quite willing that such amendment should be made, knowing that his contract of suretyship did not cover it, and that it would terminate his liability on the undertaking. There is evidence indicating that this fact was known to him. In order to make him liable on the original undertaking, for a judgment on the new cause of action, his consent must have been given under such circumstances, or must have been couched in such terms, as to manifest his intent that the original undertaking should stand as security for the newly alleged debt; it must be the equivalent of a new contract by him as surety for such new debt; it must be in effect a consent to the alteration of his contract as surety to conform to the new conditions. In every case in which a surety has been held responsible on a contract which had been altered with his consent after its execution by him, such an agreement, changing his contract of suretyship, has been either expressed or implied in the argument leading to the conclusion that he was not exonerated. His attorney in the action was authorized to maintain his defense thereto and do such things in his behalf as were proper or necessary for that purpose. To that extent he would be bound by the agreements of the attorney regarding the conduct of the action. But there is no evidence to show that he was employed or authorized by Bentel to make a new undertaking concerning the attachment or to alter or extend the old undertaking and continue it in force for the security of the new debt. It is therefore at least doubtful if the stipulation could have been allowed to have such effect if it had expressed such intention.

It does not purport to have that effect. Its import is to the contrary. One of the conditions stated in the stipulation was that the consent to the prosecution by the plaintiff of the newly acquired claim in the old action should be "without prejudice to any rights which the defendants, or either of them, may have" against said plaintiff. This plainly refers to and includes other rights than that of making a defense against the new claim, for that right they would have had without the condition. It therefore included and reserved the right of Bentel, in any suit upon the undertaking for the release of the attachment, to claim in defense thereto that he was not liable thereon for any judgment rendered in the further prosecution of the main action, for that it covered only the cause of action originally alleged, and which would be, in effect, abandoned by the amendment to the complaint to which he was consenting. Consequently, it did not alter the undertaking so as to make it apply to the new cause of action.

[5] That it cannot be so construed was, in effect, adjudged by the court during the subsequent proceedings in that action. In December, 1913, after the amendment of the complaint, the defendants therein moved to discharge the attachment for the release of which said undertaking had been given, on the ground that the affidavit given by the plaintiff to procure the attachment, in so far as it alleged that the defendants were then indebted to plaintiff, or that said defendants had made any contract with the plaintiff, was false, and that in fact no such contract had ever been made, and no such indebtedness then existed as alleged in said affidavit, and that said defendants were not at that time indebted to the plaintiff in any sum whatever. The motion came on for hearing in January, 1914, upon affidavits showing the making of the undertaking, the amendment of the complaint, and other facts relating thereto, and thereupon the court granted the motion and made an order discharging the attachment. This order was not appealed from, and it has become final. It was, in effect, an adjudication that the amendment of the complaint and the stipulation made consenting to it did not operate to renew the attachment or keep the undertaking alive for the security of the

new cause of action. The plaintiff is bound by this adjudication, and cannot be permitted now to assert the contrary. Bash v. Howald [Okl.] 157 Pac. 1156; Freeman on Judgments, § 323; Commissioners v. McIntosh, 30 Kan. 234, 1 Pac. 572; Boylan v. Bock, 60 Wash. 423, 111 Pac. 454; Lake v. Bonynge, 161 Cal. 129, 18 Pac. 535.

For these reasons we conclude that the court below was correct in rendering judgment in favor of the defendant Bentel.

The judgment in case No. 5050 is affirmed.

L. A. No. 5051.

[6] This action is upon a guaranty given by the defendant Bentel for the purpose of obtaining the release of the attachment hereinbefore mentioned. It was given simultaneously with and in the same action as the undertaking sued on in appeal No. 5050. At the time the attachment was issued a levy was made, not only on the property of Coleman & Bentel Company, but also upon several parcels of real property belonging to Bentel. The guaranty signed by Bentel alone was made in pursuance of the same negotiations for the release of the attachment which led to the execution of the undertaking. Bentel's agreement recited that the defendants were desirous of substituting for the attachments a bond for the release thereof, and that plaintiff had agreed to accept such bond on condition that Bentel "shall personally guarantee the payment of any judgment that may be obtained in this action on the account sued upon, and personally guarantee the payment of whatever amount is actually due the plaintiff from the defendant Coleman & Bentel Company." The agreement then followed, stating that, in consideration of the release of the attachment and the surrender of certain uncollected accounts previously pledged to the plaintiff, the said Bentel "does hereby guarantee the payment of any judgment that may be obtained in this action against the defendants, or either of them, and personally promises to pay whatever amount is found to be due to the plaintiff from the defendants."

It will be seen that the language of this instrument, executed as it was on January 25, 1917, eight days after the beginning of the action and prior to any amendment of the complaint therein, necessarily referred solely to the cause of action set forth in the complaint as it then stood. It therefore contains no promise to pay any judgment rendered upon some other and different cause of action. Bentel had a right to insist that the case should stand at it then was, in which event, since, as we have shown, the plaintiff then had no cause of action against the defendants, or either of them, and could not recover any judgment against either of them, Bentel would never have become liable to the plaintiff upon his guaranty for any sum whatever. The subsequent amendment of the complaint in pursuance of the stipulation to which we have already referred expressly reserved any right which Bentel had against the plaintiff. This, as we have said with reference to his obligation upon the undertaking, included his right to defend any action upon this guaranty on the ground that it did not cover or make him liable for any judgment that might be rendered in the newly alleged cause of action set up in the amended complaint in pursuance of the consent given in the stipulation upon the conditions therein stated. For reasons similar to those set forth with respect to the undertaking, the conclusion necessarily follows that Bentel was not liable upon this guaranty for the judgment subsequently rendered in the new action to which the guaranty did not relate.

The judgment in case No. 5051 is affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; LENNON, J.; LAWLOR, J.; SLOANE, J.

184 Cal. 274

RUDNECK et al. v. SOUTHERN CALIFORNIA METAL & RUBBER CO.
(L. A. 6029.)

(Supreme Court of California. Nov. 12, 1920. Rehearing Denied Dec. 9, 1920.)

1. Sales ⟸69—Contract held one for certain pile of iron refuse.

A contract of sale as expressed in letters *held* one for a certain pile of iron borings and turnings, and not for a quantity of unidentified borings and turnings.

2. Appeal and error ⟸1051(4)—Admission of evidence to show contract to be what in terms it clearly was is harmless.

Admission of evidence to show a contract to be what by its terms it clearly was, one for a certain pile of iron, is harmless.

3. Sales ⟸54—Contract, being in clear terms, circumstance is immaterial on construction.

There being no doubt as to what a contract really was as expressed in writing, namely one for sale of a certain pile of iron refuse, the circumstance that several of the carloads, shipped to and without objection paid for by, the buyer, were from another source, is immaterial on the question of what the contract was.

4. Sales ⟸36—Inspection bars defense of mistake as to material bought.

Where the purchaser of a certain pile of material before the purchase examined it and was fully informed as to its nature, he cannot claim mistake as to the nature of the material

5. Partnership ⟸216(2)—Issue of publication of certificate of partnership in case of fictitious name held raised by pleadings.

The issue of plaintiffs, partners doing business under a fictitious name, as shown by the complaint counting on a partnership contract,

having published a certificate of partnership, as required by Civ. Code, § 2468, to entitle them to maintain an action on such a contract, is in the case, without a plea of abatement; the complaint alleging compliance with the Code requirement, and the answer denying such allegation.

6. Appeal and error ⟹1010(2)—Finding without evidence for party having burden of proof not sustained.

A finding on an issue in plaintiff's favor without evidence can be upheld only if they did not have the burden of proving the affirmative of the issue.

7. Partnership ⟹217(1)—Burden of proof on partners using assumed name, who allege publication of certificate.

Plaintiffs, partners doing business under a fictitious name and suing on a partnership contract, have the burden of proving publication of a certificate of partnership, alleged in complaint and denied by the answer, and necessary under Civ. Code, § 2468, for maintenance of such action.

8. Appeal and error ⟹1178(6)—New trial ordered on a single issue; others being properly determined.

All the issues other than whether plaintiffs, partners doing business under a fictitious name, published a certificate of partnership, having been properly determined, the reversal will be for a new trial on that issue alone.

9. Partnership ⟹64—Failure of partners using fictitious name to publish certificate of partnership only matter of abatement.

That publication by partners, doing business under a fictitious assumed name, of a certificate of partnership, as required by Civ. Code, § 2468, as a condition to right to maintain action on partnership contract, has not been made is only a matter of abatement.

10. Partnership ⟹64—Publishing certificate of partnership in case of fictitious name seasonable if before trial of issue.

It is enough for partners doing business under a fictitious name to make the publication of a certificate of partnership, required by Civ. Code, § 2468, as a condition of maintaining an action on a partnership, at any time before trial of the issue of such publication, though not only after the commencement of the action, but after the making of the issue.

Department 1.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by M. Rudneck and another, partners transacting business under the name of the Western Junk Company, against the Southern California Metal & Rubber Company. Judgment for plaintiffs, and defendant appeals. Reversed for new trial on a single issue.

Hollzer & Greenberg, of Los Angeles, for appellant.

Alfred Siemon and W. W. Kaye, both of Bakersfield, for respondents.

OLNEY, J. This is an appeal by the defendant from a judgment against it for the purchase price of certain materials found to have been delivered to it under a contract of purchase from the plaintiffs and for which it failed to pay. That a contract was made, that certain materials were delivered under it, and that the defendant refused to pay therefor are admitted. The substantial defense was that the materials delivered were not of the character called for by the contract. The facts are:

The plaintiffs are engaged in the junk business in Kern county, and were the owners of a pile of machine shop refuse at the town of Taft. The pile, to some extent at least, was made up of "borings and turnings," borings being the metal sawdust, so to speak, made in drilling into a metal, in this case iron or steel, and turnings being the metal shavings made in turning a metal upon a lathe. The defendant desired iron refuse for the purpose of supplying it to copper or other smelters, which apparently use it in reducing their ores. For this purpose the defendant inspected the plaintiff's pile of refuse, and, according to the testimony on behalf of the plaintiffs, which was accepted by the court, agreed to buy it. The agreement was confirmed by an exchange of letters reading as follows:

"Dec. 4, 1917.

"Western Junk Company, Bakersfield, Calif.—Gentlemen: As per agreement made with your Mr. Morris Rudnick, you have sold us say 150 to 200 tons, more or less, of borings and turnings at $8.50 ton, f. o. b. Taft, railroad weights to govern.

"Same to be loaded in gondolas not less than 30-ton minimum. Shipping instructions to be furnished by us.

"Kindly confirm the same by letter.

"Please try and load as clean a stock as you can.

"Yours very truly,

"So. Cal. Metal & Rubber Co.,

"MT/SO By M. Tannenbaum."

"Dec. 5, 1917.

"Southern Cal. Metal & Rubber Co., Los Angeles, Cal.—Gentlemen: Your letter recd. asking us to give conformation as per agreement which we have regarding 150 to 200 tons of borings and turnings, more or less. I would be glad to do it but as you seen the pile, possibly we may not be able to get it all out, but as far as I am concerned you get every pound that is their. I start to load a car from Bakersfield Sat. morning and would like to know if it is possible for me to put in this car auto fenders and bicycle frames and other material like that in car with borings. Regards to tin cans and other stuff like that from dumps I

should judge I can get several hundred tons, but before going farther would like to know what I'll get for it F. O. B. Taft or Bakersfield, and how it is to be packed, let me know by return mail. Kindly send shipping instructions at once as I start to load Sat. morning.

"Very truly yours,

"Western Junk Co.

"By M. Rudneck, per Mch."

Following the making of the arrangement, the plaintiffs loaded nine cars, pursuant to shipping instructions from the defendant, and of these three were received and paid for without objection then or thereafter as to the character of their contents, and no claim is made on either side with reference to them. Their only bearing on the case arises from the fact that at least two, if not all three, were not loaded with material from the pile in question, and that this would seem to support to some extent the contention of the defendant that its contract was not to purchase a specified thing, the pile, but to purchase articles or materials by description, as "borings and turnings." The remaining six cars were actually loaded from the pile, and on arriving at their destinations were rejected, the defendant claiming that they were not "borings and turnings," but chiefly slag and sand. The trial court found that this claim was not true, and also that the defendant prior to purchasing had inspected the pile and knew the real nature of the material in it, and in effect that the rejected material was just what the defendant expected to get when it made the contract. These findings go to the essential merits of the case, and upon them the trial court gave judgment for the plaintiffs.

[1-3] The first point made on appeal by the defendant is that the two letters exchanged between the parties constitute a written contract, that the contract as expressed in them is for "borings and turnings," and not for a specific thing, the pile of material at Taft, and that the evidence of the plaintiffs that the latter was the subject-matter of the contract was evidence varying the terms of a written contract, and should not have been admitted, and should not be considered, although admitted. We need not consider whether or not the two letters constituted a written memorial of the arrangement between the parties such as would, under the so-called parol evidence rule, preclude the introduction or consideration of evidence of further additional terms. A sufficient answer to defendant's contention is that the contract, even as expressed in the letters, is not one for a quantity of unidentified borings and turnings as appellant claims, but for a certain pile of borings and turnings. The two letters are to be read together, and the plaintiffs' letter in reply to the defendant's refers to the pile, and states in effect that the plaintiffs' obligation is limited to as much of it as they can get out, but the defendant is to have all they can get. This is a clear specification of the pile as the subject of the sale. The evidence to which the defendant objected was evidence merely to the same effect, and, whether properly admissible or not, could not have affected the result. This conclusion is not affected by the fact already adverted to, that two or possibly three cars were loaded with material not from the pile. This fact would be of decided importance if there were any doubt as to what the contract as expressed in the letters really was. But there can be none, and, this being so, the fact mentioned is immaterial.

[4] The contract, then, was one for a certain pile of "borings and turnings." The court found that the rejected material came from the pile, and it is not contended that this finding is not supported by the evidence. It would not, however, necessarily follow that the defendant was bound to accept and pay for the material. The description of the pile as one of borings and turnings would indicate pretty strongly what the parties, or at least the defendant, believed the nature of the pile to be, and if it did so believe and it turned out that its real nature was not that, there was a substantial mistake such as would vitiate the contract and justify the defendant in refusing to accept deliveries under it. On the other hand, if it appeared, in spite of the description given the pile, that the defendant at the time it contracted to purchase it knew what its real nature was, then there was no mistake, the material delivered was just that which the defendant when it made the contract believed it was purchasing, and there was no justification for the defendant refusing to accept it. Under these circumstances, it would make no difference how the pile was described, whether as one of borings and turnings or of something else. The description is material only as showing a mistake, and it would appear that in spite of the incorrectness of the description there was no real mistake.

It follows, then, that since the material rejected came from the pile sold, the defendant can justify its rejection only on the ground of a mistake as to the nature of the pile. Such mistake is negatived by two findings of the court. The first is that—

"It is not true that the material so shipped and consigned by plaintiffs did not consist of borings; and it is not true that 627,160 pounds thereof, or any other substantial quantity, consisted of slag or sand or other worthless material."

The second is that the defendant at the time it made the contract of purchase had examined the pile, and was fully informed as to the real nature of the material in it, so that what was delivered to the defendant was just what it contracted for. It is evi-

dent that if either one of these findings is sustained by the evidence, there was no mistake, and the defendant was not justified in its rejections.

The defendant's counsel contended vigorously that the evidence does not sustain the first finding. It is quite doubtful if this contention is sound, but we need not pause to discuss it. The second finding is not attacked in the briefs or in the argument, although the bill of exceptions does specify that it is not supported by the evidence, and in any case the evidence is ample to justify it. That the defendant's agent inspected the pile before purchasing is admitted. Of course, such inspection would not necessarily be final, and if it appeared, as it did in Abel v. Murphy, 88 N. Y. Supp. 256, that in spite of the inspection there was a substantial mistake as to the nature of the thing purchased, the contract could be avoided. But there is nothing to show that in this case the inspection which the defendant made failed to reveal the real nature of the pile. In fact, the fair conclusion from the evidence is that the character of the pile was such that an inspection of it would necessarily reveal the nature of the material of which it was composed. Apparently the material was all about alike and its character plainly evident. The real contention of the defendant's counsel upon the merits would seem to be that the sale was one by description. But the sale was not that, either, according to the letters upon which counsel rely, or according to the other evidence in the case. The sale, not being such, but one of a certain pile of material, the finding of the court that the defendant knew when it purchased what the real nature of the pile was is decisive of the case upon its merits.

[5] There is a point, however, beside the merits, which requires a reversal of the judgment. The plaintiffs were doing business as copartners under a fictitious name. As such, they were required by the Code (sections 2466 and 2468, Civ. Code) to file with the county clerk of the county of their principal place of business a certificate of partnership, and to publish the same for four weeks, in order to entitle them to maintain an action upon a partnership contract. The complaint in this case counted on a partnership contract, showed that the plaintiffs were partners, doing business under a fictitious name, and alleged compliance with both the Code requirements. The allegation as to such compliance was denied by the defendant's answer, and upon the pleadings in this state the parties went to trial. At the trial the plaintiffs proved the filing of the partnership certificate, but introduced no evidence whatever of its publication. The court found that such publication was made, but the finding is without support, and objection to it upon this ground is made in the bill of exceptions and in the briefs. The answer which plaintiffs' counsel make is that the point was, in effect, waived at the trial, and that the failure to make the required publication was a defense which should have been presented by way of a plea of abatement. As to the waiver, suffice it to say that we find nothing to justify the claim that it occurred. As to the contention that the point should have been presented by a plea in abatement, the answer is that when the plaintiffs affirmatively pleaded the fact of publication, they tendered an issue upon the point, and the denial by the defendant accepted the issue. The issue was therefore in the case, and this is enough.

[6, 7] The issue being in the case, and the court finding upon it in the plaintiffs' favor without evidence, the finding can be upheld only in case the burden did not rest upon the plaintiffs to prove the affirmative of the issue, and the real question is, Did the plaintiffs have such burden? This question was flatly presented in Sweeny v. Stanford, 67 Cal. 635, 8 Pac. 444, and a judgment in favor of the plaintiffs, who were copartners, was reversed because they had not proven the filing of their certificate of partnership. The case cannot be distinguished from the present, and it has been referred to by this court a number of times (see Phillips v. Goldtree, 74 Cal. 151, 13 Pac. 313, 15 Pac. 451; Alaska, etc., Co. v. Standard, etc., Co., 158 Cal. 567, 577, 112 Pac. 454; Holden v. Mensinger, 175 Cal. 300, 165 Pac. 950), and upon this particular point, the only one really decided by it, it has not been overruled, either expressly or by implication, and we are not prepared to do so now. Its authority is controlling, and necessitates a reversal of the judgment.

[8-10] It is not, however, necessary that there be a new trial as to any issue, except this single one as to the publication of the plaintiffs' certificate of partnership. All the other issues have been properly determined, and there is no occasion for retrying them. Collins v. Ramish, 188 Pac. 558. For the purposes of the new trial, we deem it well to say that if it appear that the plaintiffs have at that time had publication made as required by the Code, it will be sufficient to warrant judgment in their favor whether the publication be before or after the commencement of the action. The fact, if it be the fact, that publication has not been made, is but a matter of abatement. This is now settled, although upon this point the language of Sweeny v. Stanford, just referred to, might seem to justify a different view. Phillips v. Goldtree, 74 Cal. 151, 13 Pac. 313, 15 Pac. 451; Ontario Bank v. Tibbits, 80 Cal. 68, 22 Pac. 66; California, etc., Society v. Harris, 111 Cal. 133, 43 Pac. 525; Ward, etc., Co. v. Mapes, 147 Cal. 752, 82 Pac. 426. The rule is also settled that it is not necessary that the plaintiffs have com-

plied with the statute at the time of the commencement of the action; that it is sufficient if they have done so at the time at least when issue as to the matter of abatement is made. California, etc., Society v. Harris, supra; Ward, etc., Co. v. Mapes, supra; Roullard v. Gray, 38 Cal. App. 79, 175 Pac. 479. We have no hesitation in extending this rule so as to make it sufficient if there be a compliance with the statute before trial upon the issue. It is well settled that a plea by way of abatement of another action pending will be avoided by proof that the other action is no longer pending at the time of trial, although it may have been pending when the plea was made. Collins v. Ramish, supra, and authorities there cited. The reasoning of the decisions we have cited, beginning with California, etc., Society v. Harris, holding that in such a case as the present a compliance with the statute is sufficient if accomplished before objection is made that it has not been accomplished, proceeds upon the analogy between such a defense and one of another action pending. We see no reason for not following the analogy throughout and holding that in the case of one, as well as in that of the other, the defense fails if it appear at the time of the trial that the matter of abatement no longer exists. In fact, it would seem difficult to reconcile First National Bank v. Henderson, 101 Cal. 307, 35 Pac. 899, with any other view. In that case a judgment in favor of a banking corporation, as plaintiff, had been given, and an appeal was taken on the ground that the defendant had pleaded and proved that the plaintiff had not filed with the county recorder certain statements which it was required by statute to file as a condition of its right to maintain an action. Pending the appeal, the statute imposing the condition was repealed, and, this being made to appear to the Supreme Court, it was held that the ground of defense was removed, and the judgment for the plaintiff was affirmed, although the fact that the plaintiff had not complied with the statute plainly appeared. If the removal of the ground of such a defense after judgment is sufficient to justify a disregarding of the defense upon appeal, we can see no reason for not disregarding a very similar defense in the present action, if at the time of trial it appears that the ground for it no longer exists.

Judgment reversed for a new trial, in accordance with this opinion, upon the single issue as to publication by the plaintiffs of their certificate of partnership, as required by law, with directions that if such issue be determined in favor of the plaintiffs, judgment be given for them in accordance with the findings upon the other issues of the cause, and that if such issue be found against the plaintiffs the action be dismissed without prejudice. It is also ordered that appellant recover its costs on appeal from the respondents.

We concur: SHAW, J.; LAWLOR, J.

184 Cal. 343

AMERICAN WELL & PROSPECTING CO. v. BLAKEMORE et al.

SAME v. REX MIDWAY OIL CO. et al.

(L. A. 5132, 5133.)

(Supreme Court of California. Nov. 19, 1920. Rehearing Denied Dec. 16, 1920.)

1. Corporations ⊜93 — Sale of delinquent stock without notice is void.

Under Civ. Code, §§ 337, 346, relating to sale of corporate stock for delinquent assessments, a sale made without published notice is void.

2. Corporations ⊜243(7) — Creditors cannot set aside irregular forfeiture of stock where stockholders have acquiesced.

Under Civ. Code, § 347, limiting the time to set aside irregular forfeitures of delinquent stock and requiring money paid for the stock to be tendered, creditors cannot hold stockholders personally liable for unpaid balances on shares which had previously been sold for delinquent assessments without collusion.

3. Corporations ⊜93—Stock sold for delinquent assessment vests title in company.

Under Civ. Code, §§ 343, 344, permitting corporations to purchase stock sold for delinquent assessments, the sale passes title to the company and, as between the stockholder and corporation, deprives stockholders of all interest in the shares.

4. Corporations ⊜254 — Stockholders not charged with knowledge of corporation's insolvency.

Stockholders are not charged with knowledge of the corporation's insolvency.

5. Corporations ⊜243(7) — Stockholders not liable to creditors after shares have been forfeited for delinquent assessments.

In absence of fraud, stockholders whose shares have been forfeited and purchased by the corporation for delinquent assessments are not liable to the company's creditors for the unpaid balance on their stock, though the forfeiture was made while company was insolvent.

In Bank.

Appeals from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Actions by the American Well & Prospecting Company against C. P. Blakemore, William Schneider, and Jacob Fieber, and the Rex Midway Oil Company. Judgments for plaintiff, and the plaintiff and the individual

defendants appeal. Reversed on defendants' appeal.

In L. A. 5132:

Samuel H. French, of Los Angeles, for appellant Blakemore.

Davis & Rush, of Los Angeles, for appellants Schneider and Fieber.

Henry K. Norton and Wilbur Bassett, both of Los Angeles, for respondent.

In L. A. 5133:

Henry K. Norton and Wilbur Bassett, both of Los Angeles, for appellant.

Samuel H. French and Davis & Rush, all of Los Angeles, for respondents.

LAWLOR, J. Both the plaintiff, American Well & Prospecting Company, a corporation, and the defendants, C. P. Blakemore, William Schneider, and Jacob Fieber, appeal from a judgment in favor of the plaintiff in the respective sums of $3,820.15 against the defendant Blakemore, $1,140 against defendant Schneider, and $1,140 against defendant Fieber, in two actions brought to recover from the defendants certain sums alleged to be due from each of them as the balance not paid in upon their stock in the defendant corporation, Rex Midway Oil Company.

There is no dispute as to the facts. The oil company was organized under the laws of this state in May, 1910. All its works were located in Kern county. April 10, 1912, the company's note for $8,738.80 was executed in favor of the plaintiff. This note was not paid, and on October 27, 1913, the plaintiff secured judgment thereon against the oil company in the sum of $8,738, upon which judgment execution was issued but later returned wholly unsatisfied. It is this judgment which is the basis of plaintiff's claim.

At the time of its organization the oil company had a capital stock of $250,000, divided into 1,000,000 shares of the par value of 25 cents each. It was stated on each certificate, however, that the par value was $1. In July, 1910, 999,980 shares were issued to F. H. Lathrop, as "fully paid-up stock," in consideration for the transfer by Lathrop to the oil company of a lease on certain oil lands in Kern county. Immediately thereafter Lathrop returned to the oil company 950,000 shares to be held as treasury stock. On October 10, 1910, proceedings were duly completed for an increase in the par value to $1, but no certificates of stock were recalled nor were any reissued. Subsequently various blocks of treasury stock were purchased from the company by the three individual defendants. Blakemore bought 2,250 shares at 4 cents and 14,500 shares at 8 cents; Schneider and Fieber each 5,000 shares at 25 cents. Thereafter each of the last-named defendants paid an assessment of 2 cents per share. In December, 1912, a second assessment of 3 cents was levied, but the defendants failed to pay this, and their stock was declared delinquent, March 20, 1913, a delinquent sale was held at which no bids were offered, and the defendants' stock was accordingly purchased by the oil company itself. The transfer was duly entered on the oil company's books. It was found that "on the 20th day of March, 1913, and at least six months prior thereto, and until the forfeiture of its charter thereafter the said defendant Rex Midway Oil Company was insolvent," and this finding is not questioned. On November 30, 1913, the oil company's charter was declared forfeited for failure to pay its license tax to the state.

The amended complaint herein, filed December 3, 1914, alleges that, nothwithstanding the sale of the delinquent stock, defendants are the present owners thereof. On this theory it is further alleged that there is due to the oil company from Blakemore, Schneider, and Fieber on each share the difference between $1, the par value, and the respective sums actually paid for said stock plus the first assessment also paid by them. The defendants Schneider and Fieber jointly, and Blakemore separately, answered the complaint. In each answer it was alleged that, by virtue of the above-mentioned sale, the individual defendants were no longer the owners of the stock, and therefore their liability for the sums remaining unpaid on their shares had terminated. The cause was tried by the court, sitting without a jury, and judgment was rendered for the plaintiff.

On appeal Blakemore, Schneider, and Fieber, "expressly waiving all other objections," claim that all interest which they had in the stock purchased by them was divested by reason of the sale thereof, and hence they are not now liable to the creditors of the corporation. Plaintiff's contention is that, because each certificate of the stock which was purchased by the defendants stated the par value of each share to be $1, the defendants are now estopped to deny that one dollar was the par value at the time they purchased the stock, and therefore that the measure of their liability per share is the difference, not between the amounts paid in by them and 25 cents, but the difference between such amounts and one dollar.

[1] 1. Before proceeding to discuss defendants' contention, it will be proper to consider plaintiff's claim:

"That the attempted forfeiture of the stock * * * was not a valid forfeiture * * * because the necessary statutory steps were not taken."

The court found:

"That no publication of the notice of said sale for said delinquency was made in any newspaper published in Kern county at any time;

that there was at said time a newspaper published in said Kern county;" that "in all the proceedings in and about said assessment and in leading up to said sale, all of the provisions and requirements of the law * * * regarding the levying of assessments and making calls on capital stock of corporations and the sale of stock for the nonpayment thereof, and particularly, among other things, the provisions of sections 334 to 345, inclusive, of the Civil Code, were followed and complied with except as to the failure to publish notice of delinquent sale under sections 337 and 339 * * * in Kern county."

As to the sale of delinquent stock, section 336 of the Civil Code provides:

"Notice must be * * * published once a week, for four successive weeks, in some newspaper of general circulation and devoted to the publication of general news, published at the place designated in the articles of incorporation as the principal place of business, and also in some newspaper published in the county in which the works of the corporation are situated, if a paper be published therein."

And section 337 of the same Code reads, in part:

"If any portion of the assessment * * * remains unpaid * * * the secretary must, unless otherwise ordered by the board of directors, cause to be published in the same papers in which the notice hereinbefore provided for shall have been published, a notice. * * *"

Section 346 declares:

"No assessment is invalidated by a failure to make publication of the notices hereinbefore provided for, nor by nonperformance of any act required in order to enforce the payment of the same; but in the case of any substantial error or omission in the course of proceedings for collection, all previous proceedings, except the levying of the assessment, are void, and publication must be begun anew."

It is well settled in this state that, in taking the necessary steps to sell stock for nonpayment of assessments, "a strict observance of the statutory provisions with respect to notice is essential." San Bernardino Inv. Co. v. Merrill, 108 Cal. 490, 41 Pac. 487. See, also, Occidental B. & L. Co. v. Sullivan, 62 Cal. 394, 398; Ruck v. Caledonia, etc., Min. Co., 6 Cal. App. 356, 92 Pac. 194; 14 C. J. 649. Under this rule, there having been no publication of notice of the delinquent sale in Kern county, as required by section 337, the forfeiture was void. This conclusion finds support in section 346, for, while under the provisions of that section the assessment itself was valid, the sale was defective and a new publication of notice necessary.

[2] But section 347 provides that—

"No action must be sustained to recover stock sold for delinquent assessments, upon the ground of irregularity in the assessment, irregularity or defect of the notice of sale, or defect or irregularity in the sale, unless the party seeking to maintain such action first pays or tenders to the corporation, or the party holding the stock sold, the sum for which the same was sold, together with all subsequent assessments which may have been paid thereon and interest on such sums from the time they were paid; and no such action must be sustained unless the same is commenced by the filing of a complaint and the issuing of a summons thereon within six months after such sale was made."

And according to the weight of authority, "a sale of forfeited shares cannot be set aside on the ground of mere irregularities unless within a reasonable time a tender is made * * * of the amount of the assessment." 14 C. J. 650. The following quotation from Crissey v. Cook, 67 Kan. 20, 72 Pac. 541, is also pertinent:

"'If the forfeiture is invalid in respect of something which the parties cannot waive and which cannot be cured by their acquiescence, he remains liable to the company's creditors in the event of its insolvency. On the other hand, where there has been a mere irregularity in making a bona fide forfeiture within the company's powers, as by failing to give him the prescribed notice or to pass a formal resolution of forfeiture, but only an entry to that effect on the corporate books has been made by the secretary, yet, if both the company and the shareholder treat the forfeiture as valid, it will be held as such as against the company's creditors.' 2 Thomp. Corp. § 1792."

These authorities have application here. Upon the findings it must be assumed that the levy of the assessment was valid; that the defendants were personally notified both that the assessment was due and payable and that the sale was to take place; that a proper notice of the assessment was duly published; that a proper notice of the sale was published at the oil company's principal place of business, as distinguished from the place where its works were situated; and that the stock was sold at public auction, in default of bidders, to the oil company itself. There is no suggestion that defendants were guilty af any collusion or bad faith, that they have not acquiesced in the validity of the sale, or that the failure to publish notice "in some newspaper published in the county where the works of the corporation are situated" resulted in any injury to plaintiff. It must be held that, as to this irregularity in the publication of a notice, plaintiff is bound by the acquiescence of the defendants and cannot now insist that (passing for the moment the question of the power of the directors to forfeit the stock after the corporation had become insolvent) the sale did not divest the individual defendants of title to their shares.

[3-5] 2. We shall next consider the claim of the individual defendants that by virtue of the sale they were relieved from liability for the unpaid balances upon their stock

In this connection the sole contention of plaintiff is that bidding in at a sale by a corporation of its own stock "at a time when it is insolvent is an invalid transaction, no matter what was the nature of the transaction."

We may observe at the outset there is no evidence, nor is it found, that at the time of the delinquent sale any of the defendants or the directors knew of the corporation's insolvency, or that the sale was tainted with fraud or collusion.

The plaintiff cites Vermont Marble Co. v. Declez Granite Co., 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143, to the effect that the assets of a corporation, in case of insolvency, are held in trust for the creditors is not disputed. This is the so-called trust fund theory. It is further argued that the obligation of the defendants herein to pay the balance of their subscriptions was an asset of the corporation. Upon the trust fund theory the judgment is correct for it follows as a corollary to the above that, after the corporation * * * is insolvent and the creditor himself can compel the stockholder to make good the stockholder's obligation to him as beneficiary, the corporation cannot deprive the creditor of the stockholder's obligation by any agreement or transaction between the corporation and the obligor.

Plaintiff further claims that the decisions in Vermont Marble Co. v. Declez Granite Co., supra, People's Bank v. Rickard, 139 Cal. 285, 73 Pac. 858; Welch v. Sargent, 127 Cal. 72, 59 Pac. 319; National Carriage Co. v. Story, etc., Co., 111 Cal. 531, 44 Pac. 157; Herron Co. v. Shaw, 165 Cal. 668, 133 Pac. 488, Ann. Cas. 1915A, 1265, and Lucey Co. v. McMullen, 178 Cal. 425, 173 Pac. 1000—are applicable to the facts in the case at bar. But we do not find that in any of those cases a similar state of facts was presented. In the Rickard, Sargent, and Story Cases it appeared that the stockholder, with knowledge of the corporation's insolvency, voluntarily transferred his stock to an irresponsible third person with the intent to escape liability; and that the decision in each of those cases turned upon this fact appears, for instance, from this excerpt from the opinion in the Sargent Case:

"After the corporation has become insolvent *to the knowledge of the stockholder*, he cannot, by a transfer of his stock to an irresponsible person, escape liability for an unpaid subscription to stock, as against a creditors' bill." (Italics ours.)

In the case at bar, as we have said, there is no showing that at the date of the sale any of the defendants knew of the corporation's insolvency. In the Vermont Marble Company, the Herron Company, and the Lucey Company Cases, the shares which defendants held had been issued to them as fully paid up stock in return for the transfer from defendants to the corporation of certain property which was actually worth much less than the par value of the stock, and the sole question was whether, there being no contract between the defendants and the corporation to pay the balance, the defendants were nevertheless liable therefor to the creditors. There was no question arising out of any attempted sale, either voluntary or involuntary, of the stockholder's shares. Here, however, as we have noted, the individual defendants have expressly waived any question that might arise as to their original liability, and their sole contention on appeal is that that liability was terminated by the purchase of the stock by the corporation itself at the delinquent sale.

Plaintiff also cites in this connection Thompson and Morawetz, respectively. In volume 4, § 3759, of the former it is said:

"The rule that a forfeiture bars an action for any balance due on the stockholder's subscription is fraught with too much danger both to the corporation and to the corporate creditors, and opens such a wide and inviting door to fraud, to become the settled policy of corporate law. Under this rule designing directors could by tacit agreement proceed to forfeit unpaid stock in a failing or already insolvent corporation, and by forfeiture and sale thereby free the stockholders, including themselves as such, from further liability on calls, and where the stock itself might be worthless on the market. In an effort apparently to escape such a conclusion it has frequently been held, especially in England, that a forfeiture will not be exercised for the purpose of enabling the subscribers to escape their liability. * * * A subscriber * * * cannot, by announcing his withdrawal from the corporation, relieve himself from liability to pay additional installments. And on the same theory it has been held that a stockholder cannot forfeit his shares by mere abandonment and thus discharge himself from his subscription. Instead of preventing, these cases indicate and tend to encourage the dangers suggested. The only safe, reasonable, and sane rule, consistent with all analogous principles of law, is the one that holds the right of forfeiture to be merely cumulative and not exclusive, and that after forfeiture and sale the subscriber is liable for the residue on his express promise to pay."

But it is clearly the rule in California, as between the stockholder and the corporation, that the effect of a sale made to meet delinquency in the payment of assessments is wholly to divest the stockholder of all right or interest in his shares, to pass title to the corporation (Civ. Code, §§ 343, 344), and, therefore, to terminate all liability on the part of the stockholder for unpaid balances on his stock. See, also, 4 Thompson, supra, § 3757. And the learned author from whom we have just quoted, in the section succeeding that referred to, admits that—

"On the theory of the class of cases holding that the forfeiture terminates the relation of the

stockholder to the corporation and relieves him from further liability on his subscription, it follows logically that on a valid forfeiture he ceases to be a stockholder for all future purposes. * * * It follows also that such a forfeiture releases the former stockholder from all liability to creditors of the corporation; * * * a corporate creditor cannot thereafter charge him with the amount of his subscription remaining unpaid. And a valid forfeiture, or even an invalid forfeiture which has been treated by the corporation and the stockholders as valid, will be held as such against the creditors of the corporation."

It is declared in Morawetz that—

"The power of declaring a forfeiture of shares is conferred upon a corporation solely for the purpose of compelling the subscribers to pay their dues promptly, and thus to increase the amount of the common fund. It was not conferred, and cannot be exercised, for the purpose of discharging stock subscribers from liability to creditors, in case the corporation should prove a failure. Unpaid shares in an insolvent corporation, or a corporation which has lost a portion of its original capital, are clearly of no value, but are a burden to the owner, and to declare them forfeited would be a benefit rather than a loss. To say that a corporation, when insolvent, can declare a forfeiture of the shares of its members would, in effect, mean that the members of a corporation may, under the corporate name and for their own benefit, incur debts upon the faith of their subscriptions, and afterwards, if the corporation should prove a failure, annul their liability, leaving creditors unpaid, by going through the form of declaring a forfeiture." (2 Morawetz on Private Corporations. § 857.)

The only case cited in the text in support of the views thus expressed is Tiger Bros. v. Rogers, etc., Co., 96 Ark. 1, 130 S. W. 585, 30 L. R. A. (N. S.) 694, Ann. Cas. 1912B, 488, where it was held that a purchase by the corporation at a delinquent sale of shares upon which the full amount of the subscription had not been paid was void as to creditors. But in that case neither the statutes under which the corporation was formed nor the corporate by-laws contained any provision authorizing the corporation to purchase its own shares, as do sections 341 and 343 of our Civil Code.

We are not referred to, nor have we been able to find, any case in this state in which it is held that where there is no fraud or collusion, and the directors in good faith have forfeited the shares, the stockholder's liability for the unpaid balance on his stock is not thereby terminated.

Defendants cite on this point 1 Cook on Corporations, §§ 127, 128:

"In the absence of fraud and collusion it is a settled rule that where a corporation has authority to declare the forfeiture of stock for nonpayment of calls, and the forfeiture is regularly declared, such formal declaration puts an end to the liability of the stockholder, and corporate creditors cannot subsequently hold such an expelled or released stockholder liable. This is the rule, even though the debt was contracted by the company before the stock was forfeited. The same principle of law that prevents the corporation from suing on a subscription after the stock has been forfeited, prevents the corporate creditors also from doing the same."

In Mills v. Stewart, 62 Barb. (N. Y.) 444, it is said:

"If the directors should intentionally discharge the stockholders, leaving the debts unpaid, it would be a fraud on the creditors, and therefore void. *If it was done in good faith*, having due regard to the rights * * * of both creditors and stockholders, I can perceive no reason why it is not both legal and proper. If we are to forbid the exercise of corporate powers, because they may be abused, we may, for like reason, prohibit the exercise of judicial and legislative power. * * * The corporation acting, as I presume in good faith, have, in conformity with the charter, forfeited the stock of the defendant. He thereby ceased to be liable to the creditors * * * and this action cannot be maintained. If the directors *fraudulently* forfeited the stock, and thereby released the defendant from liability to the plaintiffs, the forfeiture is void." (Italics ours.)

That case was subsequently before the court of appeals (41 N. Y. 384). The opinion in the higher court contains the following:

"The forfeiture relieved the respondent from all liability to the company for the unpaid subscription. * * * The debt [upon which the action was brought] was contracted * * * while the respondent was a stockholder. * * * The finding and judgment show that the proceedings to forfeit the stock of the respondent were instituted and conducted in good faith, without any design to defraud the creditors of the company. * * * The power to forfeit, like the power to manage all the affairs of the corporation, is vested in the directors, upon the assumption that they will exercise it in the best manner practicable for the promotion of the interest of the company and its creditors. That they will not forfeit stock unless the interest of all concerned will be promoted thereby. Should they forfeit it for the purpose of defrauding the corporation or any creditor, such forfeiture would, for that reason, be set aside. Again it is said that the creditor trusts the corporation, upon the faith of this liability of the stockholders to him, and that it would be unjust to deprive him of this remedy by the forfeiture of the stock. The answer to this is that he can rely only upon the liability of the stockholder, *subject to the power of the company to discharge the same*, by receiving payment, or, if they deem it for the interest of all concerned, forfeiting the stock. This the party dealing with the company is presumed to know, and to rely much more upon the capacity and fidelity of the directors, than upon any liability of the stockholders. Again, when the stockholder has paid in full for his stock, he is entitled to it. This he can never obtain after forfeiture, although compelled to pay the entire price thereof to a creditor of the company. The Legislature could never have intended a result so unjust to the stockholder. * * * The appellant's counsel insists, that the

judge erred in excluding proof *of the insolvency of the company at the time of the forfeiture* of the defendant's stock. This evidence, *if the act of the directors was free from fraud, was wholly immaterial. Such proof alone would not show it to have been done fraudulently.* No other proof tending to show fraud was offered in connection with it, nor was any intimation of the purpose for which it was offered given to the court." (Italics ours.)

Earle v. Carson, 188 U. S. 42, 53, 23 Sup. Ct. 254, 257 (47 L. Ed. 373), was a suit by the receiver of an insolvent bank, on behalf of the creditors, to recover the amount of the double liability imposed by statute upon stockholders in national banks. The facts were much stronger than in the case at bar, for the sale which the plaintiff claimed was void was a voluntary sale on the part of the stockholder, while here the delinquent sale was, of course, involuntary. The court held that—

"The power of a stockholder in a national bank to transfer stock thereof, like other personal property, is not limited by the mere fact that at the time of the transfer the bank, which was a going concern, was insolvent * * * *unless it be shown that the seller was aware of the facts and had sold the stock in order to avoid the impending liability.* Nor is such a bona fide sale void if the person to whom the stock is sold is, owing to his insolvency, unable to respond to the double liability, if the fact of such insolvency was unknown to the seller." (Italics ours.)

On a similar state of facts it was said in McDonald v. Dewey, 202 U. S. 510, 526, 26 Sup. Ct. 731, 734 (50 L. Ed. 1128, 6 Ann. Cas. 419):

"The original stockholder cannot be held liable, unless the bank was practically insolvent at the time the transfer was made, *and its condition was known, or ought to have been known to the stockholder making the transfer.* * * * The transferor can only be held liable if the bank be insolvent, and such insolvency be known, or ought to have been known to him from his relations to the bank. * * * We think it a proper deduction from the prior cases, and such we hold to be the law, that the gist of the liability is the fraud implied in selling, *with notice of the insolvency of the bank and with intent to evade the double liability imposed upon the stockholder by the National Banking Act. In short, the question of liability is largely determinable by the presence or absence of an intent to evade liability.* The fact that the sale is made to an insolvent buyer is doubtless additional evidence of the original fraudulent intent, but would not be in itself sufficient to constitute fraud without notice of the insolvency of the bank." (Italics ours.)

See, also, Allen v. Montgomery, 11 Ala. 437, 450; Macauly v. Robinson, 18 La. Ann. 619, 14 C. J. 1007.

In our opinion, these authorities announce the correct rule as to the effect of a forfeiture of delinquent shares on the liability of the stockholder to creditors for the sums remaining unpaid on his stock. Plaintiff urges that—

"It is the right of the creditor to have recourse against any stockholder in whose hands the stock appears which is not fully paid-up stock and such a stockholder is under the obligation of seeing that his transferee is financially able to make good the representation upon which the stock was issued."

But in the final analysis this contention rests upon the assumption that the rule announced in Vermont Marble Co. v. Declez Granite Co., supra, was designed to preserve for the creditors not only the liability, but the solvency of the stockholder. Such is not the law. The directors are vested with statutory authority to institute proceedings for the sale of any stock on which an assessment is delinquent, and on behalf of the corporation to buy in that stock in default of other bidders. So long as the good faith of the directors is not questioned, the power thus to take over shares continues even through insolvency. And Thompson, supra, while arguing that the adoption of the rule here contended for by defendants "is fraught with too much danger," nevertheless concedes, in the succeeding section, that where, as in California, a forfeiture terminates the shareholder's liability as between him and the corporation, it also precludes creditors from recovering on that liability.

Here was a corporation organized, it seems, when it was probably believed that the property which it proposed to acquire contained valuable deposits of oil. Formed under these circumstances, the corporation exchanged all but 20 of its 1,000,000 shares of capital stock for a lease of such property. Nine hundred and fifty thousand shares were returned by the lessee to be held as treasury stock, and it was from this stock that the shares were purchased by the defendants. As bearing on the bona fides is the fact that the defendants paid one assessment on their stock. It was found necessary to levy a second assessment, and the circular letter sent to stockholders on that occasion was introduced in evidence. It was to the effect that the assessment "would clear up all the corporation's obligations and absolutely put us out of debt." There is no suggestion that this statement was not made in good faith. According to the minute book, which was admitted in evidence, it was not until more than three months after the sale that the secretary, Clyde P. Campbell, notified the board that—

"The company was unable to meet its obligations, and had been in financial troubles for several months past."

As already noted, it is not found, nor is it claimed, that the directors had knowledge of the insolvency. Moreover, no contention is made by the plaintiff that the directors

were chargeable with knowledge. And it is the well-settled rule that "stockholders" are not charged with knowledge of the corporation's insolvency. 4. Thomp. Corp. § 4470; 6 Fletcher, Cyc. Corp. § 4043; 14 C. J. 845. We have a case, then, where the sole question raised by the plaintiff is whether, after the corporation has become insolvent, the board of directors can by forfeiture extinguish, as between a shareholder and creditors, the former's liability for the balance as yet not paid in on his stock. In view of the record, and the authorities we have discussed, it must be held that, since there was no showing of any fraud, collusion, or intention to prejudice the rights of creditors, and neither the directors of the Rex Midway Oil Company nor the individual defendants knew of the insolvency of the corporation, the taking over by the corporation of the defendants' shares not only divested the defendants of title thereto, but terminated their liability to creditors for the difference between the respective amounts paid in by them and the par value of the stock.

3. In view of this conclusion it will be unnecessary to discuss plaintiff's contention that the measure of the defendants' liability should be the face value of their stock rather than the actual sums which they contracted to pay for the shares.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SHAW, J.; LENNON, J.; SLOANE, J.; WILBUR, J.

(184 Cal. 808)

CALIFORNIA NAT. SUPPLY CO. v. WHITMORE et al. (L. A. 5143.)

(Supreme Court of California. Nov. 19, 1920. Rehearing Denied Dec. 16, 1920.)

In Bank.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Action by the California National Supply Company against George F. Whitmore, C. O. Blakemore, and William Schneider. Judgment for plaintiff, and last two named defendants appeal. Reversed.

Samuel H. French, of Los Angeles, for appellant Blakemore.

Davis & Rush, of Los Angeles, for appellant Schneider.

Flint & Jutten, of Los Angeles, for respondent.

LAWLOR, J. The questions presented here were considered and decided in American Well, etc., Co. v. Blakemore et al. (L. A. 5132), and American Well, etc., Company v. Rex Midway Oil Company et al. (L. A. 5133) 193 Pac. 779. An opinion has been filed this day in those cases, and upon the authority thereof the judgment herein is reversed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SHAW, J.; LENNON, J.; SLOANE, J.; WILBUR, J.

(49 Cal. App. 501)

DAHNE v. DAHNE. (Civ. 3203.)

(District Court of Appeal, Second District, Division 1, California. Oct. 7, 1920. Hearing Denied by Supreme Court Dec. 6, 1920.)

1. Appeal and error ⟸197(1)—Variance cannot be objected to for first time on appeal.

Objection that testimony pertained to a matter not within the issues cannot be made for the first time on appeal.

2. Appeal and error ⟸1048(5)—Questions on cross-examination held harmless in view of negative answers.

In an action to establish a trust in which defendant denied that plaintiff had paid the purchase price of the property and alleged that defendant herself had paid the entire consideration, action of the court in permitting plaintiff to be cross-examined as to whether in purchasing the property he had not made a gift thereof to defendant, if error in that it admitted evidence not within the issues, *held* harmless where plaintiff's answers were negatived.

3. Trusts ⟸371(8)—Testimony held not at variance with allegation that defendant had paid for land with her own money.

In action to establish a trust on theory that plaintiff had paid for land conveyed to defendant, defendant's testimony that she had paid for the property with money accumulated from gifts given her from time to time by plaintiff *held* not at variance with allegation that defendant herself had paid the entire consideration for the land.

4. Gifts ⟸47(3)—Donee in confidential relationship with donor required to prove absence of fraud and undue influence.

Where confidential relations existed between donor and donee, the donee is required to prove, not only the making of the gift, but also the absence of fraud or undue influence.

5. Gifts ⟸47(3)—Fraud and undue influence presumed against donee in confidential relationship with donor.

Where confidential relations existed between donor and donee, the existence of fraud or exercise of undue influence is presumed as against the one who profited in the transaction.

6. Gifts ⟸52—Finding on issue of undue influence held sufficient.

Finding that gifts were made voluntarily and of grantor's own free will and accord, but without use of the words "undue influence," *held* a sufficient finding that there was no undue influence exerted by donee.

7. Appeal and error ⊂⊃931(1)—Findings construed in support of judgment.

On appeal findings should be construed most favorably in support of the judgment.

8. Trusts ⊂⊃81(2)—Invalidity of marriage did not preclude wife from claiming property purchased by her with money given her by husband as gifts.

In action to establish a trust on theory that land deeded to defendant was in fact paid for by plaintiff, the fact that defendant, who had lived with plaintiff for 10 years supposing herself to be his lawful wife, did not by reason of invalidity of marriage acquire marital rights in his property, did not preclude her from retaining property on ground that she had paid therefor with money received from time to time as gifts from plaintiff, since in such case she did not claim property by virtue of marital rights.

9. Husband and wife ⊂⊃265—Husband cannot revoke gift of community property to which wife did not consent.

A husband has no power to revoke his own gift of community property on the ground that his wife did not consent thereto, and is as fully bound as though it was his separate estate.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Eugenio Dahne against Louise B. Dahne. Judgment for defendant, and plaintiff appeals. Affirmed.

W. Jefferson Davis and Sweet, Stearns & Forward, all of San Diego, for appellant.

Holcomb & Kempley, of San Diego, for respondent.

SHAW, J. In this action plaintiff sought a decree declaring certain real property, consisting of a house and lot, legal title to which was vested in defendant, to be the subject of a trust wherein, as alleged sole beneficiary and legal owner thereof, he prayed that such trustee be required to execute a deed conveying the property to him.

The admitted facts and defendant's testimony, in accordance with which, since the only evidence in conflict therewith is the testimony of plaintiff, the court properly made its findings, show that on January 17, 1906, plaintiff, knowing that he had a legal wife then living and falsely representing that she was dead, married the defendant, with whom he cohabited and lived as her husband until March 26, 1916, during all of which period the court found that confidential relations existed between the parties. The property in question was purchased by defendant on July 28, 1913, on which occasion plaintiff, who was present, stated that it was his wife's transaction and directed that the receipt for $200 paid on account of the purchase price be issued to her, which was done. A few days later she paid $1,800 on account of the purchase; whereupon a deed was executed by the owner conveying the property to her, subject to an existing mortgage thereon. The consideration paid for the property consisted of funds accumulated by the parties during the time they were living together as husband and wife and moneys from time to time given to defendant by plaintiff. That, as found by the court, it was the intention of plaintiff and in pursuance of which he acted, to give the property to defendant as her own estate, conclusively appears not only from statements touching the subject contained in plaintiff's letters, but also from the fact that about March 25, 1916, upon learning that, due to the property having been conveyed to his putative wife by another, some question existed as to her power to sell and convey it without his joining therein, he, for a consideration of $10, which defendant paid to him, voluntarily and of his own accord executed to her a quitclaim deed to all his right and interest in the property. The effect of the findings is to exclude the making of any promises, representations, persuasion, fraud, or anything said or done on the part of defendant to influence plaintiff's action; on the contrary, it appears therefrom that, whatever he did in the matter, was voluntary, of his own free will and accord, and without conditions, representations or promises made on the part of defendant, and with the intention that the property should be her sole and separate estate—all of which findings are fully supported by defendant's testimony.

[1, 2] Coming now to the alleged errors of which appellant complains, the defendant, in response to an allegation of the complaint that plaintiff had paid the entire purchase price of the property, and was and at all of the times mentioned had been the owner in fee thereof, denied the same and alleged that the entire consideration therefor was paid by herself. Because of this denial and counter allegation in defendant's answer, appellant insists that the court erred in permitting respondent's attorney to interrogate plaintiff on cross-examination with reference to the property being the subject of a gift made by him to defendant. In connection with this testimony certain letters written by plaintiff to defendant were introduced in evidence, wherein he recognized the property as being the sole and separate estate of defendant, and also recognized the proceeds of a mortgage given thereon as being her sole and separate estate, and which, if used in the manner directed by him, he would pay back to her. He was then questioned as to whether he did not at the time of the purchase of the property consider that he was giving it to defendant, to all of which questions he gave negative answers. No objection was made to the questions, but after they were answered plaintiff's attorney for the first time stated:

"It seems to me she is precluded from changing her tactics and claiming a gift when her answer alleges she purchased it with her own separate funds."

In the absence of any objection made or motion to strike out the testimony upon the ground now urged, that it pertained to a matter not within the issues, appellant is in no position to raise the question for the first time in this court. Moreover, if error, since his answers were negative, he could not in any event have been prejudiced by the evidence.

[3] It is next insisted that proof made by defendant that the real estate was the subject of a gift from plaintiff constituted a variance between the allegations of the answer and evidence received. Defendant's testimony was to the effect that she paid for the property with money accumulated from gifts thereof from time to time made by plaintiff to her, as to all of which testimony no objection whatever was interposed. Moreover, notwithstanding the purchase price of the property was concededly paid by defendant, plaintiff claimed that it was his money; hence the source from and manner in which defendant obtained it was a proper subject of inquiry and evidence tending to controvert his claim was properly received. As to this point we perceive no merit in appellant's contention.

[4-7] The evidence conclusively shows that following the marriage ceremony the parties lived together and cohabited as man and wife for some 10 years, during all of which time plaintiff was fully cognizant of his bigamous marriage, and of which fact defendant had no knowledge until shortly before this action was commenced, when she learned that he had a wife then living from whom he had not been divorced, and thereupon separated from him. Due to this fact appellant insists that, notwithstanding the relation was illicit, the law presumes that a gift of either the property or money with which it was purchased was the result of undue influence exercised by defendant, and therefore the transfer was invalid. Plaintiff did not base his alleged right to the property upon the ground that it was the subject of a gift; on the contrary, he denied that it was so held by defendant, claiming that he paid the purchase price thereof out of his separate funds and caused the title to be vested in defendant merely as a matter of convenience and in reliance upon her parol promise to convey to him upon request, as to which, as stated, the court made adverse findings. As tried, however, and without objection, the case took a wider scope, and, while it was made to appear that the allegations of the complaint as to alleged actual fraud were untrue, the evidence disclosed that, in part at least, the property was purchased with money which plaintiff, who at times received a salary of $1,600 per month, had given to defendant. Since, although the parties were not husband and wife, the court found at the times such gifts were made confidential relations existed between the donor and donee, it devolved upon the latter not only to show the making of the gifts with which she acquired the property, but, since the law from the relation found to exist presumes the existence of fraud or exercise of undue influence as against the one who profits in the transaction, the further burden rested upon her to overcome this presumption by showing that the making thereof was not the result of such fraud or influence. Sections 2219 and 2235, Civ. Code; White v. Warren, 120 Cal. 322, 49 Pac. 129, 52 Pac. 723; Frantz v. Porter, 132 Cal. 53, 64 Pac. 92; Odell v. Moss, 130 Cal. 352, 62 Pac. 555. As to such transactions, "the party benefited by it will be under the necessity of showing that no advantage was taken, and that it was the result of free volition." Cooley on Torts (3d Ed.) p. 982. While in the findings the trial court omits the use of the words "undue influence," it does in effect and upon sufficient evidence find that the gifts by plaintiff were, in the absence of fraud, made voluntarily and of his own free will and accord, thus excluding the theory that they were due to any influence exercised by defendant over him, and under the rule that findings should be construed most favorably in support of the judgment, we deem them sufficient.

[8] Appellant next argues that, conceding defendant contracted the marriage with plaintiff in good faith, believing his representation that the wife to whom he had theretofore been married was dead, nevertheless, and notwithstanding her innocence, she acquired no marital rights in his property. A sufficient answer to this contention is that she does not claim the property by virtue of any marital rights as the wife of plaintiff. In the case of Jackson v. Jackson, 94 Cal. 446, 29 Pac. 957, cited by appellant, the facts are readily distinguishable from those in the instant case. What is there said is based upon the fact that, when the husband contracted the marriage, the former wife had, due to her desertion of him in a foreign country, been absent for a period of more than five years, was reputed to be and in good faith by him believed to be dead, in which case, under subdivision 2 of section 61 of the Civil Code, his second marriage was valid until annulled; whereas, in the present case, the complaint discloses that plaintiff knew at the time he contracted the marriage with defendant he had a wife then living from whom he had not been divorced. Moreover, in the Jackson Case it was made to appear that the deeds to the property involved were obtained by gross fraud and the exercise of undue influence by the donee whose relation to the donor was, as provided in sections 2219 and 2235, Civil Code, that of a trustee, facts which the findings herein exclude.

[9] In reply to appellant's contention that, since plaintiff had a legal wife living, he could not give away the community property, it may be said that, conceding the funds to have been the community property of himself and wife, she is not complaining. However this may be, he has no power to revoke his own gift of community property, for the reason that his wife did not consent to the making of it. As to him, he is as fully bound as though it was his separate estate. Spreckels v. Spreckels, 172 Cal. 775, 158 Pac. 537.

There is no merit in the claim that the findings are contradictory. While following the complaint, which contains a vast deal of surplusage and immaterial matter repeatedly stated and restated, no inconsistency appears in the material findings.

Taking the voluminous record as whole, it is clear that in arriving at its conclusion the trial court properly excluded the testimony of plaintiff as unworthy of belief and accepted that of defendant as true, thus in our opinion, reaching a decision which, in the absence of any errors resulting in a miscarriage of justice, is a righteous one.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

49 Cal. App. 447

FIRST NAT. BANK OF HASKELL, OKL., v. RANGER et al. (Civ. 3342.)

(District Court of Appeal, Second District, Division 1, California. Oct. 5, 1920.)

1. Fraudulent conveyances ⟸278(2) — Plaintiff has burden of establishing fraud.

Where conveyance by a husband to his wife was attacked under Civ. Code, § 3442, as a fraudulent transfer, the burden of proving that it was such a transfer was on the plaintiff.

2. Fraudulent conveyances ⟸297 — Finding that conveyance by husband to his wife was not fraudulent held warranted.

Where a creditor of a husband attacked under Civ. Code, § 3442, a conveyance by the husband to his wife, evidence *held* to warrant a finding that the husband was solvent at the time the conveyance was made and that he did not at that time contemplate insolvency.

3. Fraudulent conveyances ⟸57(4)—Though property retained proves valueless, conveyance is not therefore fraudulent.

Where a husband at the time he conveyed property to his wife owned oil leases then valued at about $50,000 and had other property and moneys on deposit, the fact that the oil leases after he expended all of his funds in boring wells proved valueless will not establish that the conveyances were fraudulent.

4. Witnesses ⟸52(6) — Husband incompetent to testify against his wife in action to set aside fraudulent transfer to wife.

As Code Civ. Proc. § 1881, declares that a husband cannot be examined for or against his wife without her consent, a husband cannot be called in an action to set aside as fraudulent transfers to his wife, on the theory that subdivision 1, declaring that a husband without consent of the wife cannot be examined as to any communication during marriage, made the husband competent as to other matters.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by the First National Bank of Haskell, Okl., against Mae B. Ranger and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Thomas A. Sanson and Eugene E. Morris, both of Los Angeles, for appellant.

Kemp & Clewett and Schmidt & Riggins, all of Los Angeles, for respondents.

SHAW, J. Plaintiff, as a judgment creditor of F. B. Ranger, brought this action to set aside certain alleged fraudulent transfers of real estate and money, made by him to his wife, the defendant Mae B. Ranger, and to subject the property so transferred to the payment of plaintiff's judgment.

The appeal is from the judgment entered in favor of defendants.

At the time of the transfers, made in the months of March and May, 1914, F. B. Ranger, as indorser upon a promissory note, was indebted to plaintiff in the sum of $3,500 and accrued interest. On July 26, 1918, the indebtedness originally evidenced by this note and interest thereon amounted to the sum of $5,485.11, for which a judgment was obtained against Ranger. Upon a return nulla bona of an execution issued upon the judgment, an alias execution was issued, by virtue of which a writ of garnishment was served upon defendant Mae B. Ranger, the purpose of which was to hold and sequester any and all moneys in her possession belonging to Ranger as judgment debtor of plaintiff. She answered, stating that she was not indebted to him in any sum whatsoever and held no property to which he or his creditors were entitled. Thereupon plaintiff brought this action in the nature of a creditor's bill, alleging that on March 24, 1914, when Ranger, without consideration, conveyed to his wife the two lots of land in question, he was insolvent, or, if not insolvent, he made the conveyance in contemplation of insolvency, and further that at the time of serving the writ of garnishment upon Mae B. Ranger she had in her possession upwards of $10,000 in money which F. B. Ranger had, for the purpose of defrauding his creditors, given her while indebted to plaintiff and others, all of which

allegations Mae B. Ranger by her answer denied.

As to these issues the court found adversely to plaintiff, whose chief contention is that the finding is not justified by the evidence.

[1-3] Section 3442 of the Civil Code provides:

"That any transfer or incumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors."

And section 3450 of the Civil Code provides:

"A debtor is insolvent, within the meaning of this title, when he is unable to pay his debts from his own means, as they become due."

While the burden of establishing the alleged fraudulent transfers of the property devolved upon plaintiff, the evidence in support of the allegation is very meager. It appears therefrom that at the time of the transfers made, in the spring of 1914, F. B. Ranger, as an oil operator was, and for a long time prior thereto had been, engaged in acquiring leases of oil lands in the state of Oklahoma and elsewhere, and undertaking the development of the same for the production of oil. Among such holdings was a lease to 560 acres in the Haskell oil field in Oklahoma. At the time in question he had sold 80 acres of this lease to the 99 Oil Company, which had put down a well that produced some 250 barrels of oil per day. The land retained by him surrounded this 80 acres so transferred to the 99 Oil Company on three sides thereof, and Ranger's west line of 160 acres was within 250 feet of the well of the 99 Oil Company, and the south line of 80 acres was within 200 feet of the same. On said 80 acres of land so held by him and within about 200 feet of the well of the 99 Oil Company, he was at the time in question engaged in boring a well which, when completed, produced about 20 barrels of oil and some 6,000,000 feet of gas. Later he bored two other wells on the lease, neither of which proved successful. The uncontradicted testimony of J. J. Hawk, a stockholder in the 99 Oil Company, is that his leasehold of 480 acres was at the time when Ranger made the transfers reasonably worth $48,000. In addition to this, the evidence tends to show that he had other leases and large sums of money on deposit in sundry banks, including that of plaintiff, which, less the amount given his wife, he used in his oil operations until the funds were exhausted in his unsuccessful operation in developing his property. Other than a number of undated letters written by F. B. Ranger, which the testimony shows he commenced writing more than a year after the transfers, and continued for two or three years, the evidence shows that, in addition to the note held by plaintiff and upon which Ranger as indorser was indebted in the sum of $3,500 he was also an indorser upon a note of the Longuey Mining Company, held by the Hellman Trust & Savings Bank of Los Angeles. Whether this note was secured collaterally, or whether the mining company was able to pay the same, is not disclosed, nor is the date of maturity of the note shown. It does appear, however, that the note was fully paid in the month of August following the transfer of the property to his wife, and that Ranger's standing with the Hellman Trust & Savings Bank was such that they loaned him $11,000 upon his unsecured note. With reference to the letters, which appear to have been received in evidence without objection, and aside from any question as to the competency of admissions therein made against his wife, Mae B. Ranger (as to which we entertain grave doubt), the letters have little or no probative force other than to tend to establish the fact that at the time of the transfers Ranger was a man possessing considerable means, consisting of cash deposited in banks, oil leases and boring machinery used in connection with the development of oil on such leaseholds. Upon these facts this court cannot say the evidence was insufficient to justify the finding that Ranger was solvent and able to pay his debts at the time when he made the transfers. Nor, considering the character of the property owned by him, its situation in being contiguous to the well of the 99 Oil Company, and the fact that after the transfers he expended large sums of money, until he had exhausted his funds, in boring wells and developing the property in an unsuccessful attempt to find oil, can this court say the trial court erred in concluding that Ranger in making the transfers did not at the time contemplate insolvency. On the contrary, it appears that Ranger in making the transfers retained property in value largely in excess of his debts. While the leasehold, upon development thereafter made at a large expenditure, proved valueless, such fact in itself is insufficient to establish fraud on the part of Ranger. In Evans v. Sparks, 170 Cal. 532, 150 Pac. 372, it is said (quoting from the syllabus):

"In an action by a creditor to set aside such a conveyance, proof that the assets retained by the grantor * * * subsequently became valueless does not compel the conclusion that the transfer was fraudulent and that the grantor was insolvent."

So, here, the fact that the leasehold, valued at the time of the transfer in the sum of $48,000, subsequently, upon the expenditure of large sums of money thereon in developing the same, proved valueless, does not compel the conclusion that Ranger was either insolvent or contemplated insolvency when he made the transfers.

[4] Another point made is that the court erred in its ruling that F. B. Ranger was an

incompetent witness against his wife, Mae B. Ranger, against whom he was called by plaintiff to testify. Appellant cites subdivision 1 of section 1881, Code of Civil Procedure, to the effect that a husband, without the consent of the wife, cannot be examined as to any communication made between himself and wife during the marriage, and argues that Ranger's testimony was competent as to all matters other than as to communications made between him and his wife during the marriage. The same section provides that "a husband cannot be examined for or against his wife without her consent." Clearly, the action was one against her, and the purpose of calling him was to testify against her. Without her consent he was not a competent witness. As between husband and wife, the declared policy of the law is to encourage confidence and preserve it inviolate, and hence the broad provision of the statute above quoted, subject, however, to exceptions within which the case is not included.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

49 Cal. App. 452

RANGER v. FIRST NAT. BANK OF HASKELL, OKL. (Civ. 3343.)

(District Court of Appeal, Second District, Division 1, California. Oct. 5, 1920.)

Fraudulent conveyances ⟸57(4)—Transfer of money before indebtedness not subject to claims of subsequent creditors.

Where a husband at a time he was not insolvent, and had no expectation of becoming, made his wife a present of money and she purchased an automobile, the automobile cannot be reached by the husband's subsequent creditors.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action of claim and delivery by Mae B. Ranger against the First National Bank of Haskell, Okl. From a judgment for plaintiff, defendant appeals. Affirmed.

Thomas A. Sanson and E. E. Morris, both of Los Angeles, for appellant.

Davis, Kemp & Post, of Los Angeles, for respondent.

SHAW, J. Defendant, having obtained a judgment against F. B. Ranger, caused an execution to be issued thereon which was levied upon a Rausch & Laing electric coupé and a Cadillac automobile then in possession of plaintiff herein, Mae B. Ranger, who claimed ownership of the same. Under the execution so levied the property was by the sheriff sold to defendant for the sum of $300. Thereupon plaintiff brought this action of claim and delivery. Judgment for the restoration of possession of the property was rendered in her favor, from which defendant appeals.

The contention made by appellant is identical with that made in the case of First National Bank of Haskell, Oklahoma, v. Mae B. Ranger, 193 Pac. 788, involving other transfers of property by Ranger to his wife, namely: That title to these cars was transferred by F. B. Ranger to plaintiff, Mae B. Ranger, while he was indebted to defendant bank, and, if he was not insolvent at the time he made the transfer, he made it in contemplation of insolvency. The Rausch & Laing electric coupé was purchased in December, 1913, with money given plaintiff by her husband as a Christmas present, long before he became indebted to defendant, and hence, since it was property acquired by her prior to the time when the bank became a creditor of F. B. Ranger, it could not be subjected to the payment of indebtedness thereafter incurred. In part only was the Cadillac paid for out of funds given by Ranger to his wife after incurring the indebtedness to defendant, but since in an opinion this day filed in the case of First National Bank of Haskell, Oklahoma, v. Ranger et al., 193 Pac. 788, Civil No. 3342, affirming the judgment of the trial court therein, it was held that such transfer of money by F. B. Ranger was not in fraud of his creditors, it follows that plaintiff herein was, as held by the trial court, the owner and entitled to possession of both vehicles.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

49 Cal. App. 449

GOOD v. CITY OF SAN BERNARDINO. (Civ. 3352.)

(District Court of Appeal, Second District, Division 1, California. Oct. 13, 1920. Hearing Denied by Supreme Court Dec. 9, 1920.)

1. Municipal corporations ⟸741(1)—Surviving heir who has presented demand against city for death does not lose action because other heir has neglected to join.

Under Charter of City of San Bernardino, § 236, providing no claim or demand of any kind shall be the basis of an action against the city unless a verified claim in writing specifying the items shall be filed with the city clerk at least 30 days before action, surviving heir who has presented a demand for damages on account of a death negligently caused by the city does not lose her right of action merely because some other heir has neglected or refused to join in making the demand, or because it subsequently appears there is another heir, unknown at the time of filing of the demand.

2. Master and servant ⟸88(1)—City not liable for death of painter employed by other painter engaged without authority by water commissioner.

Where a member of the board of water commissioners of the city of San Bernardino directed a painter to do such painting as was necessary at a pumping plant, and the painter, on the second day of his work, hired plaintiff's decedent, and they worked together painting for a while until decedent was killed by electric shock while painting the ceiling of a room in which certain electric machinery was located, the attempt of the commissioner without authorization of the board pursuant to Charter of City of San Bernardino, § 139, to employ the painter who employed plaintiff's decedent, was unauthorized, and the city was not liable for the death; decedent not having been invited on the premises, and being a mere licensee.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Action by Flossie Good against the City of San Bernardino. From judgment for plaintiff, defendant appeals. Reversed.

William Guthrie, City Atty., and Ralph E. Swing, both of San Bernardino, for appellant.

Joseph Scott and A. G. Ritter, both of Los Angeles, and A. S. Maloney, of San Bernardino, for respondent.

CONREY, P. J. This is an action wherein judgment has been rendered, pursuant to the verdict of a jury, against the defendant and in favor of the plaintiff Flossie Good for the recovery of damages on account of the death of Hugh S. Good. Such death was alleged to have been caused by negligence of the defendant. The defendant appeals from the judgment.

As shown by the amended complaint, this action was prosecuted by said Flossie Good, together with Mrs. George Milligan and Joseph H. Good. Flossie Good was the wife of said Hugh S. Good. Mrs. George Milligan was his mother and Joseph H. Good was his father. It was alleged that deceased left no children or grandchildren surviving him, and that plaintiffs were his only heirs at law. The plaintiffs brought the action as such heirs, as permitted under provisions of section 377, Code of Civil Procedure. Section 236 of the charter of the city of San Bernardino (Stats. 1905, p. 977) provides that—

"No claim or demand of any kind whatever shall be the basis or ground for an action or proceeding against the city for the collection or on account thereof, unless a verified claim in writing, clearly specifying the item or items constituting such claim or demand shall be filed with the city clerk, or with the board or commission having jurisdiction to allow or reject the same, at least thirty days prior to the commencement of such action or proceeding."

It was shown by the evidence that more than 30 days prior to the commencement of this action the plaintiff, Flossie Good, filed with the city clerk a demand for the sum of $10,000, basing her said claim on the alleged negligence of the defendant resulting in the death of claimant's husband, the said Hugh S. Good, at the same time and place alleged in the complaint in this action. There being no evidence that any other claim or demand was ever filed or presented to the city, the defendant moved for a nonsuit and for the dismissal of the action, the motion being based upon the absence from the claim received in evidence, of any reference to the plaintiffs Mrs. George Milligan and Joseph H. Good. There were other grounds of the motion not pertinent to the point now under consideration. Upon the ground stated, the court sustained the motion as to the plaintiffs Mrs. George Milligan and Joseph H. Good, but denied the same as to the plaintiff Flossie Good.

[1] Appellant now claims that the right to maintain the action was joint and cannot be maintained by the widow alone; that when the action is not brought by the executor or administrator, but brought by the heirs of the deceased, then all of the heirs must join as plaintiffs, or those refusing to join must be made defendants. Code Civ. Proc. § 382. It is argued that this is a substantial defense, for the reason that the rendition of a judgment in favor of the widow alone would not relieve the defendant from its liability, if any, to the mother and father of the deceased. But since the mother and father of the deceased joined with the widow as plaintiffs in this action, we cannot see that her situation in this respect is any different from that which would have existed if the mother and father had refused to join in this action and if the widow for that reason, had made them defendants. Appellant, relying upon the rule that "a right created in favor of several persons, is presumed to be joint, and not several" (Civ. Code, § 1431), asserts that the plaintiff, Flossie Good, cannot maintain this action without first proving that the preliminary demand presented by her to the city was made not only on her own behalf but on behalf of the other heirs. Our attention is not directed to any decision directly determining this point. Taking into consideration the purposes of the charter provision, we are not prepared to say that a surviving heir who has presented a demand of the character here in question must lose her right of action merely because some other heir has neglected or refused to join in making such demand, or perhaps because it subsequently appears that there is another heir who was unknown at the time of the filing of her demand.

The complaint alleged that on the 17th day

of August, 1917, while said Hugh S. Good was lawfully engaged in painting the interior of defendant's pumphouse, with the knowledge and consent of said defendant city, and while in the exercise of due care and caution, he came in contact with certain wires, etc., and was thereby injured by a powerful current of electricity then and there present in said wires, etc., resulting in his death on the same day. The negligence of defendant was alleged to consist in improper construction and installation of the apparatus; in failure to place danger signals; in failure to guard or screen the same from contact; in failure to properly operate, inspect and use said apparatus; in permitting said apparatus to become and remain in a defective condition by failure to properly inspect and protect the same; in permitting and allowing a high and dangerous current of electricity to pass through said wires, etc., without proper and sufficient insulation and protection; in failure to warn deceased of the dangerous character of said wires, etc.; in negligently failing to provide for said Hugh S. Good a safe and suitable place in which to work.

The provisions of the charter of the defendant placed the control of its water department in a board of water commissioners consisting of three members. The board is authorized "to employ and discharge at will such help as the necessities of the water service may demand." It is required that a record be kept of all proceedings of the board. Section 139 provides as follows:

"No claim for commodities furnished, or service performed, shall be valid unless prior to furnishing such commodities, or the rendition of the service, authority for the same had been given by the common council or some department of the city government having authority so to do. No member of the common council, or member of any department, and no city officer shall have power to create an indebtedness against the city, or to furnish the basis of a claim without said authority."

C. W. Smith was a member of the board of water commissioners. On or before the 16th day of August, Smith directed one Nick Codori, a painter, to go out to the Perris Hill pumping plant. The terms of employment are succinctly stated in Smith's testimony as follows:

"I employed him to go out there and do such painting as we would require; he was to get $4 a day and he furnish tools and brushes."

This is consistent with the testimony of Codori, which is the only other evidence on the subject. Codori worked at the plant on August 16th and returned to work on the following morning. On the morning of the 17th Hugh S. Good came to the pumping plant, and, after some conversation between them concerning the work to be done and the amount of wages to be paid, Codori directed Good to go to work. Thereafter they worked together until about 9 o'clock, when the accident happened. There is no evidence that the board of water commissioners employed either Codori or Good, or ordered the work to be done. There is no evidence that any member of the board of water commissioners or any official of the city, other than Smith, knew that the work was being done or that Codori was employed or was doing any work for the city. There is no evidence that Smith knew that Good was at the pumping plant or had been employed by any one to be there. The only evidence that any person connected in any way with the city had knowledge of Good's presence at the pumping plant is found in the testimony showing that Henry Maston, the engineer who was running the plant for the city, was there on the morning of the accident and knew that Good was there. But there is nothing in the nature of the employment of Maston which tends to show that he had any authority to represent the city in any dealings with either Codori or Good, or that he had anything to do with their presence there, other than that he did not prevent them from being there and did not interfere with the work which they were doing.

At the time of the accident Codori and Good were painting the ceiling of the room in which the electrical machinery was located. The ceiling was 12 feet above the floor. The wires through which the electricity came into the building, including all of the wiring alleged to have been unprotected and defectively insulated, came into the room near the ceiling and were not accessible from the floor. In order to reach the ceiling, Codori and Good had erected a platform by placing two boards at a height necessary for their purpose, resting one end of the boards upon a trestle and the other upon a transformer which was beneath the place where the wires in question were located. It was while standing on this platform that Good came in contact with the wires and received the injuries which caused his death.

[2] Under the circumstances above stated, the attempt of Smith to employ Codori was unauthorized. Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96; Reams v. Cooley, 171 Cal. 150, 152 Pac. 293, Ann. Cas. 1917A, 1200; Foxen v. Santa Barbara, 166 Cal. 77, 134 Pac. 1142; Gamewell Fire Alarm Tel. Co. v. City of Los Angeles, 187 Pac. 163. Moreover, the terms of Codori's employment, even if it could be held to have been authorized by the city, were such that his rights and duties were only those of a workman personally employed to work by the day. There was neither express nor implied authority of Codori to employ any other person to do that work or to assist in its performance. Therefore there is nothing shown in the transaction between Smith and Codori

or between Codori and Good, which would even have the effect to place Good in the position of a licensee on the defendant's premises. The only possible thread upon which one might hang the proposition that Good was there as a licensee consists in the fact that the engineer, who seems to have been in charge of the pumping plant, knew that Good was there and did not exclude him from the premises. But there is no evidence of negligence amounting to failure to perform any duty imposed by law upon the owner of such premises in favor of a licensee. The rule applicable in such cases was stated by this court in Herold v. P. H. Mathews Paint House, 39 Cal. App. 489, 179 Pac. 414, as follows:

"We readily concede that a mere licensee cannot recover, where the injuries are caused solely by reason of the unsafe condition of the premises, and without any active or overt act of negligence committed against him by the occupant or owner of the premises. That rule, however, does not apply to a case where the licensee is upon the premises of a defendant, and is injured by an overt act of negligence committed against him by the defendant."

In the present case, however, there was not any overt act of any character done by the defendant or any of its agents. In going into the pumping plant Hugh S. Good took the risks of the premises as he found them. If his injuries and death were caused by the unsafe condition of the premises, they were caused solely by such unsafe condition. The evidence, however, does not even tend to prove that the position and condition of the wires carrying the alleged high-power current of electricity were such that they were dangerous to a person entering the place in an ordinary manner. The switches connecting those wires were placed at a height where they could not be reached from the floor. The uncontradicted evidence is that they were so placed for purposes of safety. By no stretch of the rules governing reasonable conduct can it be said that the defendant owed to the deceased any obligation to anticipate that he and Codori, or that either of them, would bring in materials for a platform and erect such platform by which they could climb up to the place of danger. It must be remembered that it was not shown and respondent does not claim that deceased was an employe of defendant city. Respondent's only claim is that deceased was employed upon defendant's premises engaged in a work for the benefit of defendant; that he was not a mere volunteer on the premises, nor trespasser, but was there by implied invitation for the purpose of doing the work for which he had been hired by Nick Codori. Upon the facts and for the reasons already indicated, we are satisfied that deceased was not impliedly or at all invited to be on said premises for the purpose of doing any work or for any purpose.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

49 Cal. App. 453

DEMATEIS v. VEZU. (Civ. 3350.)

(District Court of Appeal, Second District, Division 1, California. Oct. 5, 1920. Rehearing Denied Oct. 29, 1920. Hearing Denied by Supreme Court Dec. 2, 1920.)

1. Bills and notes ⊂⊃392—Plaintiff, having no account with bank, was not entitled to notice of dishonor of check.

Where plaintiff drew on a bank in which he had no account a check for the initial payment on a contract, plaintiff was not entitled to notice of dishonor pursuant to Civ. Code, § 3195; there being no reason why plaintiff should have expected the check to be honored, though he did assert the contract was for the benefit of a corporation of which he was president, and which did have an account.

2. Sales ⊂⊃99—Seller's rescission on dishonor of buyer's check not fraudulent.

Where the check given by a buyer for initial payment on account of contract for the purchase of grapes was dishonored although it had been represented to be good, the act of the seller in rescinding the contract cannot be held fraudulent merely because the grapes meantime advanced in price.

3. Sales ⊂⊃104—Where check given by buyer was dishonored, return was not necessary to rescission.

Where a buyer gave for the initial payment a check on a bank in which he had no account, and the same was dishonored, the seller may rescind without returning the check, for the buyer could not be injuriously affected by the seller's retention of the check, where it was produced in court in an action for breach of contract.

4. Sales ⊂⊃104—That seller brings into court buyer's dishonored check warrants rescission.

Where the seller on the dishonor of a buyer's check rescinded, and on the buyer's action for breach of contract brought the check into court for cancellation, that was sufficient it not being necessary in such case to offer to return it sooner.

5. Sales ⊂⊃99—Nonpayment of sum specified in contract held to warrant rescission.

Where a contract for the sale of grapes declared that for and in consideration of the amount of $500, receipt of which was acknowledged, defendant agreed to sell to plaintiff grapes at a specified price, the fact that plaintiff's check for $500 was dishonored warranted defendant in repudiating the contract, even though the $500 payment be considered the first installment due under the contract.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by G. Demateis against Frank Vezu. From a judgment for defendant, plaintiff appeals. Affirmed.

Frank C. Prescott and Prescott & Prescott, both of Los Angeles, for appellant.

Ralph E. Swing, of San Bernardino, for respondent.

CONREY, P. J. On the 15th day of April, 1918, the plaintiff, as party of the second part, and the defendant, as party of the first part, entered into a contract in writing which provided "that for and in consideration of the amount of $500, the receipt whereof is hereby acknowledged by the party of the first part," the party of the first part agreed to sell to the party of the second part, and the party of the second part agreed to buy a specified quantity and quality of grapes at a stated price per ton. "Payments are to be made as follows: The amount of $1,000 is payable on commencement of cutting and picking of the grapes; balance to be paid, half of the amount of grapes picked payable after same has been delivered, and the other half respectively. Balance due is payable when all the grapes are delivered." In his complaint, which was filed on the 3d day of July, 1918, the plaintiff alleged facts showing an attempted rescission of the contract by the defendant; alleged that the grapes would be ready for picking in the month of August, 1918, and not until then; alleged facts on which he relied as entitling him to specific performance; and demanded a decree of specific performance, or, in case such performance be impossible, that plaintiff have judgment against the defendant in the sum of $15,000 damages. Judgment was entered in favor of the defendant, and the plaintiff appeals therefrom.

The controversy centers about the circumstances attending the nonpayment of plaintiff's check for the sum of $500, delivered by the plaintiff to the defendant at the time of the execution and delivery of the contract. The check was drawn in favor of the defendant, and signed by the plaintiff personally. The plaintiff did not have at that time, nor at any of the times in question here, any personal account with the Farmers' & Merchants' National Bank, on which bank said check was drawn. He was in fact the president, and, according to the evidence, was the owner of all the stock of a corporation known as the Italian-American Vineyard Company, which corporation did have an account in said bank. But there is nothing in the contract, nor in any of the testimony concerning the transactions between the parties in connection with the making of the contract, tending to show that the sale was other than a sale of the grapes by the defendant to the plaintiff personally, or that the plaintiff agreed to or was expected to receive any check or money from the Italian-American Vineyard Company. Defendant having deposited said check with another bank, the same was in due course presented to the drawee bank, which refused payment. The court found:

"That notice of the nonpayment of said check was received by defendant on or about the 21st day of April, 1918; that defendant, believing that said plaintiff would call and make said check good, waited until the 9th day of May, 1918, for said plaintiff to do so; that on said 9th day of May, 1918, notice of the dishonor of said check was given to plaintiff; that thereafter defendant waited until the 16th day of May, 1918, for the plaintiff to make said check good; that said plaintiff not having made said check good and not having paid said consideration for said contract the said defendant on May 16, 1918, rescinded said contract and caused notice of such rescission to be given plaintiff."

The evidence is sufficient to sustain this finding, except possibly the finding that on the 9th day of May, 1918, notice of the dishonor of the check was given to the plaintiff. The only evidence of such notice on that day is found in the approved fact that on that day the plaintiff was informed by the wife of the defendant that payment of the check had been refused. In connection with defendant's rescission of the contract and at the time thereof, he did not offer to return to the plaintiff said dishonored check, but at the commencement of the trial of this action, the defendant produced the check in court, and asked that his indorsement thereon be canceled, and that the check be returned to the plaintiff. The plaintiff refused to receive said check, and it was filed with the clerk of the court, and there remains in evidence. On the 17th day of June, 1918, the plaintiff tendered to the defendant the sum of $500 in lawful money of the United States, in payment of the $500 consideration mentioned in said contract, and then and there demanded that defendant carry out said contract, which tender and demand were then and there refused by the defendant. The court found (and appellant does not attack this finding):

"That thereafter, to wit, on the 25th day of June, 1918, with the knowledge of plaintiff, defendant sold his crop of black grapes herein referred to, to the Italian Vineyard Company; that at said time said plaintiff was the owner of 131 shares of the capital stock of the said Italian Vineyard Company; that thereafter, to wit, on the 3d day of July, 1918, plaintiff herein instituted this action."

It should be noted that the Italian Vineyard Company mentioned in this finding is a different corporation from the Italian-

American Vineyard Company. The court found and the evidence proves that at the time of entering into the contract the plaintiff did so for the purpose of procuring said grapes for the use of the Italian-American Vineyard Company, and intended that said $500 check should be drawn against the account of that company, which company had on deposit with the bank money sufficient to meet the check; but the defendant did not know of such intention on the part of the plaintiff, and had no means of acquiring such knowledge. The court further found as follows:

"It is true that the market price of grapes advanced after the 15th day of April, 1918, but it is not true that such advance in said market price of grapes was the cause of defendant rescinding said agreement, but the said defendant in rescinding said agreement, acted in good faith and without regard to the price of such grapes, and without any intention to take any undue advantage of plaintiff, and it is true that defendant did, prior to the rescission of said contract, give plaintiff an opportunity to pay the said consideration for said contract, and that said plaintiff did not avail himself of such opportunity."

The foregoing is not a statement of all the issues tendered by the pleadings and determined by the decision of the trial court, but is sufficient to exhibit those elements of the case which are brought to our attention by appellant in the statement by his counsel of the grounds of appeal relied upon by him.

Appellant contends that the mistake in the check's signature was made by defendant's agent under circumstances that the defendant himself insisted upon. Assuming that the witness Castera, by whom the check was written out, was the agent of defendant, no negligence on the part of such agent is established by the evidence. The error, if any, was solely in the signature of the check, which signature was placed thereon by the plaintiff. If the plaintiff intended to draw this check on the account of the Italian-American Vineyard Company, that fact appears to have been known to him alone.

[1] Appellant next contends that he was entitled to notice of dishonor of the check in regular and due course, as upon any other bill of exchange, and that such notice was not given. Section 3195 of the Civil Code provides as follows:

"Notice of dishonor is not required to be given to the drawer in either of the following cases: * * * 4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument."

Since the plaintiff had no account with the bank on which the check was drawn, he had no right to expect or require that the same would be paid by that bank. The defendant, therefore, was not under obligation to give to the plaintiff any notice of dishonor of such check.

[2] Appellant next contends that the attempted rescission of the contract did not comply with the conditions required by section 1691 of the Civil Code, in that defendant did not rescind promptly upon discovering the facts which he claims entitle him to rescission, and, further, in that he did not restore, or offer to restore, to plaintiff the said check. Appellant claims that the attempted rescission was an act of bad faith, prompted by the fact that between the date of the contract and the date of rescission there was a great increase in the market price of black grapes. It is true that the market price of grapes advanced within the specified period of time; but this fact is not alone sufficient to compel a finding that such advance in the market price was the cause of defendant's rescission of the contract. The court found that the defendant acted in good faith, and that finding is well warranted by the evidence, which tends to prove that defendant rescinded the contract for the very definite and sufficient reason that the check, which he had received on the positive assurance that it was good and in consideration whereof he had delivered the contract, had been dishonored and had so remained for a period of nearly one month.

[3, 4] The rescission of the contract does not fail merely because at the time thereof defendant did not restore, or offer to restore, the dishonored check to the plaintiff. "There are exceptional cases where restoration, or an offer to restore, before suit brought, is not necessary—as, for instance, where the thing received by the plaintiff is of no value whatever to either of the parties; or where the plaintiff has merely received the individual promissory note of the defendant; or where the contract is absolutely void; or where it clearly appears that the defendant could not possibly have been injuriously affected by a failure to restore." Kelley v. Owens, 120 Cal. 502, 47 Pac. 369, 52 Pac. 797; California, etc., Co. v. Schiappa-Pietra, 151 Cal. 732, 738, 91 Pac. 593. In this case, under the facts as shown, the check was of no value and the plaintiff could not possibly have been injuriously affected by its retention in defendant's hands until the time when it was produced in court. Moreover, it has been held that on rescission of a contract of sale, where the defendant vendee had given his note as part of the original transaction, it was sufficient for the vendor to offer to surrender the note, even after action brought, and bring it into court to be canceled. Coghill v. Boring, 15 Cal. 213; Whyte v. Rosencrantz, 123 Cal. 634, 642, 56 Pac. 436, 69 Am. St. Rep. 90. Under this rule, it was sufficient in this case that the defendant brought into court the plaintiff's check and left it there for cancellation.

[5] Finally, it is claimed by appellant that the payments provided for by the contract were in separate installments, and that failure as to one of these alone would not constitute a breach of the entire contract. We will assume (although it is not entirely clear from the reading of the contract) that the $500 mentioned at the beginning of the contract was to be an installment of the purchase price, and not a separate consideration for the vendor's entry into the contract; nevertheless, we are of the opinion that the failure or refusal, without sufficient cause, by the buyer to make that payment, justified a repudiation of the contract by the seller. Los Angeles Gas, etc., Co. v. Amalgamated Oil Co., 156 Cal. 776, 781, 106 Pac. 55; California Sugar, etc., Agency v. Penoyar, 167 Cal. 274, 280, 139 Pac. 671.

Plaintiff's notice of appeal is a notice of appeal, not only from the judgment, but also from the order denying his motion for a new trial of the action. As there is not any right of appeal from an order denying a motion for a new trial (Code Civ. Proc. § 963), that appeal is dismissed.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

49 Cal. App. 525

COULDTHIRST et al. v. SOUTHERN PAC. R. CO. (Civ. 2128.)

(District Court of Appeal, Third District, California. Oct. 11, 1920.)

1. Justices of the peace ⟸36(2)—Action to recover for stock killed by railroad on alleged private land involves title to land.

In a complaint for the killing of stock by a railroad brought under Civ. Code, § 485, as amended by St. 1915, p. 1281, the allegation that the plaintiffs were owners of the land along the railroad is material, so that the action involves title to land and is beyond the jurisdiction of a justice's court.

2. Justices of the peace ⟸75(1)—Answer unnecessary to remove cause where want of jurisdiction appears from complaint.

The provisions of Code Civ. Proc. § 838, providing for transfer of a case from the justice court when it appears by verified answer that the title to land is involved, does not require a verified answer to defeat the jurisdiction of the justice, where it appears from the face of the complaint that title to land is involved.

3. Constitutional law ⟸56—Constitutional jurisdiction cannot be changed by legislation.

The legislature cannot change the jurisdiction conferred upon courts of the justices of the peace by the Constitution, though it may regulate the mode or manner in which the jurisdiction may be invoked or challenged.

4. Justices of the peace ⟸36(2)—Necessity of proving railroad was not on public lands defeats jurisdiction.

Even under Civ. Code, § 485, as amended by St. 1915, p. 1281, authorizing recovery for the killing of animals by railroads passing through private lands under circumstances different from killing by railroads passing through public lands, it is necessary for plaintiffs to prove that the land in question was not public land, which involves proof of title to land, so that the justice of the peace has no jurisdiction thereof.

5. Justices of the peace ⟸141(2)—Superior court on appeal has no jurisdiction if justice had none.

The superior court acquires no jurisdiction in a case appealed from a justice court if the justice of the peace had no jurisdiction.

6. Justices of the peace ⟸141(4) — Neither appellate nor Supreme Court have jurisdiction of action involving less than $300.

Under Const. art. 6, § 4, neither the appellate court nor the Supreme Court has appellate jurisdiction in action for killing stock involving less than $300; it being conceded that title to property was not involved.

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action by H. T. Couldthirst and others against the Southern Pacific Railroad Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

F. A. Kelley, of Susanville, for appellants.
Devlin & Devlin, of Sacramento, for respondent.

BURNETT, J. The action was brought in a justice court of Lassen county to recover damages for the killing of certain stock belonging to plaintiffs. The claim was based upon the provisions of section 485 of the Civil Code, as amended in 1915 (St. 1915, p. 1281), requiring railroads to maintain fences on both sides of the railroad track and making them responsible for injury to stock caused by failure to observe said duty. A demurrer was interposed upon various grounds including the want of jurisdiction of the subject of the action and of the person of the defendant and the failure to state a cause of action. The demurrer was sustained upon the ground of the want of jurisdiction of the justice court, and the action was thereupon dismissed. Plaintiffs then appealed to the superior court "on questions of both law and fact." The superior court affirmed the judgment of the lower court sustaining said demurrer.

[1] Among the allegations of the amended complaint is the following:

"That plaintiffs for several years last past have been and now are the owners of the following described land, situate, lying and being in Lassen county, state of California and more

particularly described as follows, to wit" (said property being described therein).

The ownership of real property was thus put in issue by the complaint, and, if it was necessarily involved in the determination of the cause, it would follow that the justice court had no jurisdiction to try the action. Section 838, Code Civ. Proc. Indeed it has been decided that the action brought under said section 485 of the Civil Code does necessarily involve the ownership or possession of real property, and therefore a justice court has no jurisdiction to try such action. Wills v. Southern Pacific Co., 31 Cal. App. 723, 161 Pac. 501; Holman v. Taylor, 31 Cal. 338; Boyd v. Southern California Ry. Co., 126 Cal. 571, 58 Pac. 1046.

[2, 3] Nor was it necessary for the defendant to raise the question by filing a verified answer as specified in said section 838 of the Code of Civil Procedure. That is required only when the want of jurisdiction does not appear on the face of the complaint. Herein, however, it was expressly alleged by the plaintiffs that they were the owners of said real property, and, this being a material allegation in an action brought under said section of the Civil Code, advantage could be taken of it by filing a demurrer. It cannot, of course, be disputed that the defendant could not by failure to file an answer clothe the justice court with the jurisdiction which it is denied by the Constitution. King v. Kutner-Goldstein Co., 135 Cal. 65, 67 Pac. 10. Manifestly, the Legislature itself could not change the jurisdiction that has been conferred upon the various courts by the Constitution, although it may regulate the mode or manner in which the jurisdiction of a court may be invoked or challenged.

[4] It is true, as pointed out by respondent, that the decisions of the appellate courts specifically holding that the justice court has no jurisdiction of actions brought under said section 485 of the Civil Code were rendered before said section was amended in 1915. But there can be no doubt that the title, possession, or right of possession is equally involved under said section as amended. The effect of the law is not changed in that respect, since, in order to recover under the amended section, it is incumbent upon the plaintiffs to show that the loss or injury to his live stock happened along some portion of the railroad's right of way not running through or upon public lands, that is, in other words, at a place where the adjoining lands were in private ownership or possession.

[5] It appearing that the justice court was without jurisdiction to try the cause, it was entirely proper for the superior court on appeal to affirm said judgment. There could be no trial in the superior court, since its jurisdiction is entirely derivative, and, the justice of the peace having no jurisdiction, the superior court acquires none by the appeal. Ballerino v. Bigelow, 90 Cal. 500, 27 Pac. 372; Null v. Superior Court, 4 Cal. App. 207, 87 Pac. 392; Bates v. Ferrier, 19 Cal. App. 79, 124 Pac. 889; Bartnett v. Hull, 19 Cal. App. 91, 124 Pac. 885.

[6] The case, of course, is distinguishable from such decisions as City of Madera v. Black, 184 Pac. 397, where the parties appeared in the superior court and submitted to trial without objecting to jurisdiction or to the irregular manner in which the case may have reached the superior court. Moreover, if we concede that plaintiffs are right in their contention that the case does not involve title to or right of possession of real property, and that it is within the exclusive jurisdiction of the justice court since the amount sued for was less than $300, then it would necessarily follow that this court as well as the supreme court has no jurisdiction to entertain this appeal. Neither of said tribunals is given jurisdiction of an appeal in a case such as the appellants claim this one to be. Const. of Cal., art. 6, § 4; Willow Land Co. v. Goldschmidt, 11 Cal. App. 297, 104 Pac. 841; Edsall v. Short, 122 Cal. 533, 55 Pac. 327.

In any view of the case, it seems clear that this court cannot grant plaintiffs any relief in this proceeding.

The judgment is affirmed.

We concur: PREWETT, Presiding Judge pro tem.; HART, J.

49 Cal. App. 554

WATSON v. PRYOR. (Civ. 2198.)

(District Court of Appeal, Third District, California. Oct. 11, 1920.)

1. Appeal and error ⟸373(1)—One undertaking on appeal from several orders insufficient.

In supplementary proceedings, where no final order was entered, and where there was but one notice of appeal, reciting that the appeal was "from the orders made after judgment in said action, refusing to permit plaintiff to examine defendant upon proceedings supplementary to execution concerning the owership by defendant, of property, real or personal, and of assets belouging to him, which said orders were made and entered * * * in words and figures following," and enumerating 18 rulings as orders appealed from, the appeal was from the 18 rulings, and not from one order, and because of appellant's failure to file more than one undertaking will be dismissed.

2. Appeal and error ⟸391(2)—Appeal from 18 rulings, not under alternative method, in which only one undertaking has been filed, will be dismissed.

Appeal from 18 separate rulings, not taken under the alternative method in which only one

undertaking has been filed, will be dismissed, since in such case no new or amended undertakings can be filed.

3. Appeal and error ⟸225—Objection to examination in supplementary proceedings must be made below.

That examination of defendant on a second supplementary proceeding hearing related to matters as to which he was examined on the first hearing cannot be made for the first time on appeal.

4. Execution ⟸380—Second examination in supplementary proceedings discretionary with court.

It is discretionary with the court to permit a second examination in supplementary proceedings.

5. Execution ⟸397—Debtor in supplementary proceedings may be examined as to property in another state.

A creditor is entitled to examine debtor on supplementary proceedings as to property situated in another state.

6. Appeal and error ⟸82(5)—Rulings on evidence in supplementary proceedings held not appealable as "special order made after final judgment."

An appeal will not lie from 18 separate rulings on the admissibility of proposed evidence in supplementary proceedings in which there was no final order entered, under Code Civ. Proc. § 719; such rulings not being "special orders made after final judgment," within section 963.

7. Appeal and error ⟸116—Orders in supplementary proceedings appealable only in cases provided by law.

Proceedings supplemental to execution are a substitute for a creditor's bill, and while they are not separate actions, they are separate proceedings in an original action and appeals lie from orders therein only in the cases provided by law.

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Action by W. S. Watson against Thomas D. Pryor. From 18 orders made in proceedings supplemental to execution, plaintiff appeals. Appeal dismissed.

Peck, Bunker & Cole and C. D. Dethlefsen, all of Oakland, for appellant.

Taylor & Tebbe, of Yreka, for respondent.

PREWETT, Presiding Judge pro tem. In this case the plaintiff and appellant appeals from 18 orders, made by the lower court on proceedings supplemental to execution. But one notice of appeal was given. The clerk certifies that "an undertaking on appeal in due form has been properly filed in the foregoing action."

[1] The defendant and respondent insists that, as there were 18 appeals and but one undertaking, the appeals must be dismissed, and he cites authorities which sustain his position. People v. Center, 61 Cal. 191; Home, etc., v. Wilkins, 71 Cal. 626, 12 Pac. 799; Meley v. Boulon, 104 Cal. 262, 37 Pac. 931. The appellant does not controvert the soundness of these authorities, but he seeks to avoid their effect by claiming that his appeal is from but one order, to wit, a certain ruling or order made by the court in ruling upon the admissibility of evidence, wherein the court used this language:

"I am inclined to the opinion that the examination should be confined to the property Mr. Pryor may have acquired since the prior examination."

This is clearly a ruling upon the admissibility of proposed evidence, and is one of some 28 similar rulings. No final judgment or order was made or entered by the court adjudicating the rights of either party, and the appeals are from 18 of above 28 rulings. All the rulings appealed from are described in one notice of appeal, and are referred to therein as follows:

"Appeals to the Supreme Court of the state of California from the orders made after judgment in said action, refusing to permit plaintiff to examine defendant upon proceedings supplementary to execution concerning the ownership by defendant, of property, real or personal, and of assets belonging to him, which said orders were made and entered * * * in words and figures following to wit."

Then follows at length an enumeration of 18 rulings from which the appeal is taken.

[2] 1. It is not claimed that the appeal is taken under the alternative method. If it was not so taken, then it follows from the authorities above cited that no new or amended undertakings can be filed, and the appeal must be dismissed.

[3, 4] 2. But conceding that this court may go beyond the claim of the appellant, and hold that the appeal is taken under the alternative method, the appellant is placed in no more favorable position. It appears from the statement of the court in his ruling embraced in the first-numbered exception that the defendant had once before been subjected to an examination upon the same matter. No objection was made at the time as to the truth of this statement, and, clearly, the examination was conducted upon the assumption that such prior examination had been had. Even if the mere statement of the court is an unsatisfactory method of showing the fact, still, the proceeding having been conducted upon that assumption, it is too late to raise the point for the first time on appeal. It is well settled, both in this state and elsewhere, that it is in the discretion of the court to permit a second examination. Freeman on Executions, § 406a; 12 Encyclo-

pedia of Evidence, 237. The following California cases conclusively dispose of the matter:

"It has been held that after such examination has been had and the creditor has been given the privilege of fully examining his debtor as to the latter's property, he cannot subject him to a second examination without disclosing to the court some new facts, such as that other facts have become known to the creditor of which he was not apprised at the former examination, or matters of like kind. Our Supreme Court has determined that an order made at the conclusion of such a proceeding will be res adjudicata as to all matters properly therein involved and considered." People v. McKamy, 28 Cal. App. 196, 151 Pac. 743.

"The judgment creditor and debtor are parties to the proceeding, and each is at liberty to call and examine witnesses in respect to any contested fact which may be brought in issue in the course of the proceeding. If the parties to such a proceeding, as between themselves and their privies, are not estopped from again litigating the same matters in another form of action, the whole proceeding would be but a judicial farce, accomplishing no useful end." McCullough v. Clark, 41 Cal. 298.

In the last case the affidavit contained a defect similar to the defect in the affidavit in the case at bar, in that it failed to set out any new or additional facts in support of a second examination.

[5] 3. It is clear that a creditor is entitled to examine his debtor as to property situated in another state. Freeman on Executions, § 394, and many authorities there cited; McGee v. McSweeney, 84 Cal. 100, 23 Pac. 1117; Tomlinson v. Webster Mfg. Co. (C. C.) 34 Fed. 381. Nevertheless, the trial court committed no error in refusing permission to conduct a second examination: First, because the affidavit upon which the same was based is insufficient; and, secondly, the right to a second examination rests in the sound discretion of the trial court, subject only to the limitation as to its abuse.

[6] 4. The rulings in question are not appealable. No final judgment was entered in the matter as contemplated by section 719 of the Code of Civil Procedure, and the court entered no final order determining any right or liability. Mere rulings upon the admissibility of proposed evidence are not orders within the meaning of section 963 of the Code of Civil Procedure as "special orders made after final judgment."

The court, in discussing the character of orders that are deemed excepted to under section 647 of the Code of Civil Procedure, in McGuire v. Drew, 83 Cal. 225, 23 Pac. 312, uses the following language:

"We do not understand that a ruling made during the progress of a trial, either admitting or rejecting evidence, is an order within the meaning of above section. By section 1003 of the Code of Civil Procedure, an order is defined as follows: 'Every direction of a court or judge, made or entered in writing and not included in a judgment, is denominated an order. An application for an order is a motion.'"

[7] The examination of the judgment debtor is not, in itself, an end, but is one of the steps in the means to an end, and errors committed in the course of the examination are not reviewable on appeal until the end sought by the proceeding has been first crystallized into a final order granting or denying the proposed relief or dismissing the proceeding. "The order appealed from is not a special order made after final judgment, within the meaning of subdivision 2 of section 963 of the Code of Civil Procedure, although it was made subsequent to the entry of judgment. It in no manner affected the judgment or bore any relation to it, either by way of enforcing it or staying its operation. Neither is it a final determination of any matter affecting the appellant in the proceeding in the court in which it was made." Kaltschmidt v. Weber, 136 Cal. 676, 69 Pac. 497. This authority is peculiarly applicable to the matter now under examination. The rulings complained of neither added to nor substracted from the relief granted in the judgment, nor did they adjudicate any rights or establish any liabilities. Proceedings supplemental to execution are a substitute for a creditor's bill, and, while they are not separate action (Collins v. Angell, 72 Cal. 513, 14 Pac. 135), they are, nevertheless, separate proceedings in an original action (Bryant v. Bank of California, 7 Pac. 128),[1] and appeals lie from orders therein only in the cases provided by law. The 18 rulings above mentioned are not within this class.

Whether the appellant is entitled to any appropriate relief without the entry of some final order, or in case the court declines to enter a final order, need not at this time be discussed.

The appeal is dismissed.

We concur: HART, J.; BURNETT, J.

[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 68 Cal. xix.

(49 Cal. App. 529)

PEOPLE v. ADKINS. (Cr. 519.)

(District Court of Appeal, Third District, California. Oct. 11, 1920.)

1. Homicide ⟸276—Self-defense held for jury.

The question of self-defense in homicide prosecution *held* for jury.

2. Criminal law ⟸1159(3)—Verdict on conflicting evidence conclusive.

A verdict on conflicting evidence is conclusive on appeal.

3. Criminal law ⟸1037(2)—Absence of request for instruction to disregard improper remarks precludes review.

In absence of request that court direct jury to disregard improper remarks of prosecutor, defendant cannot complain thereof on appeal.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

John A. Adkins was convicted of manslaughter, and from judgment of conviction and order denying new trial he appeals. Affirmed.

H. E. Manning and Thomas J. Horan, both of Vallejo, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

NICOL, Presiding Justice, pro tem. Defendant was informed against by the district attorney of Solano county for the crime of murder. He was thereupon tried and convicted of manslaughter, and he prosecutes this appeal from the judgment and order denying his motion for a new trial.

It appears from the evidence that on the evening of November 16, 1919, the defendant in the company of Bessie A. Hamilton, Hazel Chapman, and Walter W. Foster, were present at a roadhouse known as Monreal's place, situated about two miles outside of the city of Vallejo. Defendant and his party engaged in dancing for about an hour and a half when the deceased, Charles Denio, with his wife, Martha Denio, and his brother-in-law, Stewart B. Reynolds, and the wife of Stewart B. Reynolds, entered the dance hall and took a table which was unoccupied and had accommodations for four, and said deceased and his party took seats thereat; that shortly thereafter the defendant left his seat and proceeded to the deceased's table, where at the time were seated Mr. and Mrs. Stewart B. Reynolds, the deceased and his wife having left the table and not being present at the time, and asked Mrs. Reynolds, to whom he was a stranger, to dance with him. Mrs. Reynolds testified that in reply to his request that she dance with him she said, "No thank you, I do not dance with anybody but my own party," and that the defendant swore at her. The defendant testified that when he asked her to dance with him she threw the contents of a glass in his face. The deceased having returned, a quarrel ensued over this occurrence, between the defendant and Reynolds and the deceased, which terminated in the shooting which caused the death of the said Charles Denio.

The defendant claims that when he fired the fatal shot that caused the death of the said Charles Denio he was acting in necessary self-defense and to repel a dangerous and violent attack then being made upon him by the said Charles Denio and his brother-in-law Stewart B. Reynolds.

Mrs. Martha Denio, the wife of the deceased, testified that, at the time deceased was shot by defendant, deceased was "standing beside me. We were standing about 15 or 20 feet from Mr. Adkins, watching him struggling with the women of his party, one of whom he kicked to the floor, and then pointed his revolver and shot my husband." On cross-examination this witness testified that she and deceased were just standing there and defendant was struggling with some of the women of his party and kicked one of them to the floor and then pointed his gun at deceased and shot; that there was no man near the defendant at the time, just the two women. It was shown by the testimony of the examining physician that there were no powder burns on the body of the deceased.

[1, 2] It was the province of the jury to determine the question whether or not the evidence supported defendant's claim that at the time of the shooting he was acting in necessary self-defense. It was for the jury to say whether or not the story of the defendant should be believed, and the evidence being conflicting the verdict of the jury is final and conclusive. People v. Rongo, 169 Cal. 71, 145 Pac. 1017. "Since our appellate jurisdiction extends only to questions of law, we must accept as proven the facts as detailed by the witnesses for the state." People v. Moore, 155 Cal. 237, 238, 100 Pac. 688.

The appellant contends that the district attorney was guilty of misconduct during his argument to the jury. The alleged misconduct consisted in his reading to the jury during his argument a certain article written by James A. Johnston, warden of San Quentin penitentiary, as to the evils of persons carrying concealed weapons.

[3] There is nothing in the point of this alleged misconduct of the district attorney. Conceding that the reading of the article was improper, there was no request made that the court direct the jury to disregard the same, and hence the appellant cannot now complain. People v. Shears, 133 Cal. 154, 65 Pac. 295; People v. Ye Foo, 4 Cal.

App. 730, 89 Pac. 450; People v. Kramer, 117 Cal. 647, 49 Pac. 842; People v. Beaver, 83 Cal. 419, 23 Pac. 321; People v. Vickroy, 182 Pac. 764.

Finding no error in the record, the judgment and order appealed from are affirmed.

We concur: HART, J.; BURNETT, J.

49 Cal. App. 473

CITY OF SAN DIEGO v. KERCKHOFF et al. (Civ. 3364.)

(District Court of Appeal, First District, Division 2, California. Oct. 5, 1920. Hearing Denied by Supreme Court Dec. 2, 1920.)

1. Appeal and error ⟸1052(8), 1071(1)—Error in admission of evidence harmless.

Where plaintiff in no event could recover, errors in findings or the admission of evidence were harmless.

2. Municipal corporations ⟸680, 681(1)—Where powers of council were enumerated, they should be strictly construed.

Where a city charter specified the powers of the council with respect to granting franchises to steam, street, and interurban railroads to use the streets, the charter provisions should be strictly construed in favor of the city.

3. Municipal corporations ⟸680, 681(1)—Enumeration of powers excludes those not specified.

Where the powers of the city council to grant franchises to steam, street, and interurban railroads to use the streets were enumerated, all powers not enumerated were excluded.

4. Municipal corporations ⟸79—Charter governs over general act in respect to street railroads.

The granting of franchises for street railroads being a municipal affair, the charter provisions of San Diego, relating thereto, will govern over the Broughton Act, but with respect to franchises for interurban railroads as to which the city charter is silent the act governs.

5. Municipal corporations ⟸683(2)—Act relating to granting of franchises not grant of any right, though preventing grant except on competitive bidding.

The Broughton Act, declaring that every franchise or privilege to construct or operate street or interurban railroad on any public street or highway shall be granted on competitive bidding, is not the grant of any right or franchise, though it does prevent the grant of any such right except on competitive bidding.

6. Municipal corporations ⟸683(2)—Franchise granted by city invalid because granted without competitive bidding.

San Diego Charter, art. 2, c. 2, § 1, subds. 46, 47, and section 9, provide that the council shall have the authority to grant franchises to lay street railroad tracks over streets of the city, and to allow any railroad company or corporation to enter the city, but that the council shall not grant authority to construct street railway, except on competitive bidding, etc. In 1907 the council granted to individuals the right to construct railroad tracks on, over, along, and across highways, etc. The Broughton Act of 1905, then in force, declares that every franchise or privilege to construct or operate street or interurban railroads, etc., except steam railroads, shall be granted on competitive bidding. Civ. Code, §§ 454–494, relate to the organization of railroad companies known generally to the courts as steam railroads, while other sections deal with street railroad companies. *Held* that, though Const. art. 11, § 11, gives each city the power to enforce local police regulations, and notwithstanding the grant authorized the use of any sort of power, the franchise must be deemed invalid, as there was no compliance with the charter provision as to competitive bidding, for the council, being without authority to charter a railroad company, the franchise, which was to individuals, must be deemed for a street or interurban road.

7. Municipal corporations ⟸683(3)—City held to have burden of showing validity of franchise in suit on bond given on grant of franchise.

Where a city was asserting the validity of franchise so as to recover on a bond given by the grantees thereof, it has the burden of showing that the franchise came within the exception of the Broughton Act so as to be valid.

8. Municipal corporations ⟸682(3)—City council held not to have power to grant perpetual right of way.

Where a city charter authorized the council to provide for the sale and conveyance, or lease of all land not dedicated or reserved for public use, the council was without authority to grant, without consideration, a perpetual right of way over public property.

9. Municipal corporations ⟸683(3)—Where franchise was invalid, no action can be maintained on bond.

Where a franchise for the construction of a railroad on municipal streets was invalid, no action can be maintained on a bond given for performance thereof.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by the City of San Diego, a municipal corporation, against William G. Kerckhoff and others. From a judgment for defendants, plaintiff appeals. Affirmed.

S. J. Higgins, City Atty., Arthur F. H. Wright, Deputy City Atty., and N. S. Hammack, all of San Diego, for appellant.

O'Melveny, Millikin & Tuller, of Los Angeles, for respondents.

NOURSE, J. This is an appeal by plaintiff from a judgment in favor of defendants in an action brought to recover the sum of $50,000 on a bond given to insure the performance of the terms and conditions of a certain fran-

chise for the construction of a railroad in the city of San Diego. The plaintiff alleged the granting of the franchise by ordinance of the common council approved April 11, 1907, the acceptance by the grantees, the deposit of a check in the sum of $25,000 to insure the faithful performance of the terms and conditions of the contract, the return of the check by the common council upon the filing of the bond in suit, and the breach of the conditions of the bond. The amended answer, among other defenses, alleged that the bond was without consideration because the franchise which was granted by the common council was illegal and void, and put in issue the entire question of the validity of the franchise. The trial court failed to find upon the question of want of consideration, but did find that the franchise was granted substantially in the manner alleged in the complaint. The conclusion of law is merely that the defendants are entitled to judgment; but, if the facts found to be true are such as will lead to but one legal conclusion, this court may draw that conclusion without reversing the case for a new trial.

[1] Appellant makes a great many objections to the findings made and the court's failure to find upon issues which are claimed to be material, and also makes numerous assignments of error in the rulings of the trial court on the admission of evidence. An examination of the entire record fails to present a case where the asserted errors have resulted in a miscarriage of justice; and, as plaintiff could not recover on the bond in view of the invalidity of the franchise, as hereinafter pointed out, it would serve no purpose to return the case to the trial court on account of any of the asserted errors or to give further consideration to them here.

The attack upon the franchise is made upon two grounds: (1) That the common council did not comply with the restrictions of the charter of the city of San Diego or of the state law in making the grant; and (2) that public property of the city was given to the grantees without compensation and in violation of the express provisions of the municipal charter.

The provisions of the municipal charter relating to the granting of franchises are contained in article 2, chapter 2, section 1, subdivisions 46 and 47, and in section 9 of the same chapter, reading as follows:

Subd. 46. "To grant authority for a term not exceeding twenty-five years to construct street railways and lay down street railroad tracks upon or over any of the streets of said city, upon which cars may be propelled by horses, mules, steam, or other motive power, or by wire ropes running under the streets and moved by stationary engines, and on such conditions as may be required by this charter, or by ordinance, and from time to time to establish, alter, and regulate the rates of fare to be charged by any person, company, or corporation to which such authority may be granted." Stats. 1905, p. 908.

Subd. 47. "To allow any railroad company or corporation to enter said city, and make its way to the water front at the most convenient point for public convenience; but no exclusive right, franchise, or privilege shall be granted to such railroad company; and the use of all such rights, privileges,and franchises shall at all times be subject to regulation by the common council. Every ordinance granting such right, privilege, or franchise shall be upon the conditions that said company or corporation shall pave and keep in repair the street between the rails of each track, and also between the tracks, and for at least two feet on each side of the same, including switches, turnouts, and side tracks, and that said company or corporation shall allow any railroad company or corporation to which a similar right, privilege, or franchise may be granted, to use in common with it the same track or tracks upon such terms as the common council shall determine." Stats. 1889, p. 655.

Sec. 9. "The common council shall not grant authority to construct a street railway or lay down street railroad tracks upon or over any of the streets of said city except in the manner and on the terms following, viz. [Here follow provisions for the filing of an application, publication of notice thereof, invitation for bids, and the award to the best bidder.]" Stats. 1889, p. 658.

The franchise granted to two individuals the right to construct "a railway track or tracks together with all necessary side tracks, turnouts and switches, and any and all other things necessary and incident to railway construction, maintenance and operation, through, over, across, upon and along any and all public avenues, plazas, streets, alleys, highways and pueblo, tide, submerged and overflow or other lands belonging to the city of San Diego on the general route hereinafter described, and to use, maintain and operate said railway by steam, electricity or other motive power."

The trial court having found that the city suffered no damage from the abandonment of the franchise, the question is whether the city may still exact the penalty of the bond if no consideration passed to the grantees and no injury was suffered by the city. The attack upon the franchise goes to the manner in which it was granted. The argument is that, as the mode is the measure of the power, a grant which is not made in accordance with the prescribed mode is void. Zottman v. San Francisco, 20 Cal. 96, 101, 81 Am. Dec. 96; Pac. Elec. Ry. Co. v. Los Angeles (C. C.) 118 Fed. 746, 753.

It cannot be ascertained from the franchise whether the grant covered the right to construct and maintain a street railroad, an interurban line, or a commercial steam railroad. It is conceded that the council did not comply with the provisions of section 9, and that if the right to construct and maintain a street railroad was given the fran-

chise is void. On behalf of appellant it is argued that the council intended to grant a franchise to construct and maintain a steam railroad, because the grantees were authorized to operate the road "by steam, electricity or other motive power." On behalf of respondents it is argued that the franchise contemplated either a street railway or an interurban line, and that, if the former, the franchise was void for noncompliance with the provisions of section 9 of the charter, quoted above, and, if the latter, it was void for noncompliance with the act of March 22, 1905 (Stats. 1905, p. 777), commonly known as the Broughton Act.

[2, 3] The argument of appellant is that the council found its power to grant the franchise in the provisions of section 47, which reads, in part:

"To allow any railroad company or corporation to enter said city, and make its way to the waterfront."

Inasmuch as the powers of the council are enumerated at length in the charter, it must follow that the municipality has withheld from the council power to dispose of its streets and other public property except to such extent and in such manner as may be specified in the charter. These powers being inherent in the city as a matter of municipal affair, the provisions of the charter must be strictly construed in favor of the city. So construing them, it follows that the council is authorized to allow a railroad company or corporation to enter the city, either for the purpose of finding a terminus there or for the purpose of passing through the city to reach another terminus. This is in consonance with the decision of the Supreme Court in People v. Craycroft, 111 Cal. 544, 44 Pac. 463, wherein it was held that the provisions of the act of March 23, 1893 (Stats. 1893, p. 288), prescribing the terms and conditions upon which a franchise might be granted "to construct or operate railroads along or upon any public street," did not apply to a steam railroad which must pass through a city or town in order to construct and operate is road between fixed termini.

[4-7] The provisions of the Broughton Act, as in force at the time the franchise was granted were, generally, that—

"Every franchise or privilege * * * to construct or operate street or interurban railroads upon any public street or highway, * * * or to exercise any other privilege whatever, * * * except steam railroads, * * * shall be granted upon the conditions in this act provided, and not otherwise." Stats. 1905, p. 777.

The sections following provide in detail a plan for letting such franchises upon competitive bidding. Wherever this act had not been made inapplicable by conflicting charter provisions, the council could not grant a franchise to construct or operate a street or interurban railroad, or any other privilege except a steam railroad, without competitive bidding. Any franchise granted otherwise would be void.

The history of this legislation shows that the original act of 1893 read:

"Every franchise or privilege to * * * construct or operate railroads * * * or to exercise any other privilege whatever." Stats. 1893, p. 288.

In March, 1896, the Supreme Court, in People v. Craycroft, supra, held that the act did not apply to a commercial railroad desiring "to make a connection through the town of those portions of its road extending upon either side of the town to its opposite termini." In this connection the court said:

"The builder of the road must own and operate the whole line; the right to do so is part of its corporate franchise, and how is it possible that any other person or corporation can acquire the right to construct, and own and operate, as a distinct and independent road and franchise, that part of the road necessary to connect its two ends? This law was not intended to apply to such a case, but only to those cases—as of street railroads—in which bona fide competition is possible."

And again:

"It is the policy of this state to encourage the building of railroads, and a corporation complying with the statutory prerequisites acquires, among other things, the right to construct and operate its road between the termini named in its articles of incorporation. In the exercise of this right it may pass through cities and towns along its route, if they are willing to grant the privilege."

Immediately following this decision the Legislature, in 1897, amended section 1 of the Broughton Act to read in part as follows:

"Every franchise or privilege * * * to construct or operate street railroads * * * or to exercise any other privilege whatever * * * except steam railroads." Stats. 1897, p. 135.

This act was superseded by the act of 1901 (Stats. 1901, p. 265), which in turn was amended in 1903 (Stats. 1903, p. 90), but without material change. In 1905 the act in force when the franchise was granted superseded the earlier act, and for the first time included interurban railroads in the franchise restrictions.

In view of this legislation and the rule of the Supreme Court, as announced in the Craycroft Case, it cannot be doubted that, unless controlled by charter provisions to the contrary, no city could grant without competition a franchise for any privilege to construct or operate a railroad within its limits, unless such railroad came within the meaning of a "steam railroad" as that term is used in the act and explained in the

decision of the court. The exception contained in the act having been inserted immediately following the court's decision, it would seem apparent the the Legislature had reference to the character of railroad covered by the decision—that is to say, a commercial railroad for the carrying of passengers and freight over a private right of way between fixed termini, without regard to the motive power, but running for some distance at least outside of city limits—such a road as that contemplated by the sections of the Civil Code, 454–494, inclusive. These sections, it will be noted, come under title 3, headed "Railroad Corporations," chapter 1 of which relates to "Officers and Corporate Stock," chapter 2, "Enumeration of Powers," and chapter 3, "Business, How Conducted." Title 4, including sections 497–511, is headed "Street Railroad Corporations," showing a clear intention on the part of the Legislature to distinguish between these two enterprises. The interurban railroads, which were included in the Broughton Act of 1905, are not mentioned in the Code, but were treated by the Supreme Court in S. F., etc., Ry. Co. v. Scott, 142 Cal. 222, 232, 75 Pac. 575, 583, where the court said:

"There has recently come into existence a certain class of railroads, known as interurban roads, which are a sort of hybrid, having in some respects the characteristics of the ordinary railroad, and in others those of the street railroad. Within the limits of the cities which they enter they usually pass along the streets, and perform the ordinary functions of street railroads, stopping where desired to let passengers on or off, and serving the public need for local street travel. Outside the cities, on their way from one city or town to another, they frequently travel upon a roadway obtained from private persons, not upon a public road, and stop, as in case of ordinary railroads, only at stations established by them for that purpose. They also often convey freight as well as passengers."

The decision in the Scott Case was rendered in February, 1904, and, no doubt, accounts for the inclusion of interurban railroads in the act of March, 1905, above noted. The court expressly declined to determine whether such a road was to be classed as a street railroad or as an "ordinary railroad," but did decide that when a "franchise" had been granted to construct and operate a railroad over designated public streets within the city, though the line continued outside the city to a terminus in another county, it was nevertheless a street railroad, and not subject to the jurisdiction of the state board of equalization for taxation purposes.

As has heretofore been stated, the municipal charter of San Diego covered the subject of granting franchises for street railroads at the time respondents' grant was made. That subject being a municipal affair, the charter provisions controlled over the Broughton Act. (Sunset Tel. & Tel. Co. v. Pasadena, 161 Cal. 265, 282, 118 Pac. 796. If the franchise was for the operation of an interurban railroad, the Broughton Act controlled, because on that subject the municipal charter was silent. Clouse v. San Diego, 159 Cal. 434, 437, 114 Pac. 573. It is conceded that neither the charter nor the Broughton Act was followed in so far as they relate to street or interurban railroads. The case of appellant then rests upon the argument that a steam railroad franchise was granted. Bearing in mind that the motive power is not the determining factor, an examination of the record fails to disclose anything which would indicate that the character of railroad contemplated in the exception in the Broughton Act or in subdivision 47 of the charter was intended. The ordinance purported to grant a franchise coupled with a perpetual right of way over certain public property. The franchise of a street railroad finds its origin in the action of the municipality—it is a contract between the city and the grantee. The franchise of the ordinary steam railroad comes from the Civil Code, § 465, which gives to every railroad corporation power to lay out its road and to construct and maintain the same across, along, or upon any street, avenue, or highway. By section 470, Civil Code, the consent of the city authorities must be had to use the streets in an incorporated city, but this consent is more in the nature of a permit than a franchise. The distinction is clearly drawn by the Supreme Court in S. F., etc., Ry. Co. v. Scott, 142 Cal. 222, 228, 75 Pac. 575, 581, where it is said:

"In the case of an ordinary railroad the right which it may acquire to operate its road along a public street is, strictly speaking, a mere right of way, similar to the right it may acquire from landowners along the route. It is a part of its roadway, and not a part of the franchise, within the meaning of the word in the phrase in question. It imposes no implied obligation upon the grantee or donee to facilitate the local public use of the street by carrying persons from place to place thereon. The right which a street railroad obtains from the city to lay its track and operate its road on a street, on the contrary, is the most valuable part of its franchise. It carries the obligation to serve the public in the use of the street, and is in furtherance of the original use. It does not receive this franchise by becoming incorporated, as an ordinary road receives its franchise to operate its road between its termini, but obtains it afterward by special grant from the municipality, and the thing thus obtained includes both the roadway and the franchise."

The framers of the San Diego charter recognized this distinction in the enactment of subdivision 47, which reads in part:

"To allow any railroad company or corporation to enter said city, and make its way to the water front at the most convenient point for public convenience."

The franchise of a street railway is limited by subdivision 46 to 25 years. A railroad company may, so far as the charter is concerned, be allowed to enter the city for an unlimited time. By subdivision 46 a street railroad franchise may be granted to "any person, company or corporation"; by subdivision 47 the right to enter the city may be granted to "any railroad company or corporation." In the case of the former the franchise can be granted only after bids have been received in accordance with notice given; as to the latter, the permit may be given without these restrictions. Reading subdivision 47 of the charter with the sections of the Civil Code relating to railroad corporations sections 454–494 and sections 291 and 292 relating to the amount of capital stock of a railroad corporation which must be subscribed and paid into the treasury), the only reasonable interpretation of the charter section is that, when a railroad corporation has complied with the general law and obtained a franchise under Civil Code, § 465, the common council may permit it to enter the city of San Diego and make its way to the water front. The evident purpose of the charter framers in omitting the word "person" from this subdivision was to withhold that privilege from all individuals who had not brought themselves under the restrictions and the limitations of the Code sections. The franchise was granted for an unlimited term to two individuals who did not constitute either a company or a corporation. It was not authorized by the charter. Appellant argues that the council found its power in section 11 of article 11 of the Constitution, which gives to each city power to enforce local police regulations. But by this same section the exercise of such power is limited to such regulations as are "not in conflict with general laws." Thus, if the charter is silent upon the matter, and the general laws prescribe the mode by which the power may be exercised, the grant contained in the Constitution is limited to that extent.

That the Broughton Act itself is not a grant of any right or franchise cannot be disputed. Sunset Tel. & Tel. Co. v. Pasadena, supra, 272. But it prevented the granting of any privilege included in its terms in any other manner than that prescribed. McGinnis v. Mayor, 153 Cal. 711, 96 Pac. 367. Section 465, Civil Code, is a grant to railroad corporations; section 470, Civil Code, is a limitation upon such grant, but is not in itself a grant of power to the city or of any right or privilege to the corporations; subdivision 47 of the charter is a limited grant of power to the city. It does not, however, refer to "steam railroads" and is not in conflict with the Broughton Act.

There was therefore no express statutory or charter grant of power to give a franchise to individuals for such a railroad as that contemplated by the ordinance without competition. If the power existed by implication, it was nevertheless limited by the provisions of the Broughton Act, because the franchise was one "to exercise any other privilege" within the meaning of the act. If the privilege sought was for a "steam railroad" within the exception of the Broughton Act, the power of the city was limited by subdivision 47 of the charter to the right to grant the privilege to a "railroad company or corporation." In this connection, it should be said that, except as hereinafter noted, there was nothing in the ordinance inconsistent with a grant to construct and operate a street railroad, and that, if the council had followed the charter provisions relating to street railroad franchises, the ordinance would have been a valid exercise of the charter powers. Furthermore, it was incumbent upon the city, in this action, to bring itself within the exception of the Broughton Act, and this it failed to do.

[8] Another objection to the ordinance which has been raised by the pleadings is that it granted to these individuals a right of way in perpetuity over public property of a strip of land 100 feet wide and two miles long. This grant was made without consideration and without compliance with the express provisions of subdivision 50 of the same section of the charter, which permits the council "to provide for the sale and conveyance, or lease, of all lands now or hereafter owned by said city not dedicated or reserved for public use * * * at public auction after publication of notice thereof." Thus if the city lands were dedicated to public use, they could not be alienated; if not so dedicated, they could be sold, conveyed, or leased only in accordance with the terms of subdivision 50. The council had no power to grant a perpetual right of way over the lands to the city in any event.

[9] From the foregoing it follows that the purported franchise was void, and that, as it was the basis of the bond sued on, the bond was without legal consideration. For this reason no recovery can be had upon the bond. Other points raised do not require consideration. The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

(49 Cal. App. 508)

PORTUGUESE AMERICAN BANK v. SCHULTZ. (Civ. 3493.)

(District Court of Appeal, First District, Division 1, California. Oct. 8, 1920. Rehearing Denied Nov. 5, 1920. Hearing Denied by Supreme Court Dec. 6, 1920.)

1. Escrows ⟸9 — Agreement for delivery on payee procuring certificates for maker satisfied by maker himself procuring certificates.

Condition in escrow agreement for delivery of notes to payee on payee putting maker in possession of automobile registration certificates was satisfied by maker himself procuring the certificates.

2. Escrows ⟸10—Notes held to have been delivered.

Where escrow agreement provided for delivery of notes on performance of specified conditions, and on presentation, to bank holding notes, of order signed by maker and payee, there was a good delivery on the performance of the conditions, notwithstanding maker's refusal to sign order for delivery, since payee on performance of conditions had absolute right to such order, and since, under Civ. Code, § 3529, that which ought to have been done is to be regarded as having been done.

3. Escrows ⟸5—Bank holding notes in escrow held not to have violated duty by taking assignment.

Where there was nothing in escrow agreements preventing the sale of notes held in escrow, the bank to which the notes had been delivered in escrow did not violate its duty as escrow holder by taking an assignment of the notes from the payee, subject to the conditions upon which it held them in escrow.

4. Bills and notes ⟸477—Defense of fraud must be pleaded.

In action on notes, maker to avoid payment on ground that notes were procured by fraud must plead such defense.

5. Bills and notes ⟸494—Burden of proving fraud on maker.

In an action on notes, maker relying on fraud has burden of proving fraud.

6. Contracts ⟸88—Burden of proving failure of consideration on party asserting it.

The burden of showing failure of consideration for a written contract is upon him who asserts it.

7. Bills and notes ⟸476(2)—Failure of consideration must be pleaded.

A party who asserts failure or partial failure of consideration for a promissory note must allege such failure, or he will not be permitted to present the defense upon that point in the case.

8. Appeal and error ⟸1170(10) — Indefiniteness of finding held not to warrant reversal.

In action on notes, defended on ground of nondelivery in that condition of escrow agreement that payee procure registration certificates for a touring car and a truck was not performed, finding on such issue that maker received certificates for "said trucks" *held* not to warrant reversal for failure to more specifically identify the touring car, in view of Code Civ. Proc. § 475.

9. Witnesses ⟸270(2)—Cross-examination on immaterial matter held improper.

In action on notes involving defense that notes placed in escrow had never been delivered, because of nonperformance of escrow conditions, where the maker, called as a witness for the plaintiff, testified as to the nonperformance of the conditions, questions on cross-examination as to damage sustained by him because of noncompliance with the conditions *held* improper; such evidence having no bearing on whether the conditions had been performed.

10. Pleading ⟸258(3)—Refusal to permit defendant to amend answer at late stage of trial held not abuse of discretion.

In an action on notes, refusal to permit maker at a late stage of the trial to amend answer by setting up fraud, where facts sought to be alleged had at all times been within the knowledge of the maker and of his counsel, and they had had ample time and opportunity to plead them, *held* not an abuse of discretion.

Appeal from Superior Court, Alameda County; Stanley A. Smith, Judge.

Action by the Portuguese American Bank against John W. Schultz. Judgment for plaintiff, and defendant appeals. Affirmed.

W. E. Rode, of Oakland, for appellant.

Robinson & Sizer, of Oakland (Clarence De Lancey, of San Francisco, of counsel), for respondent.

BEASLY, Judge pro tem. This is an appeal from a judgment in favor of plaintiff and against defendant upon three promissory notes given by the latter as the purchase price of an interest in a garage in Oakland.

On November 18, 1918, defendant Schultz and Mrs. M. E. Farrell, wife of F. M. Farrell, were copartners in a garage and automobile repair shop in Oakland, and on that day Schultz purchased Mrs. Farrell's interest in the garage, including a lease of the premises where the business was conducted, for the price of $1,900. Schultz paid $500 in cash and gave three promissory notes for the remainder of the purchase price of the property. These notes were not delivered directly and at once to Mrs. Farrell, but were deposited by Schultz with the Portuguese American Bank of Oakland, as it is said "in escrow," under instructions from the parties to deliver them to the payee, Mrs. Farrell, upon the written order of both Schultz and Mrs. Farrell; it being further stated in these instructions that such written order would be given whenever the conditions of the bill of sale of the property from Mrs. Farrell to Schultz should have been complied with. A copy of the bill of sale was delivered to the bank with the escrow directions.

There was at the time of the sale a mortgage upon the premises occupied by the business, which if foreclosed would oust Schultz from the leasehold; and the delivery of the notes by the bank to Mrs. Farrell was accordingly conditioned in the bill of sale upon Schultz remaining in undisturbed possession of the premises; and the delivery was also conditioned upon the delivery to Schultz of certificates of registration of an Overland car and truck which were included in the property carried by the bill of sale. The registration certificates were never delivered by the seller or her husband to Schultz, but the latter, subsequently, by his own efforts, procured that for the truck in February, 1919, and for the car in April, 1919. Schultz claims that he could not use the truck or car until he received these registration certificates. He remained in undisturbed possession of the property and premises until October 25, 1919, when he sold the property to G. S. Held, although meantime there was a squabble between Schultz and Brien, the landlord, about the amount of the rent. This dispute arose out of the refusal of the landlord to recognize or live up to the agreement between himself and Farrell made on April 29, 1918, providing for a reduction of the rent; and, although a foreclosure proceeding was meantime started upon the second mortgage, still Schultz's possession while he owned the garage was not disturbed.

At the time of the sale of the garage to Schultz, F. M. Farrell, husband of Mrs. M. E. Farrell (who may be suspected of being the real party in interest in the garage), owed the Portuguese American Bank $1,000; and two days after the deposit of the notes with the bank Mrs. Farrell indorsed them to the bank as security for her husband's debt. Schultz was, however, apprised of this before the assignment, and, being asked by an official of the bank if the notes were good, he made no objection to the indorsement, but stated that the notes were good if he was permitted to continue to occupy the premises.

On December 12, 1918, however, Schultz served a writing upon the bank, in which he notified the latter in general language that the conditions of the instructions upon which the notes had been placed with the bank had not been complied with; that Mrs. Farrell had undertaken to sell Schultz property of which she was not the owner; that the notes were secured by fraud and false representations, which had not been discovered by Schultz until after the delivery of the notes in escrow, and in this instrument Schultz claimed that the notes were therefore "null and void." He made no attempt, however, to rescind the contract or the notes, nor did he offer to return the property he had received for them. The bank retained possession of the notes. No written direction for their delivery to either Mrs. Farrell or the bank was ever given by either Mrs. Farrell or Schultz. There was no manual delivery of the notes by Mrs. Farrell or Schultz to the bank (and none by Schultz to the bank to hold as owner, but only the escrow delivery above referred to).

The notes not being paid at maturity, the bank instituted suits for their collection, and from judgments in its favor the defendant prosecutes this appeal.

[1, 2] It is claimed by appellant on these facts that the notes were never delivered. But they were delivered, subject to the conditions stated in the directions which accompanied them when they were placed with the bank. All that remained to be done to entitle the payee to their possession was compliance with these directions, to wit: That defendant should remain in possession of the garage and should be put into possession of the registration certificates of the truck and car. He did remain in possession and he procured the certificates. The fact that they were procured by himself instead of by the payee of the notes for him did not avoid the notes. It must be held that the finding of delivery is sustained by these facts. The fact that no written directions for the delivery of the notes were given by Mrs. Farrell or Schultz does not alter the case, for "that which ought to have been done is to be regarded as done, in favor of him to whom, and against him from whom, performance is due." Civ. Code, § 3529. And upon the performance of the two conditions specified in the escrow directions, the holder of the notes had the absolute right to the execution upon the part of Mrs. Farrell and Schultz of the direction to deliver.

[3] Nor is there anything in the contention that the bank violated its duty as escrow holder by taking an assignment of the notes to itself, for there was nothing in any of the papers or agreements pertaining to this escrow which prevented the sale of the notes to any one. The bank had the undoubted right, as well as any one else, to take an assignment of the notes. It took them subject, of course, to the conditions upon which it held them in escrow. The notes did not become good in its hands until compliance with these conditions of the escrow agreement, but it could buy and Mrs. Farrell could sell or hypothecate the interest of the latter in the notes, subject to the conditions upon which they were held by the bank as escrow holder. Nor were Schultz's interests, as far as we can see, affected adversely by this assignment.

[4-7] Closely associated with this contention of defendant is the offer made by him at the trial to prove that Farrell had deceived him at the sale by including therein many articles not owned by Mrs. Farrell, and by delay in procuring the registration certificates of the truck and the Overland car. If it was intended by this claim to avoid total payment of the notes upon the ground that

they were procured by fraud, it should have been so pleaded, which was not done. But as we understand defendant's contention, they were not so offered, but only in proof of damages sustained as an offset to the payment of the notes, and against the balance of the purchase price represented by them. The court at the trial excluded the evidence and rejected offers of proof of such facts upon the ground that they were not pleaded. There is no pleading of this damage, and no defense of partial or total failure of consideration is pleaded. Conceding, but not deciding that these claims, if true, would have constituted a defense or a partial defense to the notes, still it was not available to defendant in the absence of allegations informing the plaintiff of defendant's claims. The burden of proving fraud, if he relies upon it, is upon defendant in such cases as this. Wilson v. White, 84 Cal. 239, 24 Pac. 114. And the burden of showing failure of consideration for a written contract is upon him who asserts it. Cuthill v. Peabody, 19 Cal. App. 304, 125 Pac. 926. It follows that he who would assert failure or partial failure of consideration for a promissory note must allege such failure or he will not be permitted to present evidence upon that point in the case. Defendant has not so pleaded this defense and the trial court was correct in rejecting it. See note to 13 Am. Dec. 378. This is elementary. 1 Sutherland on Code Pleading, § 386.

[8] Defendant claims that there is no finding that the escrow conditions were complied with. But the court found that the defendant remained in undisturbed possession of the premises as set forth in the bill of sale, and received the registration certificates for the trucks as in the bill of sale referred to. This finding, it is claimed, does not meet the issue of nonperformance of the escrow directions given to the bank. While the finding might have been more artfully drawn we think it sufficient on the point. The defendant is found to have had undisturbed possession of the property, and to have received the registration certificates. It is true the certificates are not in terms found to have been for the truck and the touring car, but for "said trucks," which are, however, also described in the findings as the ones referred to in the bill of sale. The cars are also referred to in a letter attached to the complaint, and the reference is sufficient to identify the machines for which the certificates were received. At least the case should not be reversed for failure to more specifically identify the Overland car in the findings. Code Civ. Proc. 475.

The findings are also attacked because it is not stated therein that the direction to the bank to deliver the notes was given by Mrs. Farrell or Schultz. But even so, in our view the allegation, proof or finding of this direction was not necessary to plaintiff's case for the reason that upon performance of the conditions precedent to the right to delivery, the plaintiff had the right to the delivery of the notes, regardless of whether the formal order for delivery was given or not.

[9] At the expense of some repetition another point must be mentioned. In an attempt to prove the damage above referred to and the nonperformance of the conditions precedent contained in the directions to the escrow-holder, defendant's counsel, upon cross-examination of defendant Schultz, who had been called as a witness for plaintiff, asked him as to the amount of damage sustained by him by reason of the failure to sooner obtain the registration certificates. The court sustained objections to the question. The ruling is attacked upon the theory that the evidence sought by the question would tend to show failure to perform the conditions precedent to the delivery of the notes by the bank to Mrs. Farrell as provided in the bill of sale and escrow directions. Schultz had been permitted to testify that he had never delivered or authorized the delivery of the notes; that he had not consented to their indorsement by Mrs. Farrell to the bank; that the bank had not asked his consent to this indorsement; that neither Mr. Farrell nor Mrs. Farrell had delivered the registration certificates to him, and that he had not waived that condition of the contract; that he ultimately by his own efforts obtained a registration certificate; and that meantime until he obtained the certificates he had not been able to use the truck or Overland car in his business. The question which was asked was directed to the amount of his damage by reason of these facts. The ruling of the court excluding the evidence was correct. In being permitted to cross-examine to the extent of showing the above-recited facts, the scope of cross-examination had been fully covered. The amount of damage sustained by defendant, if any, by reason of the failure of Mrs. Farrell to perform the conditions precedent to the right of delivery of the notes to her, was not material to a showing that she had in these respects failed to perform. The amount of damage sustained or whether he was damaged at all had no bearing on the question whether Mrs. Farrell had actually done or failed to do the things provided in the bill of sale and escrow agreement, as conditions precedent to the delivery of the notes.

The question whether the defendant had been defrauded by the misrepresentations of Farrell as to title to the property sold had no bearing upon the terms of the escrow directions, nor was fraud in this respect pleaded as a defense to the notes. The cross-examination was not unduly curtailed by these rulings.

From the record it appears that the motion for a nonsuit was properly decided.

[10] We cannot see that the court abused its discretion in refusing Schultz permission to amend at a late stage of the trial so as to set up the fraud which he claimed had been practiced upon him in selling him articles to which Farrell had no title, and his claim of damages arising out of this, and out of the delay in securing the registration certificates, for, as said by the trial court in refusing the permission, these matters were at all times within the knowledge of the defendant and also of his counsel. They had had ample time and opportunity to plead them, and the question was one for the trial court, in deciding which it not only cannot be said that it abused its discretion, but it must be admitted that it could hardly be said to have erred at all.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

(49 Cal. App. 515)

KELLER v. GERBER. (Civ. 2214.)

(District Court of Appeal, Third District, California. Oct. 9, 1920. Rehearing Denied Nov. 8, 1920. Hearing Denied by Supreme Court Dec. 6, 1920.)

1. Executors and administrators ⟸228(3)—Claim given to deputy clerk in courtroom held filed in the "office of the clerk of the court."

Claims presented against the estate of a decedent to a deputy county clerk in the courtroom of a department of the superior court are filed "in the office of the clerk of the court," within the meaning of Code Civ. Proc. § 1490, notwithstanding Pol. Code, §§ 4178, 4312, defining the duties of the county clerk, and requiring that he have an office, etc.; every courtroom in which a deputy clerk is assigned being as much a part of the county clerk's office as if the partitions were removed and it was in fact a part of one room.

2. Executors and administrators ⟸228(3½)—Taking of claims from county clerk for presentation to judge not withdrawal.

The taking of claims by the attorney of one who filed claims against an estate for presentation to the judge after their delivery to the county clerk for filing did not constitute such a withdrawal of the claims as to destroy the effect of the previous presentation for filing; the claims having been left with the clerk of the court who had them in his possession until they were taken to the judge.

3. Frauds, statute of ⟸119(2)—Oral agreement to pay for services enforceable, though within statute, where services rendered.

Conceding that a contract of a deceased to pay for services was within the statute, the party performing the services was entitled to recover where there was full performance on his part, as neither law nor equity will permit statute to be used as an instrument of or a shield for fraud.

4. Contracts ⟸230—Promise to pay reasonable value of services implied.

There being no provision in an agreement for the measure of compensation for services, the law implies a promise to pay the reasonable value thereof.

5. Limitation of actions ⟸150(4)—Memorandum of agreement to pay for services held sufficient, though not mentioning rate.

A written memorandum, "And besides I will pay to Mr. K. extra for his services for nursing during the time of my sickness," was a sufficient acknowledgment to take the promise out of the bar of the statute of limitations, though it did not provide for the measure of compensation.

6. Witnesses ⟸211(1)—Testimony of physicians as to value of services rendered deceased by nurse held competent.

In an action against an estate to recover the reasonable value of services rendered the deceased in his lifetime, consisting of nursing during the time of deceased's sickness, testimony of physicians of decedent as to the general character and value of the services rendered by the claimant as nurse was admissible under Code Civ. Proc. § 1881, precluding a physician from being examined "as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient."

7. Appeal and error ⟸1170(7)—No reversal for erroneous admission of testimony resulting in no miscarriage of justice.

Erroneous admission in evidence of testimony that was privileged under Code Civ. Proc. § 1881, subd. 4, would not furnish a sufficient ground for reversal of the judgment, where other witnesses testified substantially to the same facts, in view of Const. art. 6, § 4½, providing that no judgment shall be set aside, unless there was a miscarriage of justice.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Adam Keller against John Gerber, as executor of the last will and testament of Conrad Iser, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

C. W. Baker and R. Platnauer, both of Sacramento, for appellant.

C. E. McLaughlin and White, Miller, Needham & Harber, all of Sacramento, for respondent.

NICOL, Presiding Judge pro tem. The plaintiff and defendant are executors of the last will and testament of Conrad Iser, deceased. The said Conrad Iser died on the 19th day of January, 1917. His will was admitted to probate and letters testamentary issued to the said Adam Keller and John Gerber on February 6, 1917. The estate exceeds in value the sum of $10,000, and the first publication of notice to creditors was

made on February 7, 1917. Two claims against the estate, the latest of which was to all intents and purposes an amendment of the first, were presented by plaintiff, and neither was allowed nor rejected within the time allowed by law. A short time after the period prescribed for allowance or rejection of claims had expired this action was commenced. The claims were for "work, labor, and services rendered by claimant in caring for and nursing Conrad Iser continuously during the whole period of time commencing October 20, 1913, and ending January 19, 1917, the date of the death of Conrad Iser, a period of 169 weeks," and other services rendered in caring for the business of deceased. The court did not allow anything for services rendered in caring for the business of the deceased, but rendered judgment in favor of plaintiff for the sum of $5,070 for services rendered by plaintiff in caring for and nursing deceased for the period above stated.

It is claimed by the appellant that the claims were not presented or filed within the time prescribed by law. The essence of the argument on this contention is that a claim filed with a deputy county clerk in the courtroom of a department of the superior court is not filed with the county clerk. In other words, it is claimed that no claim is filed with the county clerk until it is presented in the main office of the county clerk. It appears from the evidence that on September 29, 1917, Clinton L. Harber, one of the attorneys for plaintiff, handed to the deputy county clerk at his desk in the courtroom of department 3, of the superior court of Sacramento county, the first claim, and requested him to file the same, at which time he requested the deputy clerk, when he handed the claim to the judge, to ask the judge not to take any action on it until after he had an opportunity of talking with the judge; that he handed the amended claim to the said deputy county clerk at his desk in said courtroom on November 14, 1917, and requested him to file it, and also told him, when he presented it to the judge, to call the judge's attention to the fact that he did not want him to take any action on it without first giving claimant an opportunity to be heard.

[1] The presenting of these claims to the deputy county clerk in the manner as above stated was a filing of the claims. Section 1490 of the Code of Civil Procedure provides that claims must be filed "in the office of the clerk of the court from which the letters were issued." In our opinion each department of the superior court is necessarily a court, and the clerk of each department is the clerk of that court. There is nothing in sections 4178 and 4312 of the Political Code that militates against this conclusion. These sections, defining the duties of the county clerk, require that he have an office at the county seat and that in such office during the hours from 9 o'clock a. m. until 5 o'clock p. m. of each day in the year, except Sundays and holidays, there shall be present at least one person qualified and prepared to transact the business that may properly come into said office. But neither of said sections supports the contention of appellant that the main central office, where the permanent records are kept, is the sole and exclusive office of the county clerk. In our opinion every courtroom in which a deputy county clerk is assigned under the law is as much a part of the county clerk's office as if the partitions were removed and it was in fact a part of one room.

The appellant cites the following California cases: Estate of Sbarboro, 63 Cal. 5; Tregambo v. Comanche, 57 Cal. 501; Edwards v. Grand, 121 Cal. 254, 53 Pac. 796; Hoyt v. Stark, 134 Cal. 178, 66 Pac. 223, 86 Am. St. Rep. 246; Rauer v. Standley, 3 Cal. App. 44, 84 Pac. 214. But none of these cases in our opinion supports the appellant in this contention. In Estate of Sbarboro, 63 Cal. 5, the petition for revocation of probate of will was delivered to the clerk of the court for filing about 9 o'clock a. m. on the 3d day of December, 1879; but the decree of the court admitting the will to probate had been entered on the 2d day of December, 1878, and the year within which the probate could be contested had run at midnight on December 2, 1879. The petition, before it was filed or presented to the clerk for filing, had been presented to the judge of the court at his private residence on December 2, 1879, for an order for the issuance of a citation upon it, and for the purpose of examining it, so as to determine whether the petitioners were entitled to the order. The judge retained the petition in his possession until the morning of the 3d day of December, 1879, when he took it to the office of the clerk of the court, and about 9 o'clock a. m. on that day delivered it, with his order for the issuance of a citation thereon. It was held that presenting the petition to the judge was not filing it in court, nor the equivalent of filing it; that it must be filed with the clerk, and, if not so filed prior to the expiration of the year, the decree becomes conclusive and absolute.

In Tregambo v. Comanche, 57 Cal. 501, the attorneys for the defendant, on the 20th day of April, 1879, forwarded to the clerk of the court, to be filed, certain demurrers to the complaint. The demurrers were regularly delivered to the clerk of the court on the 29th day of April, 1879. He received them without demanding his fees for filing them. But on May 1, 1879, defendant's attorneys received a letter from the clerk demanding his fees for filing the demurrers. They left Bodie for the county seat on May 2d, and arrived there the same day, whereupon they tendered to the clerk his fees, which he refused to receive, because he was then in the act of entering the defendant's default for not answering. Upon these facts the Supreme Court held that the demurrers were

on file in contemplation of law and that the default should have been set aside.

In Edwards v. Grand, 121 Cal. 254, 53 Pac. 796, the defendant Gerard Grand executed a mortgage to the plaintiff on November 22, 1892, and on the same day his wife made a declaration of homestead upon a portion of the mortgaged premises. The foreclosure of the mortgage was resisted by the wife upon the ground that, to the extent that the mortgaged premises are covered by the declaration of homestead, the mortgage was invalid, for the reason that she did not unite in its execution. The mortgage was taken to the office of the county recorder for record a few minutes after 5 o'clock p. m. on the day it was executed, and, as the statute only required the office to be kept open until 5 o'clock, the mortgage was delivered to the recorder, with the request that he would record it the first thing on opening his office the next morning. On the next morning, a little before 9 o'clock, while the recorder was on his way to the office, the declaration of homestead was handed to him, with the request that he would record it the first thing after the office was open, and when he reached his office, finding that the two instruments affected the same premises, he indorsed each of them as follows: "Filed for record November 23, 1892, at 9 o'clock a. m." The court said:

"An instrument is filed for record when it is deposited in the proper office, with a person in charge thereof, with directions to record it. * * * Delivering an instrument to the proper officer, at a place other than the office where it is required to be filed, is not sufficient, even though the officer indorses it as properly filed."

And it was held that the mortgage, which was presented at the recorder's office after 5 o'clock p. m., took precedence as to time of recordation over that of the declaration of homestead which was delivered to the recorder upon the street the following morning.

In Hoyt v. Stark, 134 Cal. 178, 66 Pac. 223, 86 Am. St. Rep. 246, the attorney for appellant on the last day allowed by law to file an undertaking on appeal, went to the office of the county clerk after 5 o'clock p. m. Finding the office closed, he went to a social club in the city of San Jose, where he found one of the deputy county clerks. To him he explained the circumstances. The deputy took the undertaking and indorsed it as filed upon that day and date. At 9:30 a. m. upon the following day, respondent's attorney called at the clerk's office and found no record of the filing of the undertaking. Thereafter the deputy clerk to whom had been intrusted the undertaking arrived at the office and delivered the bond to a fellow deputy, who placed it in its proper receptacle and made in the proper books the entry of its filing. It was held by the Supreme Court that the filing of the undertaking was not in time.

In Rauer, etc., Co. v. Standley, 3 Cal. App. 44, 84 Pac. 214, December 1, 1905, was the last day upon which an undertaking on appeal could be filed, and no such undertaking was filed until the 5th day of December, 1905, which was too late unless the time had been extended. Attached to the undertaking was a paper signed by the judge of the superior court and dated December 1, 1905, granting to appellant to and including December 6, 1905, in which to file its undertaking, but it was held by the court that any order extending the time would be unavailing unless presented for filing at the office of the clerk before the time for filing the undertaking on appeal had expired.

[2] The taking of the claims by the attorney for plaintiff for presentation to the judge after their delivery to the deputy county clerk for filing did not constitute such a withdrawal of the claims as to destroy the effect of such previous presentation for filing. In the case of Wilkinson v. Elliott, 43 Kan. 590, 23 Pac. 614, 19 Am. St. Rep. 158, the attorney for plaintiff on May 21, 1883, presented a petition praying for a divorce to the clerk of the district court. He did not ask for, or obtain, the issuance of summons. The clerk placed his file marks on the petition, when it was immediately thereafter taken by counsel for plaintiff from the possession of the clerk, who retained it until May 25, 1883. It was held by the Supreme Court of Kansas that under these facts there was not a sufficient filing. That when a party temporarily hands a petition to the clerk of the district court, in order that he may place his file marks thereon, and not for the purpose of allowing it to remain in official custody as a permanent record, and he does not ask for, or obtain, the issuance of summons, but holds the petition in his own possession away from the record, the action is not pending, within the meaning of the statute on lis pendens.

In the case at bar the claims were left with the clerk of the court, who had them in his possession until they were taken to the judge of the superior court.

Complaint is made by appellant that the claims fall within the statute of frauds and that the writing received in evidence is not a sufficient memorandum within that statute. It is true that it is alleged in the claims that the said Conrad Iser promised to pay the plaintiff for the services upon his death, but neither of the claims is based on this promise. The nonperformance of the contract is expressly alleged and the claims are founded on a quantum meruit. The case is one to establish a claim for the reasonable value of services.

[3] Even conceding that the contract is within the statute of frauds, and that the services were rendered under an invalid oral contract, respondent was still entitled to recover, by reason of full performance on his part, as neither the law nor equity will per-

mit the statute of frauds to be used as an instrument of or a shield for fraud. In Arguello v. Edinger, 10 Cal. 150, 158, Justice Field, speaking for the court, said:

"So, where a verbal contract had been so far performed, by one of the parties, relying upon the good faith of the other, that he could have no adequate remedy except by complete performance, courts of equity decreed its execution, upon the ground that the refusal to execute the same under such circumstances was a fraud, and that a statute having for its object the prevention of fraud could not be used as an instrument for its perpetration."

In Seymour v. Oelrichs, 156 Cal. 782, 794, 106 Pac. 88, 94 (134 Am. St. Rep. 154), it is said:

"The right of courts of equity to hold a person estopped to assert the statute of frauds, where such assertion would amount to practicing a fraud, cannot be disputed. It is based upon the principle, 'thoroughly established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting, or aiding the party who relies upon it in the perpetration of a fraud or in the consummation of a fraudulent scheme.' 2 Pomeroy's Equity Jurisprudence, § 921. It was said in Glass v. Hulbert, 102 Mass. 24, 35 (3 Am. Rep. 418): 'The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its enforcement, after the other party has been induced to make expenditures, or a change of situation in regard to the subject matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds.' This statement has been accepted as setting forth a plain and satisfactory ground for equitable jurisdiction, together with a clear indication of the proper limitation of its exercise. See 5 Browne on Statute of Frauds, § 457a. In the section last cited, Mr. Browne says: 'A plaintiff * * * must be able to show clearly * * * not only the terms of the contract, but also such acts and conduct of the defendant as the court would hold to amount to a representation that he proposed to stand by his agreement and not avail himself of the statute to escape its performance, and also that the plaintiff, in reliance on this representation, has proceeded, either in performance or pursuance of his contract, to so far alter his position as to incur an unjust and unconscientious injury and loss, in case the defendant is permitted after all to rely upon the statutory defense. After proof of this, the court may well be justified in using its undoubted power, in cases of equitable estoppel, to refuse to listen to a defendant seeking to deny the truth of his own representations previously made.' We can see no good reason for limiting the operation of this equitable doctrine to any particular class of contracts included within the statute of frauds, provided always the essential elements of an estoppel are present, or for saying otherwise than as is intimated by Mr. Pomeroy in the words already quoted, viz. that it applies 'in every transaction where the statute is invoked.' It is a general equitable principle, a part of the broader equitable doctrine stated in Dickerson v. Colgrove, 100 U. S. 580, and quoted therefrom in Carpy v. Dowdell, 115 Cal. 687 (47 Pac. 695), as follows: 'The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both.'"

[4] But the written memorandum above referred to is in our opinion a valid and sufficient written contract to pay the reasonable value of the services rendered by the plaintiff. It is an express written promise by Conrad Iser to pay Adam Keller for such services rendered in nursing him during his illness which ended with his death, and no oral evidence is necessary to complete the contract. There being no provision for the measure of compensation, the law implies the promise to pay the reasonable value thereof.

[5] This written memorandum, the court found, was signed by Conrad Iser on or about the 7th day of January, 1917, and among other things it provides, as follows:

"And besides I will pay to Mr. Adam Keller extra for his services for nursing during the time of my sickness."

This is a sufficient acknowledgment of his indebtedness to plaintiff, and sufficient to take plaintiff's claim out of the bar of the statute of limitations.

[6] Appellant contends that the testimony of Dr. W. A. Briggs and Dr. George A. Foster was privileged, and hence inadmissible, under section 1881, subdivision 4, of the Code of Civil Procedure, which provides that:

"A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient."

We do not think that the testimony of these physicians was inadmissible under the said provision of the statute. Their testimony was simply as to the general character and value of the services rendered by the plaintiff as nurse, and not as to any information acquired in attending the patient which was necessary to enable them to prescribe or act for the patient, and under section 1881 of the Code of Civil Procedure a physician is precluded from being examined as a witness only—

"as to information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient." Estate of Black, 132 Cal. 392, 396, 64 Pac. 695; Harris v. Zanone, 93 Cal. 59, 71, 28 Pac. 845; In re Redfield, 116 Cal. 644, 48 Pac. 794.

[7] But, conceding that this testimony was privileged under section 1881, subdivision 4, of the Code of Civil Procedure, it would not furnish a sufficient ground for a reversal of the judgment, as it was harmless for the reason that other witnesses testified substantially to the same facts, and under section 4½ of article 6 of the Constitution:

"No judgment shall be set aside, or new trial granted, in any case on the ground * * * of the improper admission or rejection of evidence * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

In view of the foregoing, we deem it unnecessary to pass upon the other questions argued in the briefs.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

49 Cal. App. 513

Ex parte MAYEN. (Cr. 742.)

(District Court of Appeal, Second District, Division 2, California. Oct. 11, 1920.)

1. Criminal law ⟸1073—Order revoking stay of execution tantamount to revocation of certificate of probable cause for appeal.

Order of the trial judge revoking stay of execution of sentence on defendant, on account of defendant's attempt to escape from the county jail, was tantamount to revocation of the judge's previously issued certificate of probable cause for appeal; the principal, if not the sole, purpose of such certificate being to stay execution of judgment of conviction pending appeal.

2. Criminal law ⟸1073—Justices of District Courts of Appeal may grant certificate of probable cause.

In view of Const. art. 6, § 4, in any case where it is proper to grant certificate of probable cause for appeal, any justice of the District Courts of Appeal may grant the certificate, though Pen. Code, § 1243, does not expressly confer on them power to issue the certificate; the section not having been amended since the creation of such courts.

3. Criminal law ⟸1084—Stay of execution prevents defendant from being treated as convict undergoing punishment.

The effect of suspension of judgment of conviction, as by stay of execution granted by a District Court of Appeal, is that during the time of the judgment's suspension defendant cannot be treated as a convict undergoing punishment for his crime, nor as one subject to imprisonment in the state prison, even for the purpose of detention, as the law regulating state prisons provides only for the imprisonment therein of convicts actually undergoing punishment for their crimes, and one convicted of an offense after stay of execution must remain in the custody of the sheriff and be confined in the county jail, within Pen. Code, § 1597, subd. 3.

4. Habeas corpus ⟸109—Court empowered to deliver petitioner to custody of person entitled thereto by law.

Where petitioner in habeas corpus is held by one person when another is entitled to his custody, the court is expressly empowered by Pen. Code, § 1493, to deliver him to the custody of the person entitled thereto by law.

5. Criminal law ⟸1012—Order revoking certificate of probable cause not "appealable order"; "substantial rights."

The trial court's order revoking, on account of defendant's attempted escape, certificate of probable cause for appeal from judgment of conviction previously granted by him, is not an "appealable order," within Pen. Code, § 1237, subd. 3, not being an order affecting defendant's "substantial rights"; defendant being afforded an adequate and more expeditious remedy by section 1243, under which he may apply to a justice of the District Court of Appeal for certificate of probable cause. Where an order adverse to defendant is made, and the code affords him a more effective and expeditious remedy than by appeal, the order is not one affecting his "substantial rights."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Substantial Right.]

6. Criminal law ⟸1073—Defendant could apply to District Court of Appeal for certificate of probable cause after trial court's revocation of own certificate.

Where defendant was granted certificate of probable cause for appeal by the trial court, but such certificate was revoked by the court for defendant's attempt to escape, the remedy provided by Pen. Code, § 1243, giving the right to apply to a justice of the District Court of Appeal for certificate of probable cause, was available to defendant.

7. Criminal law ⟸1084—"Certificate of probable cause" is equivalent to order staying execution pending appeal.

A "certificate of probable cause" in its effects is substantially the equivalent of order staying execution pending appeal from judgment of conviction; its filing with the clerk of the trial court, by whomsoever it may have been granted, the trial court itself or a justice of the District Court of Appeal, operating as a supersedeas.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Certificate of Probable Cause.]

8. Criminal law ⟸1084—Appeal from order revoking certificate of probable cause would not stay execution.

Defendant's appeal from order of the trial court revoking his previously issued certificate

of probable cause for appeal (if such order were appealable at all) would not, being an appeal from an order made after final judgment, stay execution of such judgment.

9. Habeas corpus ⊂⊃3—Mandamus held not to exclude remedy by habeas corpus; "commitment by competent authority."

Any commitment to the county jail, or to the custody of the sheriff, that the District Court of Appeal may make, is a "commitment by competent authority," within the meaning of Pen. Code, § 1611, obligating the sheriff to receive all persons committed to jail by such authority, so that mandamus, to which the sheriff can be made a party, is not the only remedy for defendant, improperly incarcerated in the state's prison after stay of execution of judgment of conviction by certificate of probable cause for appeal issued by a justice of the District Court of Appeal, after revocation by the trial court of such certificate previously issued by him, habeas corpus being available to defendant.

10. Criminal law ⊂⊃1073—Certificate of probable cause may be issued by trial court or District Court of Appeal.

The trial court and the several justices of the District Court of Appeal have concurrent and co-ordinate jurisdiction to issue a certificate of probable cause for appeal, and grant stay, each irrespective of the action of the other.

11. Habeas corpus ⊂⊃48—Where petitioner brought into court in response to mandate, detention will be inquired into.

Even though the District Court of Appeal had no power to issue writ of habeas corpus to the warden of the state prison at San Quentin, for the reason the writ may not be issued outside the court's particular appellate district, where the warden brings petitioner into such district, and produces him in court, the cause of the detention will be inquired into, irrespective of the jurisdictional question.

In the matter of the application of Fred H. Mayen for a writ of habeas corpus, to be directed to the warden of San Quentin Prison, to secure petitioner's remand to the custody of the sheriff of Los Angeles county during pendency of stay of execution. Writ granted.

John S. Cooper, of Los Angeles, and George H. Shreve, of San Diego, for petitioner.

U. S. Webb, Atty. Gen., and Arthur Keetch and Thomas A. Wood, both of Los Angeles, for respondent.

Thomas Lee Woolwine, of Los Angeles, W. J. Clark, and W. C. Doran, of Los Angeles, amici curiæ.

PER CURIAM. By this habeas corpus proceeding petitioner seeks an order directing that he be taken from the custody of the warden of the state prison at San Quentin and remanded to the custody of the sheriff of Los Angeles county.

[1] Petitioner, who had been convicted of a felony in the superior court for Los Angeles county and by that court sentenced to the state prison at San Quentin, appealed to this court from the judgment of conviction. Subsequently, the judge of the trial court, pursuant to section 1243 of the Penal Code, issued a certificate of probable cause, certifying that, in his opinion, there is probable cause for the appeal. Thereafter, upon a showing that petitioner had attempted to escape from the county jail, the trial judge, upon motion of the district attorney, ordered that his stay of execution of the sentence be vacated, and directed the clerk forthwith to deliver to the sheriff a commitment committing petitioner to the state prison. In its effect upon petitioner's rights, the order of the trial judge revoking the stay of execution was tantamount to a revocation of his previously issued certificate of probable cause; for the principal, if not the sole, purpose of such certificate is to stay execution of the judgment of conviction pending appeal.

The stay of execution having thus been revoked by the trial judge, and the efficacy of his previously issued certificate of probable cause having thereby been destroyed, application was made here for an order staying execution of the judgment of conviction until such time as the record on appeal from the judgment could be prepared and transmitted to this court, and application made to a justice of this court for a certificate of probable cause. The sheriff, in the meantime, had taken petitioner to the state prison at San Quentin under the judgment and commitment of the superior court. Petitioner was delivered by that officer into the custody of the warden of the state prison, where he remained until September 23, 1920, when the warden, in obedience to the writ of habeas corpus issued in this proceeding, produced petitioner before this court.

Shortly after the trial judge's revocation of his certificate of probable cause and order staying execution of the judgment, this court heard an application for a stay of execution, and on September 18, 1920, ordered that execution of the judgment of conviction be stayed until such time as the record on appeal from the judgment could be prepared and transmitted to the clerk of this court. See People v. Mayen, 193 Pac. 173. This stay of execution was granted by us to enable petitioner to exercise his right under section 1243 to apply to a justice of this court for a certificate of probable cause. The order was made upon the authority of such cases as People v. Lane, 96 Cal. 596, 31 Pac. 580, In re Adams, 81 Cal. 163, 22 Pac. 547, People v. Clark, 125 Cal. 251, 57 Pac. 986, and People v. Gallanar, 144 Cal. 656, 79 Pac. 378. When we made the order staying execution of the sentence, we further ordered that, pending the stay, petitioner be remanded to the custody of the sheriff.

[2] At the argument in this habeas corpus proceeding, counsel on both sides, correctly, as we think, assumed that, in any case where it is proper to grant a certificate of probable cause, any justice of this court may grant the certificate, notwithstanding section 1243 does not purport, in express terms, to confer upon the justices of the district courts of appeal power to issue the certificate. That Code section has not been amended since the creation of these appellate courts. It reads:

"An appeal to the Supreme Court * * * stays the execution of the judgment * * * upon filing * * * a certificate of the judge [of the trial court] * * * or of a justice of the Supreme Court," etc.

Though the letter of the section does not confer upon the justices of the several District Courts of Appeal authority to issue the certificate of probable cause, nor, indeed, authorize issuance of the certificate by a judge or justice of any court, save in those comparatively few cases where an appeal from the judgment of conviction may now be taken to the Supreme Court, nevertheless, the constitutional amendment whereby the District Courts of Appeal were created expressly provides that—

"All statutes now in force allowing, providing for, or regulating appeals to the Supreme Court shall apply to appeals to the District Courts of Appeal so far as such statutes are not inconsistent with this article and until the Legislature shall otherwise provide." Section 4, art. 6, Const.

We have no doubt that, in all cases where the appeal has been regularly taken to a District Court of Appeal, the effect of this constitutional provision is to confer upon the justices of such court the same power to issue certificates of probable cause that formerly was vested in the justices of the Supreme Court in all criminal cases where appeals were taken to that court from judgments of conviction. This conclusion accords with a uniform practice that, so far as we are aware, has been acquiesced in for many years by bench and bar throughout the state.

[3] The effect of our order staying execution of the sentence was to make illegal petitioner's detention in the state prison during such time as the stay of execution may continue in force. A stay of execution of a judgment of conviction suspends the judgment and arrests all proceedings thereon during the continuance of the stay. The effect of the suspension of the judgment is that, during the time of the judgment's suspension, the defendant cannot be treated as a convict undergoing punishment for his crime, nor as one who is subject to imprisonment in the state prison—even for the purpose of detention. We know of no law under which the warden of the state prison can be compensated for the keep or maintenance of persons not actually serving time as convicts, undergoing all the punishment, including hard labor, that the law says shall be meted out to persons convicted of felony. The whole scope of the law regulating such prisons must be held to provide only for the imprisonment therein of convicts actually undergoing punishment for their crimes. Ex parte Arras, 78 Cal. 304, 20 Pac. 683. Therefore, pending our stay of execution of the judgment of conviction, petitioner should be remanded to and remain in the custody of the sheriff (Ex parte Rodley, 132 Cal. 40, 64 Pac. 91); and the sheriff must keep his prisoner in the usual place of confinement—the county jail. During the stay of execution, and while he is in the custody of the sheriff, petitioner is a person confined "by other authority of law," within the meaning of subdivision 3 of section 1597 of the Penal Code. In Ex parte Arras, supra, the court said:

"It is provided generally that all persons committed by authority of law shall be confined in the common jails in the several counties. (Pen. Code, § 1597.)"

The detention of petitioner in any other place than the county jail of Los Angeles county, during the life of the order heretofore made by us staying execution of the judgment, is therefore unwarranted and unlawful.

[4] Where the petitioner in habeas corpus is held by one person, when another is entitled to his custody, the court is expressly empowered to deliver him to the custody of the person who by law is entitled thereto. Pen. Code, § 1493; Ex parte McGuire, 135 Cal. 339, 67 Pac. 327, 87 Am. St. Rep. 105. Because the county jail is the only lawful place for petitioner's confinement during our stay of execution of the judgment of conviction, and the sheriff is the only person lawfully entitled to his custody during that time, it will be our duty to deliver him from his unlawful imprisonment in the state prison—unlawful while our stay of execution is in force—and remand him to the custody of the sheriff, to be by that officer kept in confinement in the county jail, unless we shall conclude that there is merit in one or more of the objections raised by the district attorney, who appears here, through his deputies, as amicus curiæ. These objections we shall now consider.

1. It is claimed by the district attorney that, because a certificate of probable cause was issued by the trial judge, petitioner's only remedy is an appeal from that judge's order revoking his previously issued certificate and stay of execution, and that therefore this court was without authority to order a stay of execution of the judgment, or, at any rate, that there was no occasion for our order staying execution. The district attorney's argument, as we understand it, runs substantially as follows: The order of the trial judge revoking the certificate of proba-

ble cause that previously had been issued by him was an order affecting the substantial rights of the defendant, made after judgment, and therefore is an appealable order, under subdivision 3 of section 1237 of the Penal Code; an appeal from such order stays enforcement of the judgment; therefore, such appeal affords the only proper remedy, where, as here, the trial judge, having issued a certificate of probable cause and granted a stay, subsequently revokes such certificate and stay of execution.

[5] This argument is based upon two erroneous assumptions. In the first place, we do not think that the order revoking the certificate of probable cause is an appealable order. We do not think it is an order affecting petitioner's "substantial rights," within the meaning of subdivision 3 of section 1237, under which only those orders made after final judgment are appealable that affect the defendant's "substantial rights." The order revoking the certificate of probable cause did not affect petitioner's "substantial rights," for the reason that he is afforded an adequate and far more expeditious remedy by another Code section (section 1243), under which he is permitted to apply to a justice of this court for a certificate of probable cause. It seems to be the settled law of this state that where an order adverse to the defendant in a criminal action is made, and the Code affords him some remedy therefor that is more effective and expeditious than an appeal would be, such order is not one affecting his "substantial rights," within the meaning of subdivision 3 of section 1237, which declares that "an appeal may be taken by the defendant * * * (3) from any order made after judgment, affecting the substantial rights of the party." Thus, in People v. Jackson, 138 Cal. 32, 70 Pac. 918, it was held that the refusal of the trial judge to settle a bill of exceptions, though it is an order made after final judgment, is not an order affecting the "substantial rights" of the defendant, for the reason that the remedy specifically provided by section 1174 of the Penal Code is more effective and expeditious than an appeal from the order refusing to settle the bill of exceptions would be.

[6, 7] That the remedy provided by section 1243, the right to apply to a justice of this court for a certificate of probable cause, was available to petitioner, admits of no doubt. The revocation of a certificate of probable cause that has previously been granted leaves the case in the same situation it would have been, had the certificate been refused in the first instance. Where the certificate is refused by the trial judge in the first instance, the defendant is permitted to make application to a justice of this court for a certificate of probable cause, even though he may have commenced serving his sentence. Pen. Code, § 1245. There is no possible reason, perceivable by us, why the right to apply to a justice of this court for a certificate of probable cause should be denied a defendant in a criminal action merely because the trial judge, having granted the certificate on application to him therefor, later sees fit to revoke it. Section 1243 does not say that application may be made to a justice of this court for a certificate of probable cause when and only when the trial judge has refused the certificate in the first instance. The language of the section is that in all cases, other than capital cases, an appeal from the judgment of conviction stays execution of the judgment upon filing with the clerk "a certificate of the judge of the trial court, or of a justice of the Supreme Court," certifying that there is probable cause for the appeal. No limitation is placed upon the authority of a justice of the appellate court to issue the certificate if, in his opinion, it should issue.

With respect to the issuance of the certificate, the jurisdiction of a justice of the appellate court is co-ordinate with that of the trial judge. It at least is not inferior thereto. Of course, in practice, no justice of this court would consider an application for a certificate of probable cause until the applicant had first invoked the authority of the trial judge to issue the certificate. Any other practice would involve too serious and too frequent interruption of the business of this court. But this does not militate against the fact that the authority of the trial judge and that of a justice of this court to issue the certificate of probable cause are concurrent and co-ordinate. Each, in a qualified sense, exercises original jurisdiction, though the jurisdiction to grant the certificate, when exercised, is exercised in furtherance of this court's appellate jurisdiction. There is, we think, no room to doubt the authority of a justice of this court, under section 1243, to grant a certificate of probable cause after the issuance and subsequent revocation of a certificate of probable cause by the trial judge.

A certificate of probable cause, in all its effects, is substantially the equivalent of an order staying execution pending an appeal from a judgment of conviction—nothing more and nothing less. Its filing with the clerk, by whomsoever it may have been granted, operates as a supersedeas. And such stay or supersedeas may be granted by a justice of this court whenever the trial judge refuses to stay execution of the sentence, whether such refusal to stay execution be brought about by the trial judge's refusal to issue the certificate of probable cause in the first instance or by his revocation of a certificate or a stay of execution previously granted by him. This being so, it follows that, upon the the trial judge's revocation of the certificate of probable cause previously issued by him, section 1243 afforded petitioner an effective and expeditious remedy—a remedy far more effective and expeditious than any appeal from the order of revocation would be.

Wherefore we conclude that the order of revocation was not one affecting petitioner's "substantial rights," within the meaning of subdivision 3 of section 1237, and that therefore it was not an appealable order.

[8] The other erroneous assumption in the point raised by the district attorney that now is being considered by us is the assumption that, on an appeal from an order of the trial judge revoking his previously issued certificate of probable cause—assuming such order to be appealable—there can be a stay of execution of the judgment of conviction. With the exception of section 1243 of the Penal Code, we know of no statutory provision permitting a stay of execution in a criminal case. If there be any, it has not been called to our attention. Section 1243 relates solely to an appeal from the "judgment of conviction." An appeal, therefore, from an order made after final judgment, would not stay execution of the judgment. See Carit v. Williams, 67 Cal. 580, 8 Pac. 93; Credits Com. Co. v. Superior Court, 140 Cal. 82, 73 Pac. 1009.

For the foregoing reasons, we are satisfied that an application to this court, or to a justice thereof, for a stay of execution pending such time as petitioner's application for a certificate of probable cause can be presented and heard here, is the only remedy available to him. His right, under section 1243, to apply to a justice of this court for a certificate of probable cause, and his right to a stay of execution of the judgment until such time as such application for the certificate can be presented, heard, and determined, are rights that are inseparably incident to his right to appeal from the judgment of conviction, and should not be denied him simply because the trial judge, after having once issued a certificate of probable cause, has subsequently deemed it his duty to revoke it.

[9] 2. It is claimed that if petitioner is entitled to be taken from the state prison and remanded to the custody of the sheriff, his sole remedy is by mandamus against the sheriff. The basis for this contention is the claim that only by a proceeding to which the sheriff is a party can that officer be effectively directed to take the petitioner into his custody. This argument ignores the fact that the sheriff must obey all lawful orders of this court (subdivision 4, § 4157, Pol. Code), and that he must receive all persons committed to jail by competent authority (section 1611, Pen. Code). By the provision of the Political Code just referred to (subdivision 4, § 4157) it is provided that "the sheriff must * * * obey all lawful orders and directions of all courts held within his county," and by the Penal Code section last quoted (section 1611) it is specifically provided that "the sheriff must receive all persons committed to jail by competent authority." For the reasons stated supra, we have the power, and it is our duty, under section 1493 of the Penal Code, to order petitioner taken from the custody of the warden and committed to that of the sheriff until such time as a justice of this court can hear and pass upon his application for a certificate of probable cause.

Any commitment to the county jail, or to the custody of the sheriff, that this court may make, is a commitment by "competent authority," within the meaning of section 1611. County of Sonoma v. Santa Rosa, 102 Cal. 426, 36 Pac. 810. The sheriff has no authority to sit in judgment and determine whether this court has exceeded its jurisdiction or not, but must obey any lawful order that we may make remanding petitioner to his custody, even though that officer be not a party to this proceeding. County of Sonoma v. Santa Rosa, supra. Failure on the part of the sheriff to obey any order that we may make committing petitioner to his custody for detention in the county jail until such time as a justice of this court may hear and determine an application for a certificate of probable cause would subject that officer to the penalties provided by law for a disobedience of this court's lawful orders. The sheriff is just as much bound to obey any order that may be made in this proceeding directing him to take petitioner into his custody as he would be to obey any final order that might be made in a mandamus proceeding against him. It follows, therefore, that there is no basis for the claim that petitioner's only proper remedy is mandamus. It may not be amiss to say in this connection that we have no reason whatever to doubt the sheriff's loyalty to his oath of office, or to surmise that he will not give ready and instant obedience to any order that may be made by this court in this proceeding.

[10] 3. It is said that every intendment is in favor of the jurisdiction of the trial judge to revoke his certificate of probable cause, and that, upon this habeas corpus proceeding, this court is limited to an inquiry into the trial judge's jurisdiction to make the order revoking his certificate of probable cause. This argument proceeds upon an utter misconception of the ground for our authority to stay execution of the judgment of conviction, pending an application to a justice of this court for a certificate of probable cause, and thereby make petitioner's confinement in the state prison illegal pending the stay of execution. It may be conceded that the trial judge's revocation of the certificate of probable cause, whether for a sufficient or insufficient reason, was well within his jurisdiction, and therefore not subject to collateral attack in this proceeding. But, even so, his revocation of his certificate of probable cause, upon whatever ground made, like a refusal by a trial judge in the first instance to issue a certificate of probable cause, does not deprive the defendant in a criminal action of his right to invoke the jurisdiction of a justice of this court to issue a certificate of probable cause. To enable the defendant

in a criminal action to exercise his right to make such application to a justice of this court, it is the duty of the trial judge to stay execution of the judgment until application can be made to and determined by a justice of this court. And if, for any reason whatever, the trial judge refuses to issue the certificate of probable cause, or revokes a certificate previously granted by him, and refuses to grant a stay of execution of the judgment until application to a justice of this court to grant a certificate of probable cause can be presented and heard, then, though the trial judge's refusal to issue the certificate, or his revocation thereof, and his refusal to grant the stay, are undoubtedly within his jurisdiction, this court, nevertheless, or a justice thereof may grant such stay until defendant's application for the certificate can be presented to and passed upon by a justice of this court. The judge of the trial court and the several justices of this court have original, concurrent, and co-ordinate jurisdiction to issue the certificate and grant the stay; and a refusal on the part of the trial judge to issue the certificate or to grant the stay is no bar to an exercise of like jurisdiction by a justice of this court and the issuance by him of a certificate of probable cause or the grant by him of a stay of execution of the judgment until such time as he can hear and pass upon an application for the certificate. The exercise of such jurisdiction is an exercise of a part of our appellate jurisdiction. People v. Gallanar, supra; Matter of Adams, supra; People v. Clark, supra; People v. Lane, supra.

For these reasons, we think it clear that the refusal of the trial judge, in the exercise of his unquestionable jurisdiction, to issue the certificate, or his revocation of a certificate already issued by him, does not oust a justice of this court of his jurisdiction and authority to issue the certificate, if, in his opinion, there is probable cause for the appeal. Petitioner's right to an order in this habeas corpus proceeding, directing that he be taken from the custody of the warden of the state prison and committing him to the custody of the sheriff, does not require us to hold that the trial judge was without jurisdiction to revoke his certificate of probable cause. The question before us is: What was the effect of our order staying execution of the judgment of conviction? Did it make petitioner's further confinement in the state prison unlawful during the life of the stay? What we are concerned with here is the validity of our order, heretofore made, staying execution of the judgment of conviction. If that order was within our jurisdiction, and we are satisfied it was, then the only proper place for petitioner's confinement during the continuance of the stay is the county jail at Los Angeles, and we have the power, in this proceeding, to order that he be kept there and not elsewhere.

[11] 4. Finally, it is contended that this court had no power to issue the writ of habeas corpus to the warden of the state prison at San Quentin for the reason that the writ, so it is claimed, may not be issued outside of this appellate district. In this connection reference may be made to Older v. Superior Court, 10 Cal. App. 564, 102 Pac. 829, and the decision of the Supreme Court in the same case, 157 Cal. 773, 109 Pac. 478. Section 4, article 6, of the Constitution contains this provision:

"The said courts [the District Courts of Appeal] shall also have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all other writs necessary or proper to the complete exercise of their appellate jurisdiction. Each of the justices thereof shall have the power to issue writs of habeas corpus to any part of his appellate district."

In the instant case the writ was issued, not by one justice of the court, but by the court itself. The above-quoted language of the Constitution affords ground for the contention that the limitation upon the right to issue the writ beyond the territorial limits of our appellate jurisdiction is confined to those cases where the writ is issued by a justice of the court and has no application where the writ is issued by the court itself. As was said by the author of the Supreme Court's opinion in the Older Case:

"* * * The language of section 4 of article VI of the Constitution is very general and it may be urged with much force that the words 'necessary or proper to the complete exercise of their appellate jurisdiction' modify, not the words 'mandamus, certiorari, prohibition, or habeas corpus' but refer exclusively to 'other writs.' This interpretation would give a district court of appeal jurisdiction to issue to any part of the state either of the four writs mentioned by name, but would limit its power to those designated as 'other writs.'" 157 Cal. 773, 109 Pac. 479.

However, it will not be necessary to determine whether this court had jurisdiction in this proceeding to issue the writ beyond the territorial limits of its appellate jurisdiction; for, even if it be assumed that the issuance of the writ beyond those limits was unauthorized, nevertheless, the writ did issue, and the warden, to whom it was directed, in obedience thereto, has brought petitioner into this appellate district and has produced him in court. Having been brought before this court, in obedience to the writ, we are not disposed to scan too critically the mode by which he got here, but to hold that, being here, the court has authority to make such order as the nature of the case may require. It was held by the Supreme Court of Georgia, in Simmons v. Georgia Iron & Coal Co., 117 Ga. 305, 43 S. E. 780, 61 L. R. A. 739, that although a judge may have no authority to issue a writ of habeas corpus directed to a person holding another in custody beyond

certain territorial limits, yet, where he does issue the writ thus directed, and respondent obeys its mandate by producing into court the person detained, a plea that the court had no jurisdiction to issue the writ should be overruled and the cause of the detention inquired into. With this view of the law we are in full accord.

Our conclusion is that the confinement of petitioner in the state prison, during the continuance of our order staying execution of the judgment of conviction, is unwarranted and illegal, and that, during such time as our order staying execution may be in force, he should be remanded to the custody of the sheriff of Los Angeles county, to be by him confined in the county jail in that county.

It is so ordered.

49 Cal. App. 565

PEOPLE v. ARGRUSA. (Cr. 874.)

(District Court of Appeal, First District, Division 2, California. Oct. 13, 1920. Hearing Denied by Supreme Court Dec. 9, 1920.)

1. Arson ⊂⊃37(3) — Proof of occupancy by lodgers, proof of ownership by others than accused.

In a prosecution for arson, proof that part of the building at the time of the offense was occupied by 35 persons as lodgers was sufficient proof of ownership of such building by persons other than accused, under Pen. Code, § 452, expressly making actual ownership of the building immaterial.

2. Criminal law ⊂⊃822(1)—Instructions to be read together.

The entire instructions on a given question are to be taken together, and the accused cannot predicate error upon a single instruction.

3. Criminal law ⊂⊃823(15)—Instruction as to reasonable doubt held not erroneous in view of other instructions.

An instruction, "The accused person under our system is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether or not his guilt is satisfactorily shown he is entitled to an acquittal," *held* not erroneous for not containing the words "beyond a reasonable doubt" after "proved," and for containing the word "satisfactorily," in view of other instructions concerning reasonable doubt.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Tony Argrusa was convicted of arson, and he appeals. Affirmed.

William Sea, Jr., of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

LANGDON, P. J. This is an appeal by the defendant from a judgment of conviction of the crime of arson. Defendant was charged with willfully, unlawfully, feloniously, and maliciously, on January 23, 1918, in the nighttime of said day, setting fire to and burning and causing to be burned that certain inhabited structure, building, and dwelling house of one Albert J. Nymand, known and designated as No. 607 Vallejo street, situated in the city and county of San Francisco, and with the felonious intent then, there, and thereby to destroy the same, the said structure, building, and dwelling house, as aforesaid, being then and there actually occupied and inhabited by human beings. Defendant pleaded not guilty, and upon the trial it was shown: That defendant conducted a musical instrument store in the premises at 607 Vallejo street. This was a three-story frame building, on the first floor of which was the store of defendant and the upper two stories of which building were occupied by lodgers. The fire occurred about 2 o'clock in the morning, and was plainly of incendiary origin. The cause of the fire was apparent from the testimony of the fire chief and his assistants and the policemen on duty in the neighborhood, all of whom arrived upon the scene within a few moments after an explosion had blown out the front window of the store. They found several hat boxes upon the floor, about four feet apart, in a line. These boxes contained gasoline, and the flames were springing up in a straight line directly from these receptacles. Some of these containers were introduced in evidence, as were also pictures showing the condition of the premises after the fire. The officers broke open the door of the building, and were obliged to send for reinforcements to get the lodgers out of the building. The defendant was notified by a police officer of the fire at his store, and he came to the premises while the firemen and police officers were there. He was questioned by the fire chief and by the police officer, and he stated, according to their testimony, that he was the only person who had a key to the store. The prosecution introduced testimony to the effect that the value of the musical instruments, fixtures, etc., in the store was approximately $1,200. The contents of the store was insured for $2,000.

Appellant's principal objection is that no proof was offered as to the ownership of the building, and that "the evidence shows that, for the purpose of this case, the appellant, Tony Argrusa, was the owner of 607 Vallejo street; that 607 Vallejo street was a musical instrument store, and not an inhabited structure, building, and dwelling house."

Section 452 of the Penal Code provides:

"To constitute arson it is not necessary that a person other than the accused should have had ownership in the building set on fire. It is sufficient that at the time of the burning an-

other person was rightfully in possession of, or was actually occupying such building, or any part thereof."

In support of his contention that the record does not show the building at 607 Vallejo street to have been inhabited by human beings, appellant sets out, in his brief what he asserts to be all the evidence upon this question. An examination of the transcript discloses, in addition to the matter set out in appellant's brief, the following from the testimony of the fire marshal:

"Do you know the premises numbered 607 Vallejo street, in the city and county of San Francisco? A. I do. * * * Q. How are the two upper floors or stories of said building occupied? A. It is occupied as a lodging house. Q. Do you know how many lodgers were in the building that night [the night of the fire]? A. Thirty-five lodgers in the building."

Also, we find the following testimony by the battalion chief of the San Francisco Fire Department:

"Q. Do you know the premises numbered 607 Vallejo street, Chief? A. Yes, sir. Q. Do you know how those premises are occupied and how they were occupied on the 23d of January, 1919? A. They were occupied as a store, and lodging above the stores. * * * Q. Upon the morning in question, namely upon the morning of the 23d day of January, 1919, were the upper two floors or stories of that building occupied? A. They were occupied. There were lodgers in them, and I sent for reinforcements to get them out."

[1] It is true that the case of People v. De Winton, 113 Cal. 404, 45 Pac. 708, 33 L. R. A. 374, 54 Am. St. Rep. 357, holds that under section 452, Penal Code, "to be the subject of arson, the building must be at least the qualified property of another—must be, at least, rightfully in the possession or occupancy of another at the time of the offense." But, surely, this requirement is met by proof that the building, at the time of the offense was occupied by 35 persons as lodgers. It is not necessary that any of these lodgers be the actual owner of the premises. It is sufficient that these lodgers were in the rightful possession and occupancy of a portion of the premises at the time of the alleged crime. The actual ownership of the building is expressly made immaterial by the provisions of section 452, Penal Code, and any statements respecting the same contained in the information may be treated as surplusage.

Appellant relies upon the case of People v. Myers, 20 Cal. 76, to support his position that the ownership of the building is an essential part of the description of the offense of arson, and must be proven. This case is not in point here, for the reason that it was decided in 1862, 10 years before the enactment of the section of the Penal Code above referred to, and at a time when the common law upon this question remained unmodified in this state. The statements of law in that opinion are modified in this state now by the above-quoted provisions of the Penal Code.

[2, 3] Appellant complains of the following instruction:

"The accused person under our system is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether or not his guilt is satisfactorily shown, he is entitled to an acquittal."

The specific objections made by appellant are that the first part of the instruction should have contained the words "beyond a reasonable doubt" after "proved," and that the latter portion of the instruction should not have contained the word "satisfactorily." It is argued in connection with this last objection that the word "satisfactorily" can only mean, in this connection, "by a preponderance of evidence," and therefore it is erroneously used in the instruction. It is unnecessary for us to enter upon a pedantic discussion of the precise meaning of the word "satisfactorily" as used in this instruction. The entire instructions on a given question are to be taken together, and the defendant cannot predicate error upon a single instruction. People v. Worden, 113 Cal. 569, 45 Pac. 844; People v. Carantan, 11 Cal. App. 561, 105 Pac. 768. When the entire instructions in this case are read, it appears clearly that the jury were not led to believe that the question of what proof was "satisfactory" was to be left to the individual whim of each juror, varying with the credulity or incredulity of each juror, but that they were definitely instructed that the presumption of innocence abides with the defendant until the evidence convinces you to the contrary beyond a reasonable doubt. "Reasonable doubt" was then clearly defined by the court. Further, the jury was instructed:

"In order to convict the defendant of arson as charged in the information, the evidence must show beyond a reasonable doubt," etc.

And, further:

"I instruct you that in order to convict the defendant upon circumstantial evidence it is necessary, not only that all the facts concur to show that he committed the crime charged, but that they are inconsistent with any other reasonable conclusion. It is not sufficient that the circumstances proven coincide with, account for, or render probable the hypothesis of guilt, but they must exclude to a moral certainty every other hypothesis but the single one of guilt, or the jury must find the defendant not guilty."

The court also instructed:

"If you are satisfied beyond a reasonable doubt that the defendant," etc.

It would therefore appear that the use of the word "satisfactorily" in the instruction complained of, taken in connection with all the other instructions given, could have conveyed no other impression than that the

proof must be "satisfactorily" made from the standpoint of excluding all reasonable doubt as such doubt was defined by the court.

Without quoting further from the charge to the jury, it is sufficient to say that it appears from a reading of all the instructions that the jury could not have been mislead by the instruction of which complaint is made, and that the appellant was in no way prejudiced thereby.

The judgment is affirmed.

We concur: BRITTAIN, J.; NOURSE, J.

49 Cal. App. 400

WOLFF v. CITY OF LOS ANGELES. EICHHOLZ v. SAME. KEYM v. SAME.

(Civ. 3450–3452.)

(District Court of Appeal, First District, Division 2, California. Sept. 29, 1920. Opinion of Supreme Court in Bank, Denying Hearing, Nov. 24, 1920.)

1. Damages ⟸3—Rule of damnum absque injuria foundation of Code provisions for damages; "detriment."

The old rule of damnum absque injuria is the foundation of Civ. Code, § 3281, providing every person suffering detriment from the unlawful act or omission of another may recover compensation, and section 3282, providing that detriment is a loss or harm suffered in person or property, and unless the detriment is the result of an unlawful act or omission there is no right to damages.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Detriment.]

2. Eminent domain ⟸69 — Owner of private property injured for public benefit must be compensated.

It is fundamental that private property cannot be taken for a public use without compensation made, under Const. art. 1, § 14, and compensation must also be made to the owner if his property is injured for the public benefit.

3. Eminent domain ⟸82 — Compensation in some cases to owners of property not abutting on improvement.

Under Const. art. 1, § 14, owners of property, not directly abutting on or touched by part of a highway graded or closed, cannot be arbitrarily denied the right to damages, but, on the other hand, every depreciation in value of property by reason of a public improvement in the neighborhood cannot be made the basis of an award of damages.

On Hearing in Supreme Court.

4. Eminent domain ⟸107 — No damages for injury occasioned by improvement in next block, though it lessened travel near plaintiff's property.

Under Const. art. 1, § 14, a landowner was not entitled to recover damages from a city by reason of an improvement, where the utmost that the evidence tended to show was that by reason of the grading of one block of a street located a considerable distance away and beyond another cross street, which in no way interfered with the easy and convenient access of plaintiff's property by other streets, the use of the street as a thoroughfare near plaintiff's property was not as extensive as before the grading.

Appeals from Superior Court, Los Angeles County; L. W. Myers, Judge.

Actions by Esther Wolff, Phillip Eichholz, and Sophia A. Keym, respectively against the City of Los Angeles. Judgments for defendant, and plaintiffs appeal. Affirmed in the District Court of Appeal, and hearing denied in Supreme Court.

Ford & Hammond and Henry G. Bodkin, all of Los Angeles, for appellants.

Charles S. Burnell, City Atty., and R. L. Hanley, Deputy City Atty., both of Los Angeles, for respondent.

BRITTAIN, J. The plaintiffs in these three cases appeal from several judgments rendered against them upon nonsuits granted on motion of the respondent municipality. The cases were consolidated for the purpose of the respective appeals, it being stipulated that the judgment in the Wolff case should control the determination of the other two appeals. The plaintiffs as owners of their respective lots of land sued for damages for injuries claimed to have been suffered by them by reason of the depreciation of the values of their lands caused, as they alleged, by the opening of North Broadway tunnel and the grading of the approaches thereto and of adjacent streets in the city of Los Angeles. Except in regard to the exact location of the respective properties, their values and the amount of depreciation, if any, was caused by the opening of the tunnel, the facts of the three cases are the same and are unquestioned.

[1, 2] The work in question was done under ordinances adopted pursuant to a general act of the Legislature permitting such work to be done by municipalities under the assessment plan. No question is presented concerning the power of the municipality to order the work to be done, nor of the regularity of the procedure, nor is there any regarding the preliminary steps taken by the plaintiffs to perfect their right to sue. The sole question is whether upon the evidence before the court at the time the motion for nonsuit was made the respective plaintiffs were entitled to damages, or whether the cases were within the old rule that damages are never recoverable without a showing of legal injury. The old rule of damnum absque injuria is the foundation of the Code provisions that "every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages." (Civ. Code, § 3281), and that "detriment is a loss or harm suffered in person or property" (Civ. Code, § 3282). In these cases it is claimed there was a loss or harm suffered in the property of the appellants, but unless this detriment was the result of an unlawful act or omission, there is no right to damages. As has been stated, there is no question concerning the lawfulness of the work done by the municipality. None of the property of the respective plaintiffs abutted on any of the work done, and therefore there was no physical

taking of or change in the respective properties. It is fundamental that private property cannot be taken for public use without compensation made, and in this state since the adoption of the present Constitution in 1879, compensation must also be made to the owner if his property is injured for the public benefit. The claims of the plaintiffs rest, therefore, solely upon the contention that their properties have been injured for the public benefit without compensation having been made.

[3] In reliance upon decisions of the highest courts of other states and isolated texts of able writers upon the subjects of highways and municipal corporations, the parties before the court argue for and against the adoption of a rule which in such cases as these would arbitrarily deny the right to damages to owners of property not directly abutting on or touched by the part of the highway graded or closed. This court is unwilling to give approval to such a rule, which in its opinion would denude the constitutional provision of much of the benefit and security intended to be guaranteed to the property owner on its adoption. That the rule contended for on the part of the municipality is too narrow this court has no doubt. On the other hand, the court is not of the opinion that every depreciation in value of property by reason of a public improvement in the neighborhood can be made the basis of an award of damages. For instance, the owner of a store or apartment house on a much-traveled street might lose the greater part of his trade, or the rental or sale value of his property might be cut in half, by the public grading and improving another and parallel street one or two blocks away, which, by giving more direct access to distant parts of the city, or by causing the adjoining property to be improved with newer and more attractive buildings, would cause the public to use the newly improved thoroughfare and largely to abandon the old, yet that indirect result of the lawful improvement would not give rise to damages. For any one of a multitude of reasons, or for no reason at all, traffic may swing from one street to another at any time, and when one buys property he buys with knowledge of such fortuitous changes.

The constitutional provision in question (article 1, § 14), is that—

"Private property shall not be taken or damaged for public use without just compensation having first been made," etc.

It has been under consideration by the Supreme Court in a number of cases, but the exact question presented here has never been directly answered. In the first case where the right to compensation for damage to property arose after the adoption of the present Constitution, the court, adopting the language of Mr. Justice Thornton, said:

"To what kind of damage does this word 'damaged' refer? We think it refers to something more than a direct or immediate damage to private property, such as its invasion or spoliation. There is no reason why this word should be construed in any other than its ordinary and popular sense. It embraces more than the taking. If it did not refer to more than the damage above mentioned, the word 'damaged' in the clause relied on would be superfluous. [Page 501.] * * * The provision includes damage to private property, including land and whatever is attached to it. [Pages 505–506.] * * * We do not intend to say, nor do we think, it extends to such damage as the owner of the property injured sustains in common with the other abutters on the street or the general public, but only to that special injury which he receives over and above such common injury." Reardon v. San Francisco, 66 Cal. 492, 6 Pac. 317, 56 Am. Rep. 109.

In the Reardon Case there was physical injury to the plaintiff's land. Recovery for that injury might have been had as for a tort, upon a proper showing, regardless of the constitutional provision. The language of the decision was broad enough to reach a case where there was no physical injury. Suppose, for instance, one owned property on a street having an outlet in one direction only, and the municipality should grade the only cross street to a level so far above or so far below that of the street on which the property was located as to make access to the property practically impossible. If such a condition existed, the damage would be within the protection of the Constitution and the right of the owner to recover would in no way depend on the proximity of the injured lot to the actual work done, nor would the fact that the particular lot was not physically injured have any proper weight in the consideration of the case. There is nothing at variance with these views in the case of Eachus v. Los Angeles, etc., Ry., 103 Cal. 617, 37 Pac. 751, 42 Am. St. Rep. 149, where it is said:

"The Constitution does not, however, authorize a remedy for every diminution in the value of property that is caused by a public improvement. The damage for which compensation is to be made is a damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the Constitution; but the property itself must suffer some diminution in substance, or be rendered intrinsically less valuable by reason of the public use."

In the case supposed of a lot on a cul-de-sac entirely cut off from access, while there would be no physical detriment to the lot itself, there would be a substantial diminution of its availability for any purpose, and it would be rendered intrinsically less valu-

able by reason of the public use. In such an instance, the rule of the Reardon Case would apply. In numerous later cases the salutary rules of the Reardon and Eachus Cases have been applied, and there is no great difficulty in applying them to these appeals, without laying down the rule contended for by the respondent municipality.

Stated most strongly for the appellants, at the time of the motion for nonsuit, the evidence showed that the lands of the respective appellants were situated at or near a street parallel with North Broadway. Another parallel street intervened between the two. The lands were near or abutted on a transverse street, known as California street, parallel to which, one block away, ran Temple street. The first block of California street between North Broadway and the lands of the appellants was necessarily graded, and the incline was increased, so that it was not so convenient for use as it had been. The grade on Temple street was not changed, and the lands in question were readily accessible by way of that street. There was less traffic along California street than formerly, but it did not appear that this was caused entirely by the grading of California street. Rentals were depreciated, but the witnesses for the respective plaintiffs differed greatly, both in regard to the degree of depreciation and the fractional part thereof which might have been caused by the grading, since it was admitted that rentals and sale values of all the land in the vicinity had been falling for a considerable time and extent by reason of local conditions in no way connected with the public improvement. The motion for nonsuit was general, and upon the ground that the plaintiffs had failed to prove any damage for which they were entitled to recover. The cases are clearly within the rule announced in Eachus v. Los Angeles, etc., Ry., supra.

The judgment is affirmed in each of the three appeals.

We concur: LANGDON, P. J.; NOURSE, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [4] Without committing ourselves to all that is said in the District Court of Appeal opinion, we think the opinion clearly shows that in this case there was no such damage shown as to warrant a recovery. The utmost that the evidence tends to show is that by reason of the grading of one block of California street, located a considerable distance from plaintiff's property and beyond another cross street, which in no way interfered with the easy and convenient access to plaintiff's property by other streets, the use of California street as a thoroughfare near plaintiff's property was not as extensive as before such grading. Assuming this to have been proven, it did not show that damage contemplated by the constitutional provision. This is sufficiently shown by the opinion of the District Court of Appeal.

The application for a hearing in this court is denied.

All concur.

49 Cal. App. 315

CLARK v. JOHNSTON et al. SAME v. CAMPIN et al. SAME v. TAYLOR et al.

(Civ. 3211, S. F. 9636.)

(District Court of Appeal, First District, Division 1, California. Sept. 20, 1920. Opinion of Supreme Court in Bank, Denying Hearing, Nov. 19, 1920.)

1. Appeal and error ⟸931(3) — To support order findings presumed to have been made.

No formal findings of facts having been filed, court must be presumed on appeal to have found to be true evidence and affidavits, filed in support of a motion to set aside satisfaction of judgment, in support of an order granting such motion.

2. Judgment ⟸898(2) — Satisfaction entered by fraud set aside on motion.

A party to the record may have a satisfaction of judgment entered in fraud of his rights set aside on motion in the immediate action in which the judgment is entered.

On Hearing in Supreme Court.

3. Judgment ⟸898(4) — Satisfaction, fraudulently entered, set aside on motion of third person.

Where promissory notes were assigned to another for the sole purpose of a suit upon them, and defendants knew that plaintiff was merely a nominal party, a satisfaction, given pursuant to an arrangement between the nominal plaintiff and the judgment debtors, which was in actual fraud of the real party in interest in the judgment, will be set aside, on motion of such real party in interest, under Code Civ. Proc. § 385.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Actions by W. A. Clark against D. R. Johnston and A. B. Davis, against D. D. Campin and A. B. Davis, and against Ambrose Taylor and A. B. Davis, consolidated. Judgments for plaintiff. From orders, on motions by J. J. Rauer and by J. A. Miller, vacating satisfaction of judgments, the defendants appeal. Affirmed in the District Court of Appeal, and hearing denied in Supreme Court.

Fred C. Peterson, for appellants.

H. M. Anthony, of San Francisco, for respondents.

BEASLY, Judge pro tem. These are appeals by the defendants in the several cases from identical orders vacating in each case a satisfaction of judgment theretofore entered in favor of the respective plaintiffs in the actions entitled as above. The orders were made upon the motion of the respondent Rauer, a stranger to the record. There are three cases similar in all respects, consolidated by stipulation and tried together in the superior court, and they are here upon a consolidated record under section 941a et seq. of the Code of Civil Procedure.

Avoiding so far as possible unnecessary detail the facts of the three cases may be stated as follows: Clark, the plaintiff, was a bookkeeper in the office of Rauer, a collector. Rauer held three promissory notes as indorsee or assignee against Davis and his codefendants. Rauer transferred these notes to Clark by assignments absolute in form. The purpose of the assignments was solely that Clark's name should be used as plaintiff in these actions, which were accordingly begun in his name, one against Johnston and Davis, another against Campin and Davis, and the third against Taylor and Davis. A fourth action not embodied in this record figured in the facts as they finally developed in the trial court. These cases went to judgment in favor of plaintiff, the amounts thereof and of the fourth judgment above enumerated aggregating about $3,500. In this state of the cases Clark, at the instance of Davis, satisfied the judgments by directions in writing to the clerk, which the latter obeyed by entering the satisfactions of record. For these satisfactions Clark took from Davis a check for $50 and a promissory note for $1,950. Clark made no profit personally from the transaction, as he turned over and delivered the check and the note to Rauer's attorney, who was also Clark's attorney in the case. In one of the actions a writ of attachment had been issued and levied, and to secure the release of the property taken under this writ the Fidelity & Deposit Company of Maryland had, at the instance of Davis and his codefendant, executed an undertaking, and the surety company, in turn, in order to secure itself, had taken from the defendants in the action certain collateral. This was released upon presentation to the surety company of proof of satisfaction executed by Clark. The rights of the Fidelity & Deposit Company are not involved in this matter, as no attempt was made in the proceedings following the satisfaction to re-establish any rights of Rauer or Clark against it. Davis by securing the satisfaction of the several judgments, if it is permitted to stand, will profit to the extent of having settled judgments in about the sum of $3,500 for a promissory note of problematical value and $50 in cash, and also by having procured the release of the collateral held by the surety company as security for its undertaking given upon the release of the levy of the writ of attachment.

[1] Following this satisfaction proceedings were instituted by Rauer upon which this appeal is predicated. Rauer in each action noticed a motion to set aside the satisfaction. This motion was based upon the ground that the satisfaction of judgment "was made and entered without right and without consideration." In support of his motion Rauer filed certain affidavits of himself and his attorney, showing that Clark had no interest whatever in the notes or in the judgment; that the assignments to him had been made solely for purposes of collection, and only with the intent upon his part and upon that of Rauer that he should nominally be plaintiff in the action; that he was not permitted to conduct or manage the litigation in any way; that he paid none of the costs, and that he was in short a mere figurehead in the case, and that Clark had nothing whatever to do with the actions except that they were prosecuted in his name; that at all times Rauer was the owner of the notes and judgments, and that all these facts were at all times known to Davis; that Rauer had never authorized Clark to adjust, compromise, or settle the actions or to satisfy the judgments therein; and that Clark had no authority to do any of these things. Certain counter affidavits were filed in the matter, but the trial court found in accordance with the facts above stated, or at least it must be presumed to have so found in support of the order which it subsequently made; no formal findings upon the matter having been filed. Certain oral testimony was presented at the hearing, and, among other things, Rauer testified that he had told Davis distinctly that Clark had no interest whatever in the judgments. Upon this state of the record the trial court vacated the satisfaction of judgment in each case.

[2] Upon this record it is contended by appellants that Rauer, being a stranger to the record, could not be heard to move to vacate the satisfaction. Of course, a party to the record may have a satisfaction, entered in fraud of his rights, set aside on motion in the immediate action in which the judgment is entered. Haggin v. Clark, 61 Cal. 1. This case takes us so far in the controversy upon firm ground. The Court of Appeals of the state of New York went a step further in the case of McGregor v. Comstock, 28 N. Y. 237. The case involved facts so nearly like those of the case before us as to be indistinguishable in principle. Comstock, a tenant of Winthrop, was sued in ejectment by McGregor and others. Comstock had judgment for his costs. The plaintiffs and their attorneys knew from the beginning of the action that Comstock was not the real defendant in the case, but that Winthrop was

the person in whose interest the defense was being made. The judgment was satisfied by Comstock unknown to and without consultation with Winthrop, after the latter had procured an execution and its levy against property of some of the defendants. The Court of Appeals, affirming an order vacating the satisfaction, said:

"The order appealed from should be affirmed, whether the application for the order be regarded as made by defendant's attorney on his own behalf to enforce his lien as attorney, or on behalf of his client, who was the real party in interest, and defended the action in the name of the nominal defendant for his own benefit."

After a further discussion the writer of the opinion continues:

"I am also of the opinion that under the circumstances Winthrop is to be regarded as the equitable assignee of the judgment as between him and Comstock, and that the giving of the satisfaction piece by Comstock was a fraud upon the rights of Winthrop. Winthrop had assumed the whole defense of the action, and incurred all the expenses of the litigation. Comstock paid nothing, and was liable for nothing to the attorney employed to defend. He had no equitable or legal right to the fruits of the judgment. The payment of the judgment to Comstock with knowledge of the facts was a fraud upon Winthrop. The facts disclosed in the affidavit show conclusively that a fraud was intended to be perpetrated. It would be a reproach to the law if such purpose could not be defeated."

In a case of similar import, but where the facts differed in this, that the judgment was assigned after it was entered, the Supreme Court of Errors and Appeals of New Jersey said:

"Where there has been a cancellation of judgment procured by fraud and mistake, * * * this court has the power to vacate such cancellation, and restore the lien of the judgments, saving the rights of intervening creditors, who have in good faith and without notice, given credit and obtained liens upon belief that such judgments have been legally satisfied." Keogh v. Delaney, 40 N. J. Law, 97.

The case presented the following facts: At the request of Delaney and his son, who was his surety, one Bonnell paid Keogh his judgment and took an assignment thereof. Delaney gave Bonnell a note for the amount, for which it was agreed that the judgment should stand as collateral. Delaney applied to Keogh's attorney for a satisfaction, which was given him inadvertently and procured without Bonnell's knowledge. This act on the part of Delaney was held to be fraudulent, and upon motion of Bonnell the satisfaction was set aside.

Potter v. Hunt & Sloane, 68 Mich. 242, 36 N. W. 58, presents from a somewhat different standpoint the same principle. Potter sued Hunt and Sloane on two promissory notes. Hunt successfully defended to judgment for his costs. Potter knew that Hunt had defended the case alone; that Sloane was insolvent and friendly to Potter and desired his success in the litigation, Sloane's action in satisfying the judgment was set aside by the court on the ground that it was a fraud upon Hunt. It will be noted that, while Sloane was a nominal party to the action, he had taken absolutely no part in the defense of the cause, and had apparently given all the aid and comfort possible to the plaintiff in the case.

It was held in Henry v. Traynor, 42 Minn. 234, 44 N. W. 11, that the entry of satisfaction of judgment may be vacated when it operates to the disadvantage of a third party having a lien on the judgment or entitled to be protected or secured by it.

In our own state there is no direct authority upon the point at issue. The nearest approach to it, aside from the case of Haggin v. Clark, supra, is the provision of the Code of Civil Procedure (section 385) that in case of certain transfers of interest the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding. Under that section if Rauer had taken an assignment from Clark upon the entry of judgment, or of the notes before judgment, the case could have proceeded under Clark's name, and satisfaction by Clark would have been open to attack by Rauer; and if, as was suggested by the Court of Appeals of New York in the case of McGregor v. Comstock, supra, the real owner be regarded as the equitable assignee of the judgment, then we see no reason why the proceeding by motion of Rauer is not appropriate. No one is injured by this proceeding. It has been invited by the bad faith of Clark and Davis in satisfying the judgment and attempting to settle the same in fraud of the rights of Rauer.

It is argued that Davis was under no obligation to consult Rauer at all; that the assignment for collection vested legal title to the notes in Clark as assignee, which was sufficient to entitle him to recover; and that, although Rauer retained an equitable interest in the claim as between him and Clark, this was no concern of Davis; and general language can be found to this effect in Kelly v. Hampton, 22 Cal. App. 68, 133 Pac. 339; Gradwohl v. Harris, 29 Cal. 150; Toby v. Oregon Pacific R. R. Co., 98 Cal. 490, 33 Pac. 207, and perhaps in other cases. But the general language quoted in appellant's argument, to the effect that Rauer's interest was no concern of Davis, cannot be fairly stretched to cover a fraud perpetrated by Davis and Clark upon Rauer. None of these cases was decided in contemplation of such a situation, as has arisen in the case before us.

If we be correct in the conclusion reached upon the point already discussed in this opinion, it is not necessary to discuss other questions raised by the parties to this appeal.

The order appealed from is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [3] In denying a rehearing we deem it well to say, in order to avoid any possible misapprehension, that, as we understand the opinion of the District Court of Appeal, the order setting aside the satisfaction is upheld and justified, because the evidence shows, as it amply does, that the satisfaction was given pursuant to an arrangement between the nominal plaintiff and the judgment debtor, which was in actual fraud of the real party in interest in the judgment. We do not take the opinion as intending to decide that where a judgment debtor in good faith secures by way of settlement a satisfaction of the judgment from the nominal judgment creditor, the settlement and resulting satisfaction can be set aside upon proof merely that the judgment creditor was a nominal party only, and that the judgment debtor knew that fact. The question which would be presented by such a case would be quite different from that actually presented here, and there is no necessity for expressing any opinion concerning it, and we do not understand the District Court of Appeal to have done so.

All concur.

(49 Cal. App. 585)

SIMPSON et al v. HOSIN. (Civ. 2216.)

(District Court of Appeal, Third District, California. Oct. 16, 1920. Hearing Denied by Supreme Court Dec. 13, 1920.)

1. Venue ⟹67—Affidavit for change need not expressly show nonresidence in county from which change is sought.

An affidavit by a sole defendant for a change of venue from S. county to Y. county, alleging that defendant resides and has resided continuously for three years in Y. county, is sufficient without stating expressly that defendant is not a resident of S. county.

2. Venue ⟹66—Affidavit of merits on application for change held sufficient.

An affidavit of merits in support of a motion for a change of venue, stating that defendant had retained E. as his attorney and counsel and had fully and fairly stated the facts of the case to "my said attorney and counsel and said E." and was advised by "said attorney and counsel" and believed that he had a good and substantial defense, was sufficient, notwithstanding the use of the word "and" between "attorney and counsel" and the name of the attorney, especially as it might be rejected as surplusage.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by Clarence Simpson and another against Mohammad Hosin. From an order changing the place of trial, plaintiffs appeal. Affirmed.

A. H. Carpenter, of Stockton, for appellants.

J. E. Ebert, of Marysville, for respondent.

PREWITT, Presiding Judge pro tem. This is an unusually frivolous appeal. The defendant, on motion, procured an order changing the place of trial from the county of San Joaquin to the county of Yuba, on the ground that he resides in the latter county. The appellants appeal from this order. The record is utterly barren of debatable questions. Only two points are made by the appellants.

[1] 1. It is claimed that the affidavit does not show affirmatively that the defendant was not a resident of the county of San Joaquin. But the Code does not require this negative showing. Section 395 of the Code of Civil Procedure provides that an action must be tried in the county in which the defendant resides at the commencement of the action. The moving party in his affidavit states:

"At the time of the commencement of the action I did reside, and do now reside and continuously for more than three years immediately last past I have resided, in the county of Yuba, etc."

Certain authorities are cited by the appellants, but these authorities are not in point; in fact, they have no application to the case of a sole defendant.

[2] 2. Objection is made that the affidavit of merits does not state that the defendant was advised by his counsel that he had a good defense to the action on the merits. The portions of the affidavit of the defendant material to this point are as follows:

"I have employed and retained J. E. Ebert * * * as my attorney and counsel in said action, * * * that I have fully and fairly stated all the facts of the case in said action, and that I have fully and fairly stated the case in this action to my said attorney and counsel and said J. E. Ebert and under such statement I am advised by my said attorney and counsel, and I verily believe I have a good and substantial defense on the merits to said action."

The use of the word "and" following the words "attorney and counsel" is manifestly a mere scrivener's mistake. The court may reject this word as surplusage, but even as the affidavit is written there exists no ambiguity. The affiant states that he has stated

the facts of the case to said attorney and counsel and that he is advised by said attorney and counsel, etc.

The order is affirmed with $100 damages for a frivolous appeal.

We concur: BURNETT, J.; HART, J.

49 Cal. App. 587

PEOPLE v. BACA et al. (Cr. 504.)

(District Court of Appeal, Third District, California. Oct. 16, 1920.)

Assault and battery ⊂=96(3)—Instruction on self-defense not required under evidence.

In a prosecution for assault with a deadly weapon, where defendant in his testimony denied that he had a weapon or that he cut any one, he was not entitled to an instruction on the law of self-defense as concerns the cutting.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Ralph Baca and Angel Lopez were convicted of assault with a deadly weapon, and from the judgment of conviction and an order denying their motion for a new trial, they appeal. Judgment and order affirmed.

Frank A. Henning, of Stockton, for appellants.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

NICOL, Presiding Judge pro tem. Defendants were charged by information of the crime of assault with a deadly weapon, committed in the county of San Joaquin, and upon a trial they were convicted of the offense charged. They moved for a new trial, which motion was denied, and judgment was pronounced that each defendant pay a fine of $360.

Appellants contend that on account of the trial court's refusal to give any instructions on self-defense they are entitled to have the judgment reversed and a new trial granted. It appears from the evidence that the defendants entered the restaurant of the prosecuting witness Aurelio Torres, in the city of Stockton, at about 11:30 p. m., on the 3d day of November, 1919. The defendant Baca placed a nickel in the slot of the piano, and no music followed. He complained about the failure of the piano to play, and Aurelio Torres returned a nickel to him, and ordered him and his companion Angel Lopez out of the place. They remained inside and commenced to call Torres a robber, whereupon Torres ejected them from the room. They returned, each with a knife in his hand, and the defendant Baca cut Torres on the right arm. The testimony of Baca shows that there was no claim whatever that he was acting in self-defense, and was therefore not entitled to any instruction on the law of self-defense. People v. Turley, 50 Cal. 469. He testified as follows:

"Q. Well did you come back at any time? A. No, sir. Q. Did you cut anybody? A. I went across and fell down. Kind of in the middle of the street; then I went across and looked for help, for an officer, over to the Main street. Q. Who were you looking for? A. Looking for an officer. Q. Did you ever at any time that evening take a knife out of your pocket? A. No, sir. Q. Are you positive of that? A. Yes, sir. Q. Did you at any time cut any one? A. No, sir. Q. Did you at any time ever have a knife open that evening? A. No, sir. * * * Q. But you are positive you never cut any one that night? A. I am sure not."

By this testimony the defendant Baca denies that he had a knife in his hand that night, or that he cut any one, and therefore there is nothing in his testimony on which to base any claim that he was acting in self-defense as concerns the cutting.

As to the defendant Angel Lopez there is also nothing to show that he, as an aider and abettor of Baca, was acting in self-defense. No showing of self-defense appears, and there is nothing in the testimony or evidence in the case as to either defendant which called for instructions on self-defense.

The judgment and order appealed from are affirmed.

We concur: BURNETT, J.; HART, J.

49 Cal. App. 592

PEOPLE v. HERMAN. (Cr. 516.)

(District Court of Appeal, Third District, California. Oct. 18, 1920.)

1. Criminal law ⊂=406(7)—Conversation with defendant prior to theft held admissible as showing preparation.

In a prosecution for theft of wool, alleged to have been stolen by defendant's employé and sold in defendant's name, defendant giving the employé a certain amount per pound, a conversation between defendant and the purchaser prior to the theft, as to the price the purchaser would pay for wool, was admissible as bearing upon the question of defendant's preparation to commit the crime charged.

2. Criminal law ⊂=386 — Conversation over telephone with man giving defendant's name held admissible.

In a prosecution for grand larceny, where it was charged that defendant and an employé stole wool, and that the employé sold it at a certain place in the name of defendant, the court did not err in permitting a bookkeeper for the purchaser to testify that on the morning of the delivery of the wool she had a telephone conversation with a man who said his name was H. (the name of the defendant), and that he was expecting his man to come in there

with some wool and not to give him the price, etc.

3. Criminal law ⊜406(7)—Offer of defendant to third person of chance to make money held admissible.

In a prosecution for theft of wool, testimony that on a date prior to the theft defendant asked witness if he "wanted to make a little change," to which the witness replied, "Sure," and defendant said to "go out with G. some night and help him to haul in some stuff. He did not say what stuff"—was admissible as bearing upon the question of preparation of defendant to commit the crime charged; G. and another actually taking the wool.

4. Larceny ⊜70(1)—Instruction as to defendant's knowledge of taking of property by employé held properly refused.

In a prosecution for theft of wool, taken by defendant's employé and sold to a reduction works in the name of defendant, who was afterwards paid the money and paid the employé a certain amount, the court did not err in refusing to instruct, "Even if you find that after the wool had been delivered to the S. reduction works by the witness G. and his associate, and before the payment of any money by defendant, he learned or had reasonable grounds to believe that the wool had in fact been stolen by said G. and his associate, but notwithstanding this, if you should not be satisfied that the defendant had any knowledge of or anything to do with the removal of said wool to said destination in S., then you must find the defendant not guilty," for the reason that if the evidence showed the felonious connection of defendant with the taking of the wool at any time before it was delivered in S., the effect of such evidence should not be destroyed by the giving of such instruction.

5. Criminal law ⊜829(2)—Requested instruction held properly refused, in view of charge given.

In a prosecution for grand larceny, there was no error in the refusal of instructions that defendant "is on trial charged with the crime of grand larceny and for no other crime or offense," and "that the defendant in this action is not on trial for the crime of receiving or dealing in stolen property," where the court fully instructed the jury that the defendant was on trial upon the charge of grand larceny.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

M. Herman was convicted of grand larceny and appeals from the judgment of conviction and an order denying his motion for new trial. Judgment and order affirmed.

W. H. Carlin and W. P. Rich, both of Marysville, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

NICOL, Presiding Judge pro tem. The defendant, with one Venice Gibbons, was accused of having, on the 17th day of November, 1919, stolen four sacks of wool from one W. F. Hoke in Sutter county. The said Gibbons pleaded guilty, and this defendant was tried, and, on the 14th day of January, 1920, was convicted of the crime of grand larceny. From the judgment and order denying motion for new trial defendant prosecutes this appeal.

It appears from the evidence that on the 17th day of November, 1919, the defendant was, and for some time prior thereto had been, engaged in conducting a junk business in the city of Marysville, under the name of American Junk Company. The said Venice Gibbons was on this day working for him, and for some time prior thereto he had been in defendant Herman's employ, going out in the country and gathering up junk, which he hauled to defendant's junk yard. The wool belonging to the said W. F. Hoke was stored in a shed in the usual wool sacks on his ranch in Sutter county, about 12 miles from the city of Marysville. Some time prior to the 17th day of November, the said Gibbons and the defendant had been out in the vicinity of the shed and had seen the wool, but no conversation was had between them at that time about the wool. On the afternoon of the 17th of November, 1919, Gibbons and another man were seen in the vicinity of this wool shed, at which time there were 16 sacks of wool piled upon a wagon preparatory to hauling it to market. On the night of November 17th the said Gibbons and another party took from this wagon 4 sacks of wool (weighing 962 pounds) upon a small truck belonging to the defendant, and hauled it to Marysville, thence to Sacramento, where they arrived some time before morning, and about 7 o'clock in the morning of November 18th they went to the "Sacramento Reduction Works," conducted by one Frank Repetta, where they left the wool in the name of the American Junk Company, and received from Repetta a tag showing the number of pounds. With this tag they returned to Marysville, where Gibbons saw the defendant and gave him the tag. The other party was not seen by the defendant. Defendant then called up the "Sacramento Reduction Works," and inquired the number of pounds of wool which had been stored, and, not being satisfied with the answer, went to Sacramento the forenoon of the said 18th of November, and saw Repetta, and from him learned it to be a fact that the number of pounds of wool reported had been in fact delivered, and he then returned to Marysville and saw Gibbons and paid him for the wool at the rate of 20 cents per pound.

Before this wool was stolen, according to the testimony of Venice Gibbons, he was given encouragement and assistance by defendant in the theft. Gibbons used the defendant's truck to take and transport the stolen wool to Sacramento, and after its delivery at

Sacramento he reported to and delivered the weight tag to the defendant, which tag was found on the defendant's person by the sheriff of Yuba county at the time of his arrest, and the check in payment of the wool was forwarded by the "Sacramento Reduction Works" to the "American Junk Company."

The testimony of Venice Gibbons clearly shows the facts connected with the larceny and the defendant's knowledge of the same and his connection with the asportation and the disposition of the wool at Sacramento, and the testimony of the said Gibbons as to the defendant's connection with this larceny is sufficiently corroborated.

[1] It is claimed by the appellant that the court erred in allowing the witness Frank Repetta to testify, over defendant's objection that some three or four days before the 17th day of November, 1919, he had a conversation with the defendant, in which he told defendant that if he could buy the wool he would pay him 35 cents a pound for it f. o. b. Sacramento. We do not think that the court erred in overruling defendant's objection to this evidence. It appears from the testimony of Venice Gibbons that prior to the 17th day of November, 1919, the defendant was with him out in the vicinity of the shed where the wool of W. F. Hoke was then stored, and that they saw the wool; that several days afterwards the defendant told him to go ahead and get some wool and he would pay him 20 cents a pound for it. In view of this testimony, we are of the opinion that the above conversation of Repetta with the defendant as to the price Repetta would pay for wool was admissible as bearing upon the question of defendant's preparation to commit the crime charged, and whether this testimony was full and complete, or only partial, would have reference merely to its weight and not to its admissibility.

[2] Complaint is made of the court's action in permitting the witness Mary Koewler, the bookkeeper for the "Sacramento Reduction Works," to testify, over defendant's objection, that on the morning of the 18th day of November, 1919, being the morning of the delivery of the wool, she had a telephone conversation with a man who said his name was Herman (the name of defendant) of the American Junk Company who said "he was expecting his man to come in there with some wool and not to give him the price, and I told him the gentleman had been there, and that I didn't give him the price." This testimony was admissible, and it was a matter for the jury to determine what weight should be given to the same.

[3] The objection of the defendant to the testimony of the witness J. W. Riley was properly overruled. This testimony was to the effect that the defendant, on or about the 15th day of November, 1919, asked him if he "wanted to make a little change," to which the witness replied, "Sure," and he said to "go out with Venice Gibbons some night and help him to haul in some stuff. He didn't say what stuff." This evidence was admissible as bearing upon the question of preparation of defendant to commit the crime charged, and the jury had the right to consider this evidence in connection with the other evidence and circumstances in the case, and to determine whether or not the defendant in so speaking to the said Riley was asking him to go with the said Venice Gibbons and steal the particular wool which was thereafter stolen.

[4] Complaint is made of the trial court's refusal to give certain instructions requested by the defendant. In our opinion the court did not err in refusing the following proposed instruction:

"I instruct you that even if you should find that after the wool had been delivered to the Sacramento Reduction Works by the witness Gibbons, and his associate, and before the payment of any money by defendant, he learned or had reasonable grounds to believe that the wool had in fact been stolen by said Gibbons and his associate, but notwithstanding this, if you should not be satisfied that the defendant had any knowledge of, or anything to do with the removal of said wool to said destination in Sacramento, then you must find the defendant not guilty."

We think the court properly refused this proposed instruction for the reason that if the evidence in the case showed the felonious connection of the defendant with the taking of the wool at any time before it was delivered in Sacramento to the "Sacramento Reduction Works," the effect of such evidence should not be destroyed by the giving of this proposed instruction.

[5] There was no error in the refusal of the instructions to the effect that the defendant "is on trial charged with the crime of grand larceny, and for no other crime or offense," and "that the defendant in this action is not on trial for the crime of receiving or dealing in stolen property," as the court in its instructions fully instructed the jury that the defendant was on trial upon the charge of grand larceny.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

49 Cal. App. 589

PEOPLE v. TAYLOR. (Cr. 921.)

(District Court of Appeal, First District, Division 1, California. Oct. 16, 1920.)

1. Criminal law ⟸1159(4) — Evidence held sufficient to sustain conviction.

In a prosecution for rape on a girl of the age of 13, the appellate court will not reverse a conviction, although the story of the complaining witness on the record seemed to be rather improbable.

2. Criminal law ⟸1160—Appellate court cannot substitute judgment for that of jury and trial court.

An appellate court cannot substitute its judgment for that of the jury, or for that of the trial court, expressed in denying defendant's motion for a new trial.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

David G. Taylor was convicted of rape, and he appeals. Affirmed.

J. N. Young and P. A. Fontaine, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

RICHARDS, J. This is an appeal from a judgment of conviction of the defendant upon the charge of rape. The sole point urged by the appellant is that there was no sufficient evidence to justify the verdict against him or the judgment rendered thereon. In support of this contention the appellant quotes largely from the evidence in the case, which he insists sustains his claim that he was convicted upon the unsupported testimony of the complaining witness, who not only related an improbable story, and one which was unsupported by the facts and circumstances surrounding the alleged rape, but was contradicted by strong and clear testimony in favor of the defense.

We do not deem it necessary or profitable to relate in detail the sordid story which the complaining witness, a colored girl of the age of 13 years, has told with respect to her ravishment by the defendant, who is also of colored extraction and of the age of 54 years at the time of the trial The story which the complaining witness related upon said trial, it must be conceded, appears to be quite improbable upon the face of the record presented to us; but the jury in the case saw both the accused and the complaining witness, his accuser, and heard the stories told by each, and also saw and heard the witnesses whom the defendant produced to support his denials of any criminal intercourse with the complaining witness, and whose statements, if believed, would render not only improbable, but practically impossible, the story which the complaining witness related. The jury had also before it certain facts and circumstances which cast much doubt upon the truth of the statements made by the accused and his supporting witnesses. Some of these facts and circumstances may be briefly referred to:

The defendant produced as one of his witnesses a colored woman named Reeves, who testified very strongly in his favor, stating that she was stopping in the defendant's house at the very times when the several acts of intercourse, according to the complaining witness' story, were committed; that she occupied the bed in which the complaining witness also slept, and from which the accused called her to his own bed in the adjoining room for the purpose of committing the criminal acts complained of; and that no such occurrences as those to which the complaining witness testified ever took place. The importance of this witness and her testimony to the accused is apparent, and yet the record shows that upon his preliminary examination, wherein he and his son and daughter testified fully, no mention was made by any of them of the presence of this vital witness in his house at the very time the acts complained of were alleged to have been committed. The entire omission of any reference to this witness by the defendant and his other witnesses at the time of the preliminary examination, if she was where she testified she was upon the trial of the case, called for a credible explanation, and the attempt of the accused to explain away this omission was lame and unsatisfactory to a degree that would have justified the jury in believing that her story, related upon the trial, was a tissue of falsehoods.

Again, a letter was produced at the trial, purporting to have been written by the defendant to the mother of the complaining witness after the condition of the latter became known, showing solicitude for his own safety and expressing a willingness to marry the girl. While it is true that this letter also contains a denial of any improper relations with the daughter, it is such a letter as apparently required some explanation as to the circumstances under which it was written. The defendant testified that he did not write the letter himself, but gave its substance in a dictation to his daughter, who wrote and signed the letter on his behalf, and that he did not instruct her to insert the clause in the letter expressing his willingness to marry the girl. This letter was produced upon the trial, and in connection with it there were also produced certain exhibits in the handwriting of the son of the accused. A comparison of these exhibits with the letter shows indubitably that the letter in question was written by the defendant's son, and not by his daughter, as testified to by him, and also by the daughter. Why the defendant and his witnesses

sought so studiously to becloud the authorship of this letter may not be very clear; but one thing is clear, and that is that their stories with reference to its origin and authorship are false. The jury, perceiving this, may well have made application of the instruction given them by the trial court to the effect that, if they believed a witness to have sworn falsely in any material part of his testimony, he was to be distrusted in other parts of it.

[1, 2] There are certain other particulars, not necessary to be detailed, wherein much doubt was thrown upon the truth of the testimony offered by the accused and his witnesses; and this leaves the case in a condition where, conceding the story of the complaining witness to be, upon the cold record before us, rather improbable, it is not such a story as we are prepared to say was unbelievable; and, this being so, since the jury with all of the parties before it believed her story, and disbelieved the contradicting testimony of the accused and of his witnesses, we are unable to say that the evidence was insufficient to warrant his conviction. To do so would be to substitute our judgment for that of the jury, and for that of the trial court expressed in denying the defendant's motion for a new trial, and this, under the jurisdiction upon appeal committed to us, we have no authority to do. People v. Fitzgerald, 138 Cal. 40, 70 Pac. 1014; People v. Burke, 18 Cal. App. 80, 122 Pac. 435; People v. Preston, 19 Cal. App. 685, 127 Pac. 660.

Judgment affirmed.

We concur: WASTE, P. J.; BEASLY, Judge pro tem.

184 Cal. 331

CLINE v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. (L. A. 6465.)

(Supreme Court of California. Nov. 18, 1920. Rehearing Denied Dec. 16, 1920.)

1. Officers ⟸74—Accusation may be made by another officer in private capacity.

Under Pen. Code, § 772, authorizing summary proceedings for removal of an officer on accusation verified by the oath of any person, the court acquires jurisdiction by an accusation by an individual, though it was shown that that individual was chairman of the board of supervisors of the county, and had been instructed to present the accusation by vote of the board.

2. Officers ⟸66—Crimes or corrupt acts may be made basis of accusation for removal.

Proceedings for removal of an officer on charges presented by the grand jury under Pen. Code, § 758, and on accusation by an individual under section 772, are cumulative remedies, so that acts which constitute crimes, or which have been willfully or corruptly done, may be the subject of an accusation under section 772, though they may be also the subject of charges under section 758.

3. Jury ⟸19(12)—Jury trial not authorized on accusation for removal of officer.

Pen. Code, § 772, providing for removal of an officer after summary trial on accusation verified by an individual does not authorize a trial by jury.

4. Constitutional law ⟸42—Officers ⟸74 — Hold office subject to statute authorizing proceedings for removal.

Though in an ordinary controversy between a civil officer and a private citizen or between the officer and the state or any other officer, the right to the office is treated as a property right, the office is nevertheless held subject to the statutory proceedings provided for removal of the officer, so that an officer cannot object to the proceeding prescribed for his removal or to the jurisdiction of the tribunal to which an accusation for removal is presented in accordance with the law of the state.

5. Officers ⟸61—Proceeding for removal authorized by Constitution.

Proceedings under Pen. Code, § 772, for the removal of an officer for misconduct are not in effect prosecutions for crime, but are under the authority granted the Legislature by Const. art. 4, § 18, to provide for trials for misdemeanor in office which is part of the provisions for impeachment contained in that and the preceding section, especially since that section of the Penal Code is embraced in the part of the Code whose title and chapter headings indicate that the Legislature was intending to act under the authority of the impeachment provisions.

6. Jury ⟸19(12)—Right to jury trial on accusation for removal of officer not guaranteed.

The provision of Const. art. 1, § 7, that the right of jury trial shall remain inviolate, refers to the right to jury trial as it existed at common law, and does not guarantee to an officer the right to trial by a jury on trial of an accusation against him for his removal under Pen. Code, § 772.

7. Officers ⟸74 — Accusation for removal must be presented within county.

Under Pen. Code, § 772, providing that, when an accusation in writing is presented to the superior court, charging an officer within its jurisdiction with misconduct, the court shall hear the charges and remove the officer if guilty, the officers within the jurisdiction are those within the county in which the court is sitting so that the section is not subject to the objection that it discriminates against an officer accused thereunder because it might be brought in any county of the state, whereas the proceeding by the grand jury under section 758 could be brought only in the county in which the officer held office.

8. Constitutional law ⟸211 — Provision for judgment for private accuser in proceeding to remove officer does not establish discrimination.

The provision of Pen. Code, § 772, for judgment against an accused officer on removal in favor of the accuser, does not render that section invalid as discriminatory, though there is no similar provision in case proceedings are instituted against the officer by the grand jury under section 758, since the grand jury is charged with the duty of inquiring into such misconduct by Pen. Code, §§ 923, 928, and the provision for reward to accuser may be necessary to induce private accuser to make accusation if the grand jury fails to do so.

9. Officers ⟸74 — Proceedings for removal should be made in name of people.

Proceedings under Pen. Code, § 772, for the removal of an officer on accusation by a private individual, should be entitled as proceedings by the people on accusation of the accuser under Const. art. 6, § 20, requiring all prosecutions to be conducted in the name of the people, and by their authority.

10. Officers ⟸74 — Prohibition ⟸10(2) — Erroneous title does not defeat jurisdiction in proceeding for removal.

Error in that proceedings to remove an officer under Pen. Code, § 772, were entitled in the name of the accuser, instead of in the name of the people, being amendable, does not defeat jurisdiction so as to entitle the officer to a writ of prohibition, which under Code Civ. Proc. §§ 1102, 1103, lies only when the tribunal to which it is addressed is about to act in excess of its jurisdiction.

In Bank.

Petition by John C. Cline for writ of prohibition, against the Superior Court of Los Angeles County and Charles Monroe, as judge thereof, originally begun in the District Court of Appeal, and transferred to the Supreme Court for rehearing. Writ denied.

George E. Cryer, W. I. Foley, Ingall W. Bull, and Henry T. Gage, all of Los Angeles, for petitioner.

A. J. Hill, Co. Counsel, Paul Vallee and J. Allan Davis, all of Los Angeles, for respondents:

SHAW, J. This is a proceeding in prohibition, originally begun in division 2 of the District Court of Appeal of the Second District. The decision of that court thereafter made was vacated, and a rehearing in this court was granted.

Petitioner seeks to prevent the superior court from proceeding to trial and judgment upon an accusation presented against him, under section 772 of the Penal Code by Jonathan S. Dodge, charging the petitioner with refusing and neglecting to perform certain duties of the office of sheriff of Los Angeles county, of which office petitioner was then and still is the incumbent. Section 772 is as follows:

"When an accusation in writing, verified by the oath of any person, is presented to a superior court, alleging that any officer within the jurisdiction of the court has been guilty of charging and collecting illegal fees for services rendered, or to be rendered, in his office, or has refused or neglected to perform the official duties pertaining to his office, the court must cite the party charged to appear before the court at a time not more than ten nor less than five days from the time the accusation was presented, and on that day, or some other subsequent day not more than twenty days from that on which the accusation was presented, must proceed to hear, in a summary manner, the accusation, and evidence offered in support of the same, and the answer and evidence offered by the party accused, and if, on such hearing, it appears that the charge is sustained, the court must enter a decree that the party accused be deprived of his office, and must enter a judgment for five hundred dollars in favor of the informer, and such costs as are allowed in civil cases."

Prohibition lies only when and because the court or tribunal to which the writ is addressed is acting, or is about to act, in excess of its jurisdiction, and there is no plain, speedy, and adequate remedy in the ordinary course of law. Code Civ. Proc., §§ 1102, 1103.

The claim of the petitioner that the superior court has no jurisdiction is based on the following grounds:

(1) That Jonathan S. Dodge, who verified and presented the accusation, was then and still is chairman of the board of supervisors of Los Angeles county, and that he verified and is prosecuting the accusation in pursuance of instructions from said board. The claim is that section 772 does not authorize the prosecution of such accusation by any officer of the state in his official capacity.

(2) That the accusation contains charges of willful and corrupt official misconduct, which, it is claimed, are cognizable only upon an accusation presented by the grand jury under section 758 of the Penal Code, and, further, that it charges the commission of certain crimes which can be presented only by indictment or information.

(3) That if any of the charges are proper under section 772, the defendant is entitled to a trial by jury, and that the court is about to proceed to trial without a jury.

(4) That section 772 is unconstitutional.

We will take up these points in their order.

[1] 1. It is a sufficient answer to this objection to point out that the accusation does not purport to be made by Dodge in his official capacity as member or chairman of the board of supervisors. The allegation therein that he had been instructed to verify and present the accusation has not the effect of making this an accusation presented by the board of supervisors or by any member thereof in his official capacity. The section authorizes the accusation to be "verified by the oath of any person." Under this provision any citizen may make and present the accusation, and the fact that he is an officer is immaterial so far as the jurisdiction of the court is concerned.

[2] 2. We can perceive no substantial reason for the claim that acts which constitute crimes or which, because of having been willfully or corruptly done, are the subject of charges under section 758, may not also be the basis of charges under section 772 as a foundation for the removal of the party guilty thereof from office. These remedies are all authorized on behalf of the public, and they are cumulative, distinct, and separate. The fact that one of them may be pursued does not prevent the pursuit of any of the others. If all of them were prosecuted at the same time, it would not deprive the court of jurisdiction of either, but would, at most, be nothing more than a foundation for a plea of another action pending or a plea of former adjudication. It is not necessary here to decide whether it would support such plea or not.

[3] 3. The section does not by its terms provide for or contemplate a trial by jury. It declares that when the accusation is presented "the court must cite the party charged to appear before the court," not less than 5 nor more than 10 days thereafter, and then or within 20 days from the time of presentation "must proceed to hear, in a summary manner, the accusation," and if the charge is sustained "must enter a decree" that the party be deprived of his office. No provision is made for summoning a jury, and, as the trial must take place in a summary manner, and must be begun within 20 days, it is evident that the delays incident to the drawing, summoning, and impaneling of a jury were not contemplated. If the petitioner is entitled to a jury trial of the proceeding, the authority therefor must be found in some other portion

of our law than the terms of section 772. We deem it necessary to say that the petitioner has not alleged that the court below is threatening to deny a jury trial. The briefs, however, discuss the question as if the matter was in issue, and, inasmuch as it may arise upon the trial, we have concluded to treat it as in issue. It is also proper to say that there may be some doubt whether the question can be raised in a proceeding in prohibition. In Powelson v. Lockwood, 82 Cal. 613, 23 Pac. 143, it was held that the refusal of a jury trial by a justice of the peace was mere error which could not be reached in a proceeding in prohibition. In that case, however, an appeal was provided for. In proceedings under section 772 there is no appeal. It may be that this would give cause for a distinction between the two cases if a trial by jury were required by section 772 or by the Constitution.

[4] 4. The claim that the section is unconstitutional is based on several different, and to some extent inconsistent, grounds.

At the outset we may appropriately state a fundamental principle of law concerning the relations between the state and its officers and the nature of the right to public office, a principle which has an important bearing upon this branch of the case.

In any ordinary controversy between a civil officer and a private citizen, or between such officer and the state or any other officer thereof, the right or title of such officer to his office is treated as a property right, and is not subject to attack, except in a direct proceeding for that purpose, and instituted by the authority of the state. But such officer takes and holds his office subject to the conditions that may be imposed upon it by the laws of the state whose agent or servant he is, and if a cause of removal and a mode of enforcing it is provided by law, he is deemed to have accepted his office on the condition that he may be removed for that cause and in the manner so provided. In the case of Carter, 141 Cal. 320,[1] the charter of San Diego provided, so it was held, that city officers could be removed by the city board of trustees at any time without notice or hearing. Upon the objection that this summary power of removal was invalid, the court, after citing numerous authorities on the subject, said:

"In creating an office the government can impose such limitations and conditions with respect to its duration and termination as may be deemed best, and in such a case the incumbent takes the office subject to the conditions which accompany it. It may always be terminated in such manner and by such means as are prescribed by the law which created it."

In such a controversy the office is not considered as property. Mechem on Officers, § 464; Throop on Officers, § 345.

It follows that the officer cannot successfully object to a proceeding for his removal or to the jurisdiction of the tribunal to which an accusation for removal is presented, if the law of the state provides that such proceeding may be prosecuted in that manner, before that tribunal, and for the cause alleged. The law, as we have shown, does so provide, and we are of the opinion that it is authorized by the Constitution.

[5] The argument that it is unconstitutional is mainly founded upon the assumption that the proceeding is in effect a prosecution for a crime, or is so far criminal in its nature that the officer accused is entitled to all of the rights and safeguards given by the Constitution to persons charged with crime. The case is not of that character. The purpose of this section is to provide a procedure in the nature of an impeachment to afford a means for the removal of a derelict officer. The legislation embraced in the section is an exercise of the power referred to and conferred on the Legislature by sections 17 and 18 of article 4 of the Constitution. These sections relate to the impeachment and removal of public officers. Section 17 declares that "the assembly shall have the sole power of impeachment, and all impeachments shall be tried by the Senate." Section 18 declares that the Governor and other state officers, including all judicial officers down to the judges of the superior court, "shall be liable to impeachment for any misdemeanor in office; but judgment in such cases shall extend only to removal from office, and disqualification to hold any office of honor, trust, or profit under the state; but the party convicted or acquitted shall nevertheless be liable to indictment, trial and punishment according to law. All other civil officers shall be tried for misdemeanor in office in such manner as the Legislature may provide." These provisions were also a part of the Constitution of 1849, and are there numbered as sections 18 and 19 of article 4. In the decision in the Matter of John J. Marks, 45 Cal. 217, a case which arose under the Constitution of 1849, the court said concerning these provisions:

"The Constitution of this state (article 4) undertook to distribute this power to remove public officers for misdemeanor in office—of which, as we have said, neglect of official duty was one. It, for this purpose, placed the Governor, Lieutenant Governor, secretary of state, controller, treasurer, Attorney General, surveyor general, Justices of the Supreme Court, and district judges in one class, and placed all other civil officers in another class; it then provided that those of the first class should be liable to impeachment * * * for any misdemeanor in office, * * * and that those of the second class should 'be tried for misdemeanor in office in such manner as the Legislature may provide.'"

The court there held that the act of 1853, section 4 of which is substantially identical

[1] 74 Pac. 997.

with section 772, was an exercise by the Legislature of the power given by the clause last quoted, which is identical with the final clause of section 18 of article 4 of the present Constitution. The question again arose in Woods v. Varnum, 85 Cal. 645, 24 Pac. 844. In that case, after referring to section 18, article 4 of the Constitution of 1879, and quoting the last clause, the court said:

"The manner of such a trial is therefore clearly within the power of the Legislature, and it is equally clear that the 'summary manner' mentioned in said section 772 of the Penal Code excludes the right of trial by jury."

These cases would appear to be decisive of the question concerning the constitutionality of the section.

Moreover, the proposition that both section 772 and 758 of the Penal Code were enacted in pursuance of the authority of section 18, article 4 of the Constitution is clearly shown by the title and chapter headings of the Penal Code. Part 1 is devoted to the subject of crimes and punishments; part 2 to the subject of criminal procedure. Part 1 embraces the sections defining crimes and fixing punishment therefor, and ends with section 681. Title 2 of part 2 has the subhead: "Judicial Proceedings for the Removal of Public Officers by Impeachment or Otherwise." Chapter 1 of this title is headed "Impeachments," and prescribes the procedure for impeachments by the assembly before the Senate for the officers first mentioned in the constitutional provision. Chapter 2 has the subhead, "Removal of Civil Officers Otherwise Than by Impeachment." Section 772 is the last section of this chapter. Section 758, as we have seen, provides for accusations by the grand jury for the removal of officers, and section 772 provides for such removal upon a verified accusation presented by any person to the superior court. The subheadings relate directly to the language of the Constitution, and they clearly show that it was that power that the Legislature had in mind when enacting these provisions. It is clear from all these provisions that the prosecution of an accusation under section 772 is not an ordinary prosecution for a crime or a public offense.

[6] The contention that the case comes under section 7 of article 1 of the Constitution, providing that "the right of trial by jury shall be secured to all, and remain inviolate" cannot be maintained. It is a settled proposition of law in this state that the right of trial by jury there referred to is the right as it existed at common law, and that it does not secure the right to a trial by jury in any case which was not triable by a jury, as of right, under the common law of England. Cassidy v. Sullivan, 64 Cal. 266, 28 Pac. 234; Woods v. Varnum, supra; Koppikus v. Commissioners, 16 Cal. 253; Grim v. Norris, 19 Cal. 140, 79 Am. Dec. 206. The general principle applicable has been thus stated:

"Unless expressly prohibited by the Constitution, the Legislature may, without violating the right to trial by jury, provide a summary mode of procedure for the removal of public officers for incompetency or misdemeanor in office." 24 Cyc. 135.

It is clear therefore that under our Constitution, which not only contains no provision forbidding the denial of jury trial in such cases, but expressly authorizes the Legislature to provide for the trial thereof in any manner it chooses, the fact that a jury trial is not provided does not render the section unconstitutional.

The petitioner cites Ryan v. Johnson, 5 Cal. 87, claiming that it holds that a jury trial must be allowed in cases of this character, and that Woods v. Varnum, supra, which holds that a jury trial is not allowed, should be overruled. Ryan v. Johnson is not in conflict with Woods v. Varnum, nor with the views we have above expressed. The court was there considering an accusation under section 4 of the act of 1853 (Stats. 1853, p. 40), providing for the removal of civil officers upon a complaint filed by any person, which was to be heard "in a summary manner." The section is substantially the same as section 772. But section 6 of that act provided that the rules of practice in proceedings under the act should be the same as in civil cases under the Practice Act. Practice Act (St. 1851, p. 74) § 155, provided that all civil cases should be tried by a jury. There were no exceptions as now provided by the Code. Code Civ. Proc. § 592. To the objection that the act was unconstitutional because it denied the right of trial by jury to a person accused, the court merely said that "the defendant may, by virtue of the last section of the act (section 6) have a jury trial, as well in that as any other action." The court was not discussing the effect of the Constitution at all, but was merely calling attention to the fact that the statute itself provided for a jury trial, so that the question whether it was in violation of the Constitution on that point could not arise. We may add that if the point had been directly decided there, as petitioner claims, we are convinced, from the reasons which we have set forth, that that case should itself be overruled rather than Woods v. Varnum, supra.

We attach no importance to the statement in Kilburn v. Law, 111 Cal. 240, 43 Pac. 616, that a proceeding under section 772 is a proceeding "for the punishment of an offense in its nature criminal," and is "a criminal prosecution," or to the statement In re Curtis, 108 Cal. 662, 41 Pac. 793, that it "is a criminal proceeding in the nature of an impeachment," and similar statements in Wheeler v. Donnell, 110 Cal. 656, 43 Pac. 1,

and Thurston v. Clark, 107 Cal. 289, 40 Pac. 435. They have no bearing upon the argument relating to the right to a jury trial. Doubtless it is of the character there stated. But as the Constitution expressly declares that such misdemeanors in office shall be tried in such manner as the Legislature may provide, the question whether it is a prosecution for a public offense is not determinative of the right to a jury trial. If it is a public offense, or a criminal prosecution, it is one of a class which the Constitution itself authorizes to be tried without a jury if the Legislature shall so declare.

In so far as anything said in the opinion in Fitch v. Board, 122 Cal. 288, 54 Pac. 901, may be inconsistent with what we have said on this subject, or may indicate that the Legislature could not authorize a private person to begin the proceeding, we disapprove of that opinion.

[7] Petitioner also suggests that section 772 authorizes an accusation against a county officer in the superior court of any county in the state, whereas an accusation under section 758 cannot be presented or tried in any other county than that which the accused officer serves, and this, it is argued, somehow deprives such accused officer of the equal protection of the law, contrary to the Constitution of the United States. Under the terms of the section the accused must be an "officer within the jurisdiction of the court." The word "jurisdiction," in the connection used in the phrase quoted, means the local jurisdiction; that is, the county. It does not refer to the power of the court to issue "process" to all parts of the state, given by section 5, article 6 of the Constitution. It follows that an accusation to the superior court of one county against an officer of another county could not be maintained unless brought there by a change of venue. There is therefore no basis for the argument on this point. It may be that an accusation against a "district" officer, if there are any such, could be brought in any county within the district if the district embraced more than one county. This would seem to be the effect of section 889 in its application to sections 758 and 772. Kilburn v. Law, supra. This question is not here involved.

[8] Discrimination is also predicated in the argument upon the fact that upon an accusation by the grand jury under section 758 no judgment for money can be given, whereas when the accusation is made by a citizen under section 772, judgment must be entered for $500 in favor of the accuser. The difference in this respect, however, is justified by the difference in the two methods of procedure provided. The Legislature had the power to provide more than one method. The grand jury is an official body, organized and charged with the duty of inquiring into willful or corrupt misconduct of public officers (Pen. Code, § 923), and generally to examine into the affairs of the county (Pen. Code, § 928), and it is authorized to bring accusations against officers for their removal under section 758. But that body might fail in its duty, and, as it is to the interest of the state that incompetent, negligent, or extortionate officers should not continue in office, the Legislature provided for removal upon an accusation by any citizen, and deemed it wise to reward the accuser in such case at the expense of the guilty officer; the purpose being doubtless to stimulate activity on the part of citizens and compensate the accuser in some manner for his trouble and expense on behalf of the public. We perceive no usurpation of power nor any unlawful discrimination nor anything contrary to any constitutional limitation in that provision. "A judgment imposing a fine, which in whole or in part shall go to the informer, is not such an anomaly in criminal practice as to require discussion." Kilburn v. Law, supra, 111 Cal. 241, 43 Pac. 617.

[9] Another objection is based on section 20 of article 6 of the Constitution, providing that—

> "The style of all process shall be the 'People of the State of California,' and all prosecutions shall be conducted in their names and by their authority."

[10] The document verified by Dodge and filed as an accusation and upon which the superior court assumed jurisdiction is entitled "Johnathan S. Dodge versus John C. Cline, Sheriff of the County of Los Angeles, State of California." The claim is that the title should have been the "People of the State of California, on the Accusation of Jonathan S. Dodge, versus John C. Cline, Sheriff," etc., or in some similar fashion. In every case which we have so far cited in which such an accusation was involved the cause was entitled in the same manner as the accusation in the present case. Nevertheless we believe that the contention of the petitioner is correct. The case is a prosecution of a criminal nature, and the Constitution requires that all prosecutions shall be in the name of the people of the state. See Kilburn v. Law, supra. The section itself is silent on the subject. But we are at a loss to perceive how this defect in the title affects the jurisdiction of the court. Jurisdiction of the subject-matter of such an accusation is given by section 772, beyond any doubt. We know of no authority, and none is cited, to the effect that it is essential to the jurisdiction of the court that the cause of which it assumes jurisdiction shall be set forth in a pleading having a correct title. Such a defect or misprision is of the kind that is deemed amendable and is not jurisdictional. At common law the caption of an indictment could be amended. 1 Ency.

of Pl. & Pr. 537, and note; State v. Creight, 1 Brevard, p. 169. It is well settled that an information is amendable in matters of form. 1 Bishop, Crim. Pro. § 714. An information will not be quashed for a defect in the title. Malone v. State, 14 Ind. 219. Our Constitution now declares that no judgment shall be reversed for any defect in the pleading. The public policy thus declared is that no formal defects which do not go to the merits of the case shall be considered fatal to the jurisdiction of the court or to the validity of the judgment. The document itself sets forth every fact necessary to show the nature of the accusation against the petitioner, and to bring the case within the scope of section 772. The defect in the title may be at any time amended on leave of the court if objection thereto is made. We do not think it deprives the court of jurisdiction. We find no ground upon which to sustain petitioner in his attack on the jurisdiction of the court.

The application for a writ is denied.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; OLNEY, J.; LENNON, J.; LAWLOR, J.

Mr. Justice Sloane, having participated in the decision of this cause in the District Court of Appeal, declines to act herein.

184 Cal. 399

In re WHEATLEY'S ESTATE.
(L. A. 6658.)

(Supreme Court of California. Nov. 22, 1920.)

Wills ⇐87—Instrument held direction to insurance company and not testamentary.

Where decedent, who had a life policy, signed an instrument addressed to the insurance company, stating that she wished to name as beneficiary D. if she should die in Calexico or in the vicinity, as he was to care for her remains, the writing, though duly witnessed, was not a will, not being testamentary in character, but a direction to the insurance company; the last clause apparently making a designation of the beneficiary conditional on the place of death.

Department 1.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

In the matter of the estate of Mamie Wheatley. From an order refusing to admit to probate a document offered as the will of decedent, E. C. Dyer, proponent, appeals. Affirmed.

Robert G. Hill, of El Centro, for appellant.
J. S. Larew, of El Centro, for respondent.

SHAW, J. The proponent of a document claimed to be the will of the decedent, Mamie Wheatley, appeals from an order of the superior court refusing to admit the same to probate.

The document bore the date of July 28, 1918. The decedent died on December 14, 1919. There was evidence to show that on the date of the document, while the proponent was at the house of the decedent, she said to him that she had a Metropolitan life insurance policy and some money in the bank and some property in Los Angeles, and that she wanted to will the amount of money in the Metropolitan policy to said proponent, and gave him a paper and pencil to write it upon, whereupon he wrote at her dictation the following document:

"Calexico, California, July 28, 1918.

"To the Metropolitan Life Insurance Company:

"I wish to name as beneficiary, Rev. E. C. Dyer, if I should die in Calexico, or vec. as he is to care for my remains.

"Mamie Wheatley."

Said document was thereupon signed by five persons other than the proponent, as witnesses thereto. This is the paper which was offered for probate as the last will of the decedent. While it sufficiently appears that the decedent intended at that time to make a will, it is apparent from an inspection of the document that it is not testamentary in character. It is addressed to the Metropolitan Life Insurance Company, and is nothing more than a statement to that company that she wished to name Rev. E. C. Dyer a beneficiary under the policy. It is unambiguous, and there is nothing in the language to indicate an intention other than that thus stated, or to characterize the same as a testamentary document. Indeed, the last clause appears to make the effect of the designation of Dyer as beneficiary conditional upon the event of the decedent dying in Calexico or vicinity. The case comes within the rule followed in Estate of Meade, 118 Cal. 430, 50 Pac. 541, 62 Am. St. Rep. 244, and Estate of Richardson, 94 Cal. 63, 29 Pac. 484, 15 L. R. A. 635.

The judgment is affirmed.

We concur: LAWLOR, J.; OLNEY, J.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(184 Cal. 311)

MIGUEL v. MIGUEL. (Sac. 3078.)

(Supreme Court of California. Nov. 15, 1920.)

1. Partnership ⟸95—Object and conduct of parties considered in construing oral contract for sale of partnership interest.

Where a contract for sale of partnership interest was not in writing, and its exact terms were not established, and it appeared that the parties did not at the time have in mind the distinction which subsequently determined their rights, the court in construing the contract must be guided largely by the object the agreement was intended to subserve and by the construction of the contract by the parties as manifested by their subsequent conduct.

2. Limitation of actions ⟸46(3)—Partnership ⟸95—Limitations began to run when debt was payable; price of interest in dissolved firm held not payable until money borrowed to pay a firm debt assumed by purchaser was paid by the latter.

The manifest object of an oral contract for the sale of plaintiff's interest in a dissolved partnership, in making the purchase price payable after a firm debt secured by mortgage on the firm property was paid, was to enable defendant, the purchaser, to pay secured firm debt first, and their subsequent conduct in not claiming or offering payment until after money borrowed to pay the obligation was repaid is sufficient to sustain the finding that the purchase price was payable when the defendant was relieved from the burden of the partnership debt, and not when he changed the form of that debt by paying the existing obligation with borrowed money, so that a cause of action for the price did not accrue until the borrowed money was paid by defendant.

3. Limitation of actions ⟸48(2), 66(2) — Claim for money payable on demand accrues at inception of obligation without demand.

A cause of action for money payable on demand accrues with the inception of the obligation and without the necessity for any demand.

4. Appeal and error ⟸1040(16) — Defective complaint held cured by amendment showing claim not barred.

A judgment for plaintiff will not be reversed for error in overruling a demurrer to the complaint which showed on its face that the claim was barred by limitations, where the complaint was amended before judgment to show that the claim sued on was not payable on demand, but became payable just before the action was begun.

5. Appeal and error ⟸1039(2) — Defective complaint held not to have misled defendant.

Though an amended complaint, which alleged, to avoid the statute of limitations, that the claim sued on was not payable until a partnership debt was paid, and failed to allege the payment of the debt, was defective, a judgment for plaintiff will not be reversed for that reason, where there was no dispute that the partnership debt had been paid, and defendant was not misled by the complaint.

In Bank.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by John Miguel against Joe Miguel. Judgment for plaintiff, and defendant appeals. Affirmed.

H. Scott Jacobs, of Hanford, for appellant.
J. C. C. Russell, of Hanford, for respondent.

OLNEY, J. This is an appeal by the defendant from a judgment against him for $414. The findings of the court are that the plaintiff and defendant were partners in the dairy business on September 23, 1911; that on that day they dissolved partnership, the defendant purchasing the plaintiff's interest for $900, which was to be paid when the indebtedness of the partnership, which was secured by a mortgage, should be paid by the defendant; that such indebtedness was not paid until June 15, 1917; and that, after allowing certain credits, there remained due on the $900 the sum of $414. At the trial, the only substantial points in dispute were, first, as to the agreed amount of the purchase price, the defendant claiming that it was $600, instead of $900; and, second, as to when the indebtedness of the partnership had been paid off, and the plaintiff's cause of action had consequently accrued, the defendant claiming that the indebtedness had been paid in November, 1913, or nearly four years before the commencement of the action, so that the action was barred by the statute of limitations. There was plainly evidence to sustain the finding of the court as to the amount of the purchase price, but it is contended that the evidence does not sustain the finding as to the time of payment of the partnership debt.

The facts as to this latter point were that the indebtedness at the time of the dissolution of the partnership was owing to one Silva and was secured by a mortgage on the partnership property. In November, 1913, the defendant borrowed the necessary money from a bank upon his unsecured note and paid Silva; the mortgage to Silva, of course, being satisfied at the same time. It is this payment which the defendant claims was a payment of the partnership debt, so that the plaintiff's cause of action then and there accrued. On the other hand, the debt to the bank, incurred by the defendant in substitution, so to speak, for the debt to Silva, was not paid until June, 1917, a few months before the commencement of the action, and the plaintiff claims that his cause of action did not accrue until then. That the payment to Silva was the payment of the partnership debt in the legal sense, of course, admits of no question. But the real question in the case is: What was the understanding or

agreement of the parties? Was it that the defendant should pay the plaintiff as soon as the particular partnership obligation was discharged, or was it that the defendant should pay the plaintiff as soon as the burden, so to speak, of the partnership debt, which he assumed, had been removed from the defendant? This burden, of course, was not removed by the mere substitution of the bank, instead of Silva, as the creditor.

[1] The understanding between the parties was not put in writing, so that its exact language could not be put before the court, and it is doubtful if either party at the time had clearly in mind the distinction we have made and upon which the case must turn. Under these circumstances, it was for the court to determine just what the agreement was, and in doing so it would properly be guided largely by the object which the agreement was intended to subserve, and even more largely by the view which the parties themselves subsequently took of their understanding as manifested by their conduct after the payment to Silva, when, of course, they would have to act one way or the other according as they understood their agreement to be one thing or the other.

[2] The finding of the court, which was in effect that payment was not to be made to the plaintiff until the defendant had been able to remove the burden of the partnership debt which he assumed, is sustained by both the considerations mentioned. The manifest object of the arrangement was to give the defendant time to work out the two obligations, the one to Silva and the one to the plaintiff, by making the latter not payable until the first had been paid. The case was one of a sale of an interest in a business which was in debt. It was a very natural understanding that the purchase price of the interest should not be payable until the debt to which the interest was subject had been worked out. This object would not be accomplished if the purchase price should become payable upon the substitution merely of another as the creditor of the defendant on his obligation to Silva. The essence of the purpose of the understanding must have been that the burden of that debt should be removed from the defendant before he was required to pay the plaintiff.

As to the conduct of the parties, the very pointed fact is that when the defendant borrowed the money from the bank and paid Silva, he did not pay or offer to pay the plaintiff, but immediately upon finally paying off the bank he did pay him the amount of the purchase price as he contends it was. Apparently the only real dispute between the parties before they got into court was over the amount of the purchase price whether it was $600 or $900. The defendant's conduct very strongly evidences that it was his view that he owed the plaintiff the purchase price, whatever it was, when he paid the bank, and not before. These considerations are fully sufficient to justify the conclusion of the trial court; in fact, it might well be claimed that it is the only reasonable conclusion that could be reached. This is decisive of the case upon the merits.

[3, 4] The defendant also contends that the court erred in overruling the demurrer to the complaint upon which the action went to trial for the reason that the cause of action stated appeared on the face of the complaint to be barred by the statute of limitations. The complaint was in fact demurrable for this reason. It alleged an obligation by the defendant made nearly six years before, and payable on demand. That a cause of action for money payable on demand accrues with the inception of the obligation and without the necessity for any demand hardly requires the citation of authority. But this particular defect was cured by an amended complaint, filed at the suggestion of the court before judgment, which alleged that the obligation of the defendant was payable when the indebtedness of the partnership was paid. With this allegation the complaint did not on its face show a barred cause of action.

[5] But the defendant also claims that this amended complaint fails to state a cause of action, because while it alleges that the defendant's obligation was payable only when the partnership debt was paid, it fails to allege that the partnership debt had ever been paid, and therefore fails to show that the plaintiff's cause of action had ever accrued. The mere statement of the defendant's objection to the complaint is sufficient to show that it was sound. The defect in the complaint, however, is not sufficient to warrant a reversal. The omitted fact, which the complaint should have stated, but did not, namely, that the partnership debt had been finally paid, was not in dispute. There is no question but that it was the fact, and it is found by the court. The defendant was not misled in any way, or prejudiced in the slightest, and there is no occasion for requiring a new trial because of the defect in the complaint.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LENNON, J.; LAWLOR, J.; SHAW, J.; SLOANE, J.

184 Cal. 418

GOUANILLOU v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 9396.)

(Supreme Court of California. Nov. 30, 1920.)

1. Infants ⊂⊃111—Minor's right to disaffirm adjudication continues till barred by laches after majority.

The right of a minor to disaffirm an adjudication of his rights by a judicial tribunal obtained in a proceeding in which he has not been duly represented as provided by law continues until barred by laches after the minor has attained majority, the right not being dependent on statute, but on a general rule of law enforced as a necessary incident to the status of minority.

2. Master and servant ⊂⊃416 — Workmen's compensation award subject to disaffirmance by minor not represented.

The Industrial Accident Commission being a judicial body exercising judicial functions, its decisions and awards are subject to those general legal principles which circumscribe and regulate the judgments of all judicial tribunals, including the principle that a minor can disaffirm an adjudication obtained in a proceeding in which he has not been duly represented until barred by laches after reaching his majority.

3. Master and servant ⊂⊃416—Award to minor not represented by guardian subject to disaffirmance after majority.

If the injured employee was a minor under the terms of the Workmen's Compensation Act of 1913, as amended in 1915 (St. 1915, p. 1086), at the time of first application for compensation and hearing thereon, wherein she was not represented by guardian, she had the right incident to her minority to disaffirm the award of the commission rendered in such proceeding within a reasonable time after reaching majority.

4. Infants ⊂⊃1—Age of majority a matter of legislative regulation.

The age of majority is a matter of legislative regulation, and the Legislature may prescribe a longer period of minority for some purposes than for others.

5. Master and servant ⊂⊃357 — Compensation Act prescribes status of minority for all persons under 21.

For the purpose of enforcing rights accruing under the Workmen's Compensation Act of 1913, its section 16d, and section 11d of the act of 1917, which is identical in terms, prescribe the status of minority, with the privileges and disabilities incident thereto, for all persons, male and female, under the age of 21, despite Civ. Code, § 25, providing that females of 18 are not minors.

6. Master and servant ⊂⊃400 — "May" in Workmen's Compensation Act not permissive as regards right of infant to appear with or without guardian.

The word "may" in the Workmen's Compensation Act of 1913, § 16d, as amended in 1915 (St. 1915, p. 1086), and in the act of 1917 (St. 1917, p. 842) § 11d, identical in terms, is not permissive as regards an infant employee's right to appear with or without representation by guardian, but is intended as an enabling provision to give the guardian provided for by the section a standing before the Industrial Accident Commission in default of or supplementary to any other method designated by the commission.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, May.]

7. Master and servant ⊂⊃416 — Female employee under 21 a "minor" entitled to disaffirm award.

An injured female employee, who was under 21 at the time of her first application for compensation under the Workmen's Compensation Act and hearing thereon before the Industrial Accident Commission, was a "minor" for the purpose of enforcement of rights acquired under the act, and as an incident to her status of minority she possessed the right to disaffirm the award of the commission which deprived her of right to representation by guardian to which she was entitled by the act of 1913, § 16d, act of 1917, § 11d, and the fact that she became 21 before the award was rendered does not defeat her right of disaffirmance exercised within a reasonable time after reaching majority.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Minor.]

8. Master and servant ⊂⊃417(7)—Finding of Workmen's Compensation Commission that minor employee disaffirmed award within reasonable time conclusive.

The finding of the Industrial Accident Commission that the female employee, a minor when her first application was made, filed disaffirmance of award within reasonable time, and that there was no unequivocal act on her part affirming the decision prior to the disaffirmance proceedings, cannot be disturbed on certiorari.

9. Master and servant ⊂⊃416 — Failure of commission to enter order setting aside first award disaffirmed by minor did not invalidate second award.

Where second judgment and award of the Industrial Accident Commission, by virtue of the findings on which it was based, in effect set aside and superseded the commission's previous decision, disaffirmed by the injured female employee, a minor at the time of her first application, the failure of the commission to enter a separate order setting aside the first award is a mere informality not invalidating, in view of St. 1915, p. 1102, § 28, amending section 77a of St. 1913, p. 313, St. 1917, p. 871, § 60a, the second award under review on certiorari.

Angellotti, C. J., and Wilbur, J., dissenting.

In Bank.

Application for certiorari to review an order of the Industrial Accident Commission awarding compensation for injuries, by Cyprien Gouanillou, the employer, against the commission, A. J. Pillsbury and others, its members, and Marie Michaud, the employee.

Award affirmed, and cause remanded, with directions.

C. H. Patterson, of Oakland, for petitioner. A. E. Graupner, of San Francisco, and Fred W. Fry, of Oakland (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

LENNON, J. Certiorari to review an order of the Industrial Accident Commission awarding compensation to an employee of petitioner for injuries sustained November 25, 1917. An application by the employee for adjustment of the claim to compensation was denied by the commission on March 11, 1919, upon the ground that the proceeding was barred by the statute of limitations prescribed by the Workmen's Compensation Act (St. 1913, p. 279); the application having been filed on October 17, 1918, more than six months after the date of the injury. No steps to obtain a rehearing of this proceeding have ever been taken. Miss Marie Michaud, the injured employee, was 20 years of age at the date of the filing of her application for adjustment and at the date of the hearing of said application, becoming 21 on November 10, 1918, two days after the termination of the hearing. On April 25, 1919, by a new attorney, she filed a disaffirmance of the proceeding upon the ground of minority, a notice of motion to set aside all previous proceedings upon the claim to compensation, and a new application for adjustment of the same claim. A hearing was held, and on December 30, 1919, the commission entered an award granting compensation to the employee. A rehearing of this second proceeding and award was denied by the commission, and petitioner seeks a review thereof by this court.

[1-3] It is conceded that the decision of the commission rendered March 11, 1919, is valid and in full force and effect, and consequently that the second proceeding and award are in excess of the power of the commission, unless the employee possessed the right of disaffirming the first award on the ground of her minority. The right of a minor to disaffirm an adjudication of his rights by a judicial tribunal obtained in a proceeding in which he has not been duly represented as provided by law continues until barred by laches after the minor has attained the age of majority; the right is not dependent upon statute, but is a general rule of law enforced as a necessary incident to the status of minority. Joyce v. Joyce, 5 Cal. 161; Johnston v. S. P. Co., 150 Cal. 535, 89 Pac. 348; 10 L. R. A. (N. S.) 818, 119 Am. St. Rep. 181; 22 Cyc. 641, 699. Since the Industrial Accident Commission is a judicial body exercising judicial functions, its decisions and awards are subject to those general legal principles which circumscribe and regulate the judgments of all judicial tribunals. Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 Pac. 491, Ann. Cas. 1917E, 390; Carstens v. Pillsbury, 172 Cal. 572, 158 Pac. 218; Smith v. Ind. Acc. Com., 26 Cal. App. 560, 147 Pac. 600. Therefore, if the employee was a minor, under the terms of the Workmen's Compensation Act, at the time of the first application and hearing, since she was not represented therein by a guardian, she had the right, incident to minority, of disaffirming the award of the commission rendered in such proceeding within a reasonable time after reaching the age of majority.

Section 16d of the Workmen's Compensation Act of 1913 (St. 1913, p. 288), as amended in 1915 (Stats. 1915, pp. 1079, 1086), which was in force on the date the injuries were sustained, and section 11d of the present act (Stats. 1917, pp. 831, 842), provide:

"If an injured employee, or in the case of his death, one or more of his dependents, shall be under twenty-one years of age or incompetent at any time when any right or privilege accrues to such person under the provisions of this act, a general guardian, appointed by the court, or a guardian ad litem or trustee appointed by the commission or a commissioner may, on behalf of any such person, claim and exercise any such right or privilege with the same force and effect as if no such disability existed; and no limitation of time provided by this act shall run against any such person under twenty-one years of age or incompetent unless and until such guardian or trustee is appointed."

[4] It cannot be questioned that the age of majority is a matter of legislative regulation and that the Legislature may prescribe a longer period of minority for some purposes than for others. Magee v. Welsh, 18 Cal. 155; Moore v. Williams, 19 Cal. App. 600, 610, 611, 127 Pac. 509; Dwight, Law of Persons and Personal Property, p. 284; 22 Cyc. 511. Petitioner raises the question, however, as to whether the Legislature has, in fact, altered the age of majority of females for the purpose of the Workmen's Compensation Act. The contention of petitioner is that the above-quoted section of the Workmen's Compensation Act is to be construed with section 25 of the Civil Code, which provides, in effect, that females of the age of 18 are not minors, and therefore that the section of the act quoted above has a different effect and operation in its application to females between the ages of 18 and 21 than to males under 21 and females under 18. That is to say, it is contended that the effect of the act was not to place females between the ages of 18 and 21 in the category of minors, but merely to confer upon them certain specified rights in addition to those ordinarily accorded them as persons sui juris; that these rights, as to females between the ages of 18

and 21, do not carry with them the privileges ordinarily incident to minority, such as the right of disaffirmance, and may be waived by an election to proceed as a person sui juris.

[5] We are of the opinion that this contention cannot be sustained, and that, at least for the purpose of enforcing rights accruing under the Workmen's Compensation Act, the section of the act previously set forth prescribes the status of minority, with the privileges and disabilities incident thereto, for all persons under the age of 21. The language of the statute is general, providing for representation by a guardian ad litem, or a general guardian, and a suspension of the statute of limitations for all employees under 21. The right to appear by a guardian and the suspension of the running of the statute of limitations until the appointment of a guardian are not special privileges independent of minority. The conferring of such rights is a recognition of certain disabilities appertaining to the period of minority which require particular protection by the granting of special privileges. The period at which such privileges and disabilities shall cease cannot, logically, depend upon individual volition, and there would be no logic or purpose in permitting a female 20 years of age to adopt certain privileges of minority or to waive all such privileges and, at her own option, assert the rights of a person who has attained the age of majority. A provision for representation by a guardian for the enforcement of certain rights, and a provision for the suspension of the running of the statute of limitations until the appointment of such guardian for a person sui juris as to the enforcement of such rights, would be such an anomaly in our sytem of jurisprudence that it cannot be presumed to have been intended in the absence of express legislative declaration.

Moreover, the wording and history of the section of the act under consideration are prolific with proof that the intent of the Legislature was to adopt a uniform age of majority for the purposes of the section. This section of the Workmen's Compensation Act, as enacted in 1913, contained the words "a minor" in the place of "under twenty-one years of age"; the latter phrase being substituted by amendment in 1915. It is thus evident that the Legislature originally intended to adopt the respective ages of majority fixed by the Code for males and females, but altered the law in 1915 to put females upon an equal footing with males as regards the disabilities and privileges of minority. The following phraseology of the section is also significant:

"A * * * guardian * * * may, on behalf of *any such person*, claim and exercise any such right or privilege with the same force and effect as if *no such disability existed*." (Italics ours.)

The addition to this section of the following sentence, by amendment in 1917, indicates that all persons under 21 are considered minors within the purview of the section:

"The commission shall have power to determine the fact of the *minority* or incompetency of any injured employee and may appoint a trustee to receive and disburse compensation payments for the benefit of such *minor* or incompetent and his family." (Italics ours.)

Finally, the classification of females between the ages of 18 and 21 with persons ordinarily not sui juris, namely, females under 18, males under 21, and incompetent persons, is a strong indication of a legislative intent that they, likewise, are to be regarded as not sui juris.

[6] The fact that section 16d of the act of 1913 (section 11d of the act of 1917) provides that a guardian "may" appear for the persons specified is relied upon by petitioner in support of his argument that the statute is not mandatory, but merely permissive, and that a female over 18 may elect whether or not she will be represented as provided by the section. This section must be construed in the light of subdivisions 2 and 3 of section 75 of the act of 1913 (subdivision a of section 57 of the act of 1917), which give the commission general power to regulate the manner and by whom minors and incompetents are to be represented before the commission. The provisions of section 16d of the act of 1913 (section 11d of the act of 1917) were undoubtedly intended to prescribe a method for the representation of minors and incompetents before the commission in addition to and in default of any method adopted by the commission under the authority conferred by the subsequent sections of the act. It is clear, therefore, that the word "may" is not permissive as regards the right to appear with or without representation by a guardian, but is intended as an enabling provision for the purpose of giving the guardian provided for by the section a standing before the commission in default of or supplementary to any other method designated by the commission.

[7, 8] The employee, being under 21 at the time of the first application and hearing, was therefore a minor for the purpose of the enforcement of rights acquired under the terms of the act. As an incident to her status of minority she possessed the right of disaffirming the award of the commission, which deprived her of a right to which she was entitled, and the fact that she became 21 before the award was rendered would not defeat her right of disaffirmance if exercised within a reasonable time after reaching majority. Childs v. Lanterman, 103 Cal. 387, 37 Pac. 382, 42 Am. St. Rep. 121. She exercised this right by filing her disaffirmance

and second application within six months after becoming 21 and within 1 month after the rendition of the first award. The finding of the commission that this was a reasonable time, and that there was no unequivocal act on the part of the employee affirming the decision prior to the disaffirmance proceedings, cannot be disturbed. Walker v. Ind. Acc. Com., 177 Cal. 737, 171 Pac. 954, L. R. A. 1918F, 212.

[9] The commission failed to specifically pass upon the motion of the employee to set aside the first award which motion was made at the time of the filing of the second application and upon stipulation, heard and considered together with and at the time of the hearing of the second application. Inasmuch as the second judgment and award itself, by virtue of the findings on which it was based, in effect set aside and superseded the previous decision, the failure of the commission to enter a separate order setting aside the first award is an informality which does not operate to invalidate the award under review. Stats. 1915, c. 607, § 28 (section 77a as amended) p. 1102; Stats. 1917, c. 586, § 60a, p. 871.

The second award is therefore affirmed, and the cause remanded, with directions to the commission to correct the irregularity above indicated by entering an order setting aside the first award.

We concur: SHAW, J.; OLNEY, J.; LAWLOR, J.; SLOANE, J.

ANGELLOTTI, C. J. I dissent. To my mind the section of the Workmen's Compensation Act here involved does not purport to make a woman who has reached the age of majority by attaining the age of 18 years, a minor until she attains the age of 21, for the purposes of the act, or debar her from prosecuting a claim under the act without the interposition of a guardian. It simply purports to authorize the appointment by the commission or a commissioner of a guardian ad litem or trustee for any one under 21 years of age, or incompetent, and provides that no limitation of time provided by the act shall run against any person under 21 years of age or incompetent until a guardian or trustee is appointed.

In this case the first judgment was given in a proceeding brought by the woman herself. She was then nearly 21 years of age. She became 21 years of age two days after the termination of the hearing. Judgment was not given until four months after she had attained the age of 21. I think the judgment was a valid and binding one, not open to disaffirmance, and subject to review only in the manner and within the time provided in the act.

I concur: WILBUR, J.

184 Cal. 411

MARPLE v. JACKSON, Sheriff et al.
(L. A. 5884.)

(Supreme Court of California. Nov. 29, 1920.)

1. Witnesses ⟸52(6)—Husband may not testify concerning delivery of deed to wife over her objection.

Where a wife sought to enjoin sale of property claimed by her under execution against her husband, he might not, against her objection, testify for defendants concerning delivery of deed by him to her, claimed to have been made to defraud creditors, under Code Civ. Proc. § 1881, subd. 1, forbidding husband to be examined for or against the wife without her consent.

2. Trial ⟸404(1) — Finding that allegations of complaint are true was finding of delivery of deed plaintiff set up.

Where a complaint by a wife alleged she owned premises by virtue of a described deed by her husband to her, a finding that all of the allegations of the complaint were true implied a finding that the deed was duly delivered.

3. Deeds ⟸194(3)—Deed presumed delivered on date it bears.

A deed, duly executed and acknowledged, will be presumed prima facie to have been duly delivered on the date it bears under Civ. Code, § 1055.

4. Deeds ⟸194(3)—Presumption of delivery at date held not overcome by evidence.

Court *held* justified in holding that the presumption of delivery at date of execution of a duly executed and acknowledged deed had not been overcome by the evidence.

5. Fraudulent conveyances ⟸215 — Wife not estopped to claim property against husband's subsequent tort judgment creditors.

Where a husband's creditor's judgment against him was for injuries from his automobile, and not through any reliance on his ownership of premises which they sought to sell under execution, his wife was not estopped to claim title under an old deed recently recorded.

6. Fraudulent conveyances ⟸299(12) — Evidence held to show no fraud in debtor's conveyance to his wife.

Evidence *held* sufficient to support a finding that a conveyance by a debtor to his wife was not in fraud of his creditors.

Department 1.

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Suit by Ednah W. Marple against C. E. Jackson, Sheriff, Frederica L. Blackburn, and another. From a judgment for plaintiff, defendants Frederica L. Blackburn and another appeal. Affirmed.

Elmer S. Moody and Porter C. Blackburn, both of Los Angeles, for appellants.

Tanner, Odell & Taft, of Los Angeles, for respondent.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

LAWLOR, J. This is an appeal by the defendants Frederica L. Blackburn and Oliver V. Blackburn, her husband, from a judgment in favor of the plaintiff, Ednah W. Marple, in an action to enjoin the sale under execution of certain real estate situated in Orange county, alleged to be the separate property of the plaintiff. The record on appeal is presented in typewriting.

On April 20, 1916, Mrs. Blackburn secured a judgment in the superior court of Los Angeles county against plaintiff's husband, R. S. Marple, in the sum of $1,028.95. On July 6, 1917, execution was issued on the judgment, directing C. E. Jackson, sheriff of Orange county, to levy execution upon these premises. It is the sale of the property under this execution which respondent here seeks to enjoin. She bases her claim of title on a deed from R. S. Marple to her, which recites that it is made in consideration of love and affection. This deed bears the date, May 12, 1906, and was acknowledged on that day, but was not recorded until February 14, 1916. Appellants denied that the premises were the separate property of respondent, and alleged that they were the separate property of R. S. Marple, basing their claim on the grounds (1) that the deed from Marple to respondent was void for want of delivery, and (2) that, as a voluntary transfer made without valuable consideration, it was made by Marple in contemplation of insolvency and with the intention of defrauding his creditors. The cause was tried by the court, which found inter alia that all the allegations of the complaint were true, and, as heretofore noted, rendered judgment in respondent's favor, adjudging that the premises were her separate property, and restraining appellants from proceeding with the levy of the execution upon them.

[1] 1. At the trial respondent introduced in evidence the gift deed and rested. Appellants thereupon called respondent and later her husband as witnesses. After the latter had answered some preliminary questions respondent objected to his examination regarding either the delivery of the deed or the surrounding circumstances, on the ground that, under subdivision 1 of section 1881 of the Code of Civil Procedure, "a husband cannot testify against his wife." The objection was sustained, and appellants' first contention is that this ruling was erroneous.

Subdivision 1 of said section reads in part:

"A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage."

In People v. Langtree, 64 Cal. 256, 30 Pac. 813, the defendant was charged with burglary. In discussing the question whether the court erred in excluding the testimony of a Mrs. Brandon, which testimony tended to establish the innocence of the defendant and the guilt of the witness' husband, it was said, after quoting the above Code section:

"This is the provision of the Code upon the subject, and it must prevail. * * * 'A wife cannot be examined, for or against her husband, without his consent.' * * * If examined in an action or proceeding to which he was a party, she would undoubtedly be examined for or against him. Any witness examined in an action or proceeding is examined for one party and against the other therein. * * * If the husband of this witness had been a party to the action on trial, she could not have been examined at all without his consent."

We quote from Fitzgerald v. Livermore, 2 Cal. Unrep. 744, 13 Pac. 167:

"The wife of the plaintiff was called as a witness for the defendant, and gave testimony against the plaintiff without his consent. Her testimony was material. * * * We think the evidence * * * was incompetent."

In our opinion there was no error in the ruling complained of. While it is true that, as was said in People v. Langtree, supra, quoting from Schouler on Husband and Wife, 85, "The prevailing tendency * * * is to regard the domestic confidence or the ties of a spouse as of little consequence compared with the public convenience of extending the means of ascertaining the truth," yet, under the unequivocal language of the first sentence of the Code section, it is clear that, without respondent's consent, Marple was not a competent witness.

For this reason it will be unnecessary to consider whether the evidence of the circumstances surrounding the delivery of the deed falls within the privilege as to communications. The testimony was inadmissible, not because the communication was privileged, but because Marple was incompetent to testify against his wife, a party to the action.

Poulson v. Stanley, 122 Cal. 655, 55 Pac. 605, 68 Am. St. Rep. 73; People v. Loper, 159 Cal. 6, 13, 112 Pac. 720, Ann. Cas. 1912B, 1193, and Savings Union Bank, etc., Co. v. Crowley, 176 Cal. 543, 169 Pac. 67, are cited by appellants in support of this contention. But in each of those cases the question was as to the nature of the particular communications with regard to which testimony was sought to be elicited, and in none of them was the spouse, for or against whom the testimony was offered, a party.

Mitchell v. Superior Court, 163 Cal. 426, 125 Pac. 1061, is also cited by appellants on this point. That case, however, was a contempt proceeding which, as the court said, was "in its nature ancillary to the divorce action [previously instituted by the wife] and subject to the rules with reference to the competency of witnesses in that action." It was held, therefore, that, inasmuch as the wife was a competent witness against the husband in the divorce action, it was proper to allow

her, upon her own affidavit, to institute contempt proceedings against him on account of his failure to comply with the court's direction to pay her alimony. The case is plainly distinguishable from the one at bar.

[2] 2. We shall next consider appellants' contention that "the facts clearly show that there was never any delivery of the deed." It is alleged in the complaint that respondent was the owner of the premises by virtue of the deed of May 12, 1906. From the finding that all of the allegations of the complaint are true it must be implied that the court found the deed was duly delivered. The appellants question the sufficiency of this evidence to support the finding.

[3] At the outset it is to be observed that the deed was duly executed and acknowledged, and hence, under section 1055 of the Civil Code, it must be presumed prima facie to have been duly delivered on the date it bears. Branson v. Caruthers, 49 Cal. 374, 380. The question then becomes, Was this presumption overcome by appellants?

The respondent testified that she could not remember the precise date of the delivery of the deed, but that it was "12 or 14 years ago"; that there were present at the time of the delivery, besides herself and her husband, a Mr. and Mrs. Sanborn, a Miss Hyatt, and Charles D. Ballard, a notary public; that prior to that occasion she had loaned her husband considerable sums, in return for which he had promised "to deed me property * * * as soon as he got hold of some"; that she knew nothing about the preparation of the instrument itself; that she "couldn't just remember," but thought she had received the deed from Ballard and had then laid it "up on the book case"; that the next morning she and her husband took the deed and deposited it in a safe deposit box; that the key to this box was sometimes in her husband's, and sometimes in her own custody; that they both frequently opened the box and examined its contents, but that she was always accompanied by her husband on such occasions; that just before the trial of the action in which appellants secured the judgment, which, according to the complaint, they threaten to enforce against these premises, she and her husband took the deed from the box, and she personally filed it for record on February 14, 1916; that the reason why the deed was not recorded prior to that time was that when it was executed her husband had expressed the desire not to have it recorded, saying, "I don't like to have it appear I haven't anything in my own name;" that it was after consulting an attorney that she did record the deed; and that at all times her husband had the management and control of the property.

Ballard, testifying for respondent, stated that he had prepared the deed at Mr. Marple's request, and, as to the circumstances surrounding the alleged delivery, that the only thing he could recall was "that my signature over here at the left of the signature of the grantor is a signal to me that this deed was delivered to the grantee in my presence or by me, because I never put my signature under the insignia, 'Signed, sealed and delivered,' unless it was either delivered by me * * * or by the grantor in my presence."

There were introduced in evidence an assessment "list" containing Marple's sworn statement that he was the owner of these premises, and two mortgages on the property, each executed by respondent and her husband.

It is declared in Devlin on Deeds, § 284, that—

"Where a grantor executed a deed * * * to his wife, the fact that she placed the deed after delivery where her husband equally with herself could have access to it does not change its legal effect as a conveyance."

And it was held in Lewis v. Burns, 122 Cal. 358, 55 Pac. 132:

"The presumption is that a deed duly executed was delivered at its date; and the fact that it was not recorded until after the death of the grantor does not render the deed insufficient evidence of its delivery at its date."

Stone v. Daily, 185 Pac. 665, was a case where the question before the court was as to the delivery or nondelivery of two deeds. We quote:

"The retaking of possession and subsequent retention of the instrument by Mrs. Daily is not conclusive, even though it appear that it was not an afterthought, but was contemplated by her from the beginning. It is a very strong circumstance indicating that she did not intend such delivery as would put the deed beyond her control and power of recall, and would ordinarily be controlling. But the final question always is, What was the intent with which the formality of a delivery was gone through with? And if it appear indubitably that it was gone through with for the purpose of conveying the property then and there, and that the grantor desired to retain, and did retain, the instrument, not that she might control or suspend its taking effect, but for the purposes of custody and safe-keeping merely, as, for instance, to insure its not being recorded because she did not wish her husband to know of it, any contrary inference as to her intent arising from her continued possession of the instrument is of necessity overcome, and the fact of such continued possession becomes immaterial. * * *

"The case, then, is one where the formality of a delivery is gone through with with the intent of making an immediate effective conveyance, but after delivery the grantor retains possession of the deed for purposes of safe-keeping. That such a delivery is valid and is not affected by the fact that the instrument subsequently remains in the possession of the grantor is well established. * * *"

[4] In the light of these authorities we think it clear that the finding must be upheld.

As has been shown, the production of the deed raised a disputable presumption that it had been duly delivered. It is true the grantor continued to manage and control the property, and that at his request the deed was not recorded. But we have respondent's statement that she had received the deed. It may well be the court concluded, from Marple's request not to record the deed, that both parties intended that title should pass, and that they desired not to make known the transaction because it might injure Marple's credit. The court may also have inferred that the placing of the instrument in the deposit box was for safe-keeping. And, under the ruling in Bias v. Reed, 169 Cal. 33, 42, 145 Pac. 516, 519, "the force of an executed conveyance is not to be impaired by subsequent acts or declarations of the grantor." In any event, we are not prepared to hold the court was not justified in finding that appellants had not overcome the presumption in favor of delivery. Appellants' contention is without merit.

3. Nor, in our opinion, can appellants' contention that the transaction involving the execution and delivery of the deed was fraudulent as to creditors be sustained. On this point the court found it was not true that, as alleged in the answer, the transaction was tainted with fraud. As already stated, respondent testified that it was in return for loans which she had made to her husband that the latter executed and delivered this deed. It cannot be held that appellants have advanced any sums in reliance upon the facts that the record title stood in the name of Marple, or that he continued to manage and control the property. Nor is there any showing that the grantor was insolvent or even financially embarrassed at the time the deed was executed and delivered. Appellants did not secure their judgment against Marple until after the deed had been recorded.

[5] It should be noted, moreover, that the action in which appellants' judgment was recovered was an action, not upon any contractual obligation, but for personal injuries sustained through having been struck by Marple's automobile, and was prosecuted against both Marple and respondent, so that the obligation which is the basis of appellants' claim was not incurred upon the faith that Marple was the owner of these premises, and respondent cannot be estopped, as against appellants at least, to claim that this is her separate property. In each of the cases cited by appellant on this point the transfer was held fraudulent because the complaining creditors had advanced funds to the grantor in reliance on the fact that the record title stood in his name. As we have seen, such is not the case here.

[6] It must be held that the evidence is sufficient to support the finding that there was no fraud either in the execution and delivery or in the recordation of the conveyance in question.

The judgment is affirmed.

We concur: SHAW, J.; OLNEY, J.

184 Cal. 295

REVERT v. HESSE et al. (L. A. 6040.)

(Supreme Court of California. Nov. 13, 1920.)

1. Appeal and error ⊂=640—No dismissal for delay in notice for transcript, where relief therefrom granted below.

That notice to the clerk to prepare a transcript was not filed in the time prescribed by Code Civ. Proc. § 953a, is not ground for dismissing appeal; relief from the delay having been applied for and obtained in the trial court.

2. Pledges ⊂=40—Pledgee may not sell or discharge pledged debt.

While a pledgee of evidence of indebtedness may assign his interest in the collateral, the assignee then having his rights, or may collect it when due, he, under Civ. Code, § 3006, may not without the assignor's consent sell, compromise, or otherwise discharge the pledged debt or its security.

3. Pledges ⊂=31(4)—Pledgee selling or releasing pledged security may be held for conversion.

If a pledgee of evidence of indebtedness sells or releases the pledged debt or its security, otherwise than on collection, the pledgor may set aside the sale or release, if other circumstances permit, or hold the pledgee for conversion.

4. Pledges ⊂=31(4) — It is conversion for pledgee to release pledged mortgage.

There is a conversion of pledged mortgages, they being released without the consent of the pledgor and without foreclosure or other collection of the debt immediately secured by them.

5. Principal and agent ⊂=159(1)—Principal liable for conversion through agent.

One for whom and subject to whose direction assignees of pledged mortgages act as trustees in taking the assignment of and releasing the mortgages is liable for the conversion thus accomplished through his agents.

6. Conspiracy ⊂=6—Wrong resulting in damage, the cause of action.

Where several are sued for a civil wrong, it is such wrong resulting in damage, and not the conspiracy to commit it which constitutes the cause of action.

7. Conspiracy ⊂=14 — Makes each liable as joint tort-feasor for all damages.

The result of a conspiracy pursuant to which a civil wrong is done is to render each conspirator responsible as a joint tort-feasor for all damages, regardless of the degree of his activity and though he was not a direct actor.

8. Conspiracy ⟸14—Joint recovery against all conspirators.

Joint recovery of damages may be had against all parties to a conspiracy pursuant to which a civil wrong is done.

9. Conspiracy ⟸19—Finding of conspiracy to defraud by conversion of pledged mortgages warranted.

Circumstances, including relations and interest of parties, *held* to warrant finding of conspiracy to defraud, by conversion of pledged mortgage, between one taking a qualified assignment thereof by way of pledge, and immediately, without consideration, assigning it absolutely to one who released it, and the grantee, subject to the mortgage, of the mortgaged property, and her husband, as trustee for whom she had taken title.

10. Conspiracy ⟸13—Persons participating as agents liable for damages.

Persons are liable for participating in a conspiracy to do a civil wrong, though acting merely as agents, and though unacquainted with the details of the scheme.

11. Conspiracy ⟸13—Receipt or expectation of benefit not necessary for civil liability.

To make a conspirator liable for damages for the wrong done pursuant to the conspiracy, it is not necessary that he should have received or expected benefit from the wrongful act.

12. Trover and conversion ⟸50—Damages for conversion of note, face value.

Prima facie the measure of recovery for conversion of a note or other money security is its face value, with interest.

13. Pledges ⟸36—Damages for conversion of pledged mortgage, its value, less debt to pledgee.

Where a pledged debt is converted by the pledgee, the amount due him is to be deducted from the value of the debt converted in determining the damages.

14. Pledges ⟸36—Relative to damages for conversion of pledged mortgage held water stock was to be regarded as held for benefit of the land.

Relative to damages for conversion of a mortgage by release thereof by its pledgee, water stock, appurtenant to the mortgaged land and owned by the landowner at time of giving the mortgage, is to be regarded as held for the benefit of the land at the time of the release; one who had bought the land and water stock from the mortgagor, and was a party to the conspiracy for the conversion, though defaulting in payment of assessments on the stock and allowing it to be sold therefor, having at the sale bought it in the name of another and thereafter to the time of the release having continued to so hold it, and having treated it as appurtenant to the land in the matter of a subsequent mortgage and a later sale of the land.

Department 2.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Amanda J. Revert against Arthur T. Hesse and others. Judgment for plaintiff, and defendants appeal. Affirmed.

John B. Haas and Earl Daniels, both of Los Angeles, for appellants.

John E. Daly, James H. Daly, and Daly & Daly, all of Long Beach, for respondent.

LENNON, J. Action for damages for fraudulent conversion in securing the possession of and releasing of record two mortgages on premises consisting of 80 acres of land in Imperial county, Cal.

[1] The motion to dismiss this appeal, which was made upon the ground that appellants' notice to the clerk to prepare a transcript was not filed within the time prescribed by section 953a of the Code of Civil Procedure, is without merit. In the cases relied upon by respondent in support of the motion there was no transcript on file in the Supreme Court, either for the reason that no transcript was prepared because no notice was given to the clerk, or for the reason that the trial judge refused to certify the transcript after it was prepared, on the ground that, while the notice to the clerk was filed, it was not filed within the time specified by section 953a of the Code of Civil Procedure. Under such circumstances it was held that the Supreme Court was without power to aid the appellant, because the granting of relief from failure to file such notice within the requisite time lay solely within the jurisdiction of the trial court. Estate of Keating, 158 Cal. 109, 110 Pac. 109; Fiske v. Gosbey, 168 Cal. 334, 143 Pac. 611; Brown v. Superior Court, 175 Cal. 141, 165 Pac. 429. In the instant case, however, relief from the delay in filing the notice was not sought in the Supreme Court, but was applied for and obtained in the lower court, and, the transcript having been certified by the trial judge and filed in the Supreme Court before the motion to dismiss the appeal was made, the case must be considered upon its merits.

Beginning with the execution of the two mortgages in question by Simon F. Flink in May, 1915, the complaint recounts the sequence of events culminating in the alleged conversion as follows: The mortgages in question were executed as security for two promissory notes of $2,000 each, given by said Simon Flink in part payment of the purchase price of the land hypothecated by the mortgages. The notes and mortgages were made in favor of Amanda J. Revert, the plaintiff, and one Isaac Bordner, as joint tenants with right of survivorship, and, upon the death of the latter in September, 1915, plaintiff became the sole owner thereof. Plaintiff subsequently transferred and assigned these notes, together with the mortgages upon the property in question, to one

Edwin R. Gurnsey, as collateral security for the payment of a promissory note in the sum of $489.31, payable on demand, executed and delivered by plaintiff to said Gurnsey. On September 7, 1916, after the recording of the above-mentioned assignment, plaintiff's promissory note for the sum of $489.31 and the notes and mortgages held as collateral security therefor were assigned by Edwin Gurnsey to the defendant Sidney Beach, who, in turn, on September 12, 1916, assigned the said notes and mortgages to Walter Niolon. On September 14, 1916, Walter Niolon released the two Flink mortgages without notice to plaintiff or demand upon her for the payment of her note for $489.31, for which, as above stated, the mortgages were held as collateral security. Plaintiff has never received any of the money secured by the Flink mortgages.

Prior to the assignment of the notes and mortgages by Edwin Gurnsey to defendant Sidney Beach, to wit, on June 6, 1916, Simon Flink, the mortgagor, sold and conveyed the premises described in said mortgages, subject to the two mortgages aforesaid and to a prior mortgage in the sum of $1,500 in favor of Margaret Paine, to defendant Arvilla Hesse. About September 23, 1916, on which date the release of the Flink mortgages was recorded, defendant Arvilla Hesse and her husband, defendant Arthur Hesse, borrowed the sum of $2,500 from one Charles Spitly, securing the payment of the same by the execution of a trust deed to the property described in the Flink mortgages. The premises were subsequently sold by defendants Arvilla and Arthur Hesse.

Arthur Hesse, Arvilla Hesse, and Sidney Beach were made defendants; plaintiff attempted to join Walter Niolon as defendant, but was unable to obtain personal service. The complaint further alleges that the assignment of the Flink mortgages by defendant Sidney Beach to Walter Niolon and the release by the latter were executed without consideration, and that this assignment and release, together with the acts subsequent thereto, were had and done with the full knowledge and consent of each and all of said defendants with the fraudulent intent of defrauding plaintiff by depriving her of her rights and privileges in and to the two mortgages and in pursuance of a conspiracy among all of the defendants to convert the notes and mortgages to their own use and to permit defendants Arthur and Arvilla Hesse to dispose of the premises freed from said incumbrances. It is further alleged, upon information and belief, that defendants Arthur and Arvilla Hesse agreed, upon the release of said mortgages, to place a new first mortgage or incumbrance upon the premises and "to divide any surplus derived from said new incumbrance after payment of said mortgage of Margaret N. Paine, and thereafter to sell said described premises, and divide the proceeds of such sale among said defendants." Damages are alleged in the sum of $3,606.17. The answer denies the allegations of conspiracy, conversion, and damages, and alleges, by way of an affirmative defense, that, at the time of the assignment to Sidney Beach, the notes of Simon Flink were worth no more than the amount for which they were assigned as collateral security, namely, $489.31. The trial court made its findings of fact in substantial accord with the allegations of the complaint, and gave judgment against the defendants Arthur Hesse, Arvilla Hesse, and Sidney Beach, jointly and severally, for the sum of $3,606.17, which was the face value of the mortgage notes, less the amount of the note for the payment of which they were held as collateral security, with interest thereon from September 23, 1916, from which judgment defendants appeal.

[2-5] While a pledgee to whom an evidence of debt has been pledged can collect the same when due, he cannot sell, compromise, or otherwise discharge the pledged debt, or the security therefor, without the consent of the pledgor. Civ. Code, sec. 3006. Such a pledgee may, of course, assign his interest in the collateral to an assignee, who thereupon acquires the rights of the pledgee (Pease v. Fitzgerald, 31 Cal. App. 727, 161 Pac. 506), but, aside from this right of assignment, his control over the debt is limited to the right to hold the same and collect at maturity; if he sells or releases the debt or security otherwise than upon collection, the pledgor may set aside the sale or release, if other circumstances permit, or hold the pledgee for conversion. Chester v. Hill, 66 Cal. 480, 6 Pac. 132; Kelly v. Matlock, 85 Cal. 122, 24 Pac. 642; Hunt v. Glassell, 30 Cal. App. 676, 159 Pac. 227; Traders' Bank, etc., v. Wilcox, 183 Pac. 256. It is not disputed that the assignment by plaintiff to Edwin Gurnsey of the notes and mortgages executed by Simon Flink and the subsequent assignment thereof by said Gurnsey were assignments by way of pledge. It also appears from the evidence that defendants Sidney Beach and Arthur Hesse were fully informed as to the nature of these assignments. There was an attempt on the part of the defendants to prove that the attorneys who arranged the assignment for Gurnsey were also the attorneys for plaintiff, and that these attorneys, at the time of the assignment by Gurnsey to Beach, were informed of and acquiesced in defendants' plan for releasing the mortgages. This attempt failed utterly, for not only was there no competent evidence that the attorneys in question were aware of defendants' purpose, but there was no proof that they were the attorneys for, or in any way represented, plaintiff at the time they arranged the assignment from Gurnsey to Beach. Inasmuch as the

pledged mortgages were released without the consent of the pledgor and without foreclosure or other collection of the debt immediately secured by them, there was a conversion of the pledged property in the instant case. Moreover, inasmuch as it is admitted that the assignees Sidney Beach and Walter Niolon acted as trustees for defendant Arthur Hesse and subject to his directions in taking the assignments of the pledge and releasing the mortgages, defendant Arthur Hesse is liable for the conversion thus accomplished by him through his agents. Horton v. Jack, 126 Cal. 521, 58 Pac. 1051. This proposition appears not to be seriously questioned by appellants, who rely primarily upon the contention that the evidence was insufficient to support the finding of conspiracy on the part of defendants Sidney Beach and Arvilla Hesse, and therefore that said defendants cannot be held jointly and severally liable for damages. Appellants also rely upon an alleged failure on the part of plaintiff to prove damage from the conversion.

[8-9] It is a general and well-settled principle of law that, where two or more persons are sued for a civil wrong, it is the civil wrong resulting in damage, and not the conspiracy, which constitutes the cause of action. Herron v. Hughes, 25 Cal. 555; Davitt v. Bakers' Union, 124 Cal. 99, 56 Pac. 775; Dowdell v. Carpy, 129 Cal. 168, 61 Pac. 948; Manner v. Slater, 148 Cal. 284, 83 Pac. 35. In such an action, the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tort-feasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor, and regardless of the degree of his activity. Cohen v. Fisher, 135 App. Div. 238, 120 N. Y. Supp. 546; White v. White, 132 Wis. 121, 111 N. W. 1116; Miller v. John, 208 Ill. 173, 70 N. E. 27. A plaintiff is entitled to a joint recovery of damages against such defendants as he can show have united or co-operated in inflicting a wrong upon him. Herron v. Hughes, supra; More v. Finger, 128 Cal. 313, 60 Pac. 933; Nevin v. Gary, 12 Cal. App. 1, 106 Pac. 422.

"The law recognizes the intrinsic difficulty of proving a conspiracy. The allegations with reference to conspiracy are treated as matters of inducement leading up to a more particular description of the acts from which conspiracy may be inferred. * * * The conspiracy may sometimes be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances." Woodruff v. Hughes, 2 Ga. App. 361, 58 S. E. 551; Jernigan v. Wainer, 12 Tex. 189.

In the present action, while plaintiff was unable to prove any formal agreement between defendants Arthur Hesse and Sidney Beach, nevertheless, there was before the court the entire transaction resulting in the consummation of a flagrant fraud upon the plaintiff, in which transaction defendant Sidney Beach participated as an intermediary. There was also the undisputed fact that, only five days after receiving from Gurnsey a qualified assignment of the Flink notes and mortgages by way of pledge, defendant Sidney Beach, without consideration, transferred the same notes and mortgages to Niolon, by an absolute assignment, and was unable to remember whether or not he also assigned plaintiff's note for $489.31, for the payment of which the other notes and mortgages were held by him as security. These circumstances, coupled with the further fact that defendants Sidney Beach and Arthur Hesse were not strangers, but were on more or less intimate terms, occupying the same office, were sufficient to warrant the inference drawn by the trial court that defendant Sidney Beach was a party to a conspiracy which had for its object the fraudulent conversion complained of by plaintiff. Likewise, as regards the defendant Arvilla Hesse, there are the facts that she took title to the premises, subject to the recorded mortgages in favor of plaintiff, in her own name for the benefit of her husband, and held the same for him at the time of the assignment and release of said mortgages by other agents of her husband. In addition, there is to be considered the part assumed by her in the various transactions subsequent to the release, by means of which her husband reaped the benefit of the conversion of the mortgages, the execution by her, together with her husband, of a new first incumbrance upon the property in order to obtain a loan of $2,500, and the joining by her in a conveyance of the property when the same was sold free from plaintiff's mortgages. In coming to a conclusion upon the question of the implication in the conspiracy of the defendant Arvilla Hesse, all these circumstances were to be weighed by the trial court against the only evidence offered by this defendant in her own behalf, namely, her own denial that she knew anything about the transaction in which her husband was involved.

[10, 11] The fact that defendants Sidney Beach and Arvilla Hesse acted solely as the trustees or agents of defendant Arthur Hesse does not constitute a valid defense, for a person is liable for his participation in a conspiracy, having for its object the commission of a wrongful act, even though he acts only as an agent for another, and is unacquainted with the details of the scheme. Brumley v. Speedway, etc., Co., 138 Tenn. 534, 198 S. W. 775.

"A number of persons may conspire to do an unlawful act, and each becomes responsible for acts done in furtherance of the conspiracy. It would be no defense as to any one of them to show that his participation was not neces-

sary to the accomplishment of the ultimate purpose, and that it would have been consummated if he had not become a conspirator." Green v. Cochran, 43 Iowa, 544, 550.

Plaintiff's omission to prove that said defendants Sidney Beach and Arvilla Hesse received pecuniary compensation as a result of the conversion is immaterial. Those who aid in the commission of a wrongful act by another are liable for the resulting damages, although they expected no benefit from the wrongful act and in fact received none. Brumley v. Speedway, etc., Co., supra; Breedlove v. Bundy, 96 Ind. 319; Felsenthal v. Thieben, 23 Ill. App. 569. It follows that the finding of the trial court, to the effect that defendants Sidney Beach and Arvilla Hesse joined with defendant Arthur Hesse in a conspiracy whereby plaintiff was defrauded of her interest in the Flink notes and mortgages by a conversion thereof, cannot be disturbed,

[12, 13] With regard to the question of damages, the general rule is that where a note or other money securities have been converted, "their owner is, prima facie, entitled to recover their face value with interest." Sutherland on Damages (4th Ed.) vol. 4, § 1132. Where the converted debt was held by way of pledge, the amount due the pledgee on the principal debt must be deducted from the value of the debt converted (Gay v. Moss, 34 Cal. 125), and this was done by the trial court in the instant case. Appellant sought to further mitigate the damages by attempting to prove that the Flink notes were not worth their face value, owing to the small value of the security and the insolvency of the maker.

[14] At the time the mortgages were executed, the mortgagor, Flink, owned 76 shares of wafer stock appurtenant to the mortgaged land. While there was a conflict of testimony as to the value of the land *with* the appurtenant water stock, there was uncontradicted testimony that the land *without* the water stock was practically worthless. Appellants contend that, in determining the value of the land as security for the notes in question, the water stock cannot be taken into consideration, for the reason that, prior to the conversion of the mortgages, the water stock had been sold for a default in the payment of assessments thereon. Upon an examination of the testimony of defendant Arthur Hesse on this phase of the case, it appears that, after purchasing the premises and water stock in question, said defendant made default in the payment of assessments on the water stock. The stock was thereupon sold to meet the delinquent assessments, and at the sale, which occurred June 30, 1916, defendant Arthur Hesse purchased said stock in the name of a third party acting in defendant's behalf. Defendant Arthur Hesse continued to hold the water stock in the name of this third party until after the release of the Flink mortgages. In view of the fact that defendant Arthur Hesse bought in the water stock with full knowledge of the circumstances and treated it as appurtenant to the land in question for other purposes, assigning the stock to Spitly at the time the trust deed to the property was executed as security for the $2,500 borrowed from Spitly, and transferring the ownership in the stock to the purchaser of the property when the latter was finally sold by defendants, said defendant cannot be permitted to take advantage of his own default in order to decrease the value of plaintiff's securities. The water stock must be regarded as held for the benefit of the land at the time of the release of plaintiff's mortgages, and the enhancement of the value of the land by the water stock was properly taken into consideration in determining the value of the converted securities. There was a conflict of testimony as to the value of the land *with* the water stock, from which the trial court was warranted in finding that said value was sufficient to protect the Flink notes to the extent of their face value. Therefore, conceding that appellants succeeded in proving the insolvency of Flink, the maker of the notes, which is doubtful, nevertheless, the finding of the trial court that the notes were worth their face value is sustainable upon the theory that the property hypothecated by the mortgages was ample security for the full value of the notes.

The judgment is affirmed.

We concur: WILBUR, J.; SLOANE, J.

184 Cal. 390

SIMONS BRICK CO. v. WIGLESWORTH.
(L. A. 6063.)

(Supreme Court of California. Nov. 20, 1920.)

1. Guaranty ⟸6—Acceptance of offer of guaranty limited to time parties reasonably had in mind.

Defendant's statement that, if plaintiff would employ a particular company to vaccinate its hogs with anti-cholera serum, he would personally warrant or guarantee the immunity of the hogs from cholera, was a proposal which had to be accepted within such time as the parties contemplated it would remain open, and, in the absence of express understanding, within such time as they reasonably had in mind under the circumstances.

2. Guaranty ⟸91—Finding that offer of guaranty was intended to remain open and was part of subsequent contract held warranted.

An implied finding that it was understood that defendant's offer to guarantee the im-

munity of plaintiff's hogs from cholera, if plaintiff would employ a certain company to vaccinate them, should remain open until plaintiff vaccinated the hogs, and that the employment of the specified company some months later was on an understanding of which the guaranty was a part, *held* supported by the facts shown.

3. Guaranty ⟸6—Guaranty of results of use of anti-cholera serum not binding when made after use.

Defendant's statement to plaintiff's president, after plaintiff had employed a company in which defendant was interested to vaccinate its hogs for cholera, that he guaranteed the results of the use of his serum was not a binding promise.

4. Frauds, statute of ⟸17—So-called guaranty need not be in writing unless a promise to answer for another's debt.

A promise which may be aptly termed a "guaranty" is not required to be in writing by Civ. Code, §§ 1624, 2787, 2793, 2794, and Code Civ. Proc. § 1973, unless it is a promise to answer for the debt, default, or miscarriage of another.

5. Animals ⟸23(1)—On vaccination of hogs there is implied warranty of skill but not of results.

Where a vaccine company was employed to vaccinate plaintiff's hogs for cholera, there was an implied warranty or agreement that reasonable skill and care would be exercised in the selection and application of the vaccine, but no implied warranty that the hogs would be rendered immune to cholera.

6. Animals ⟸23(1)—No express warranty of results of anti-cholera serum held to have been created.

Where the agent of a vaccine company employed to vaccinate plaintiff's hogs for cholera called on plaintiff's president some time prior to the employment and left an advertising pamphlet containing a form of warranty contract, but it was not read by plaintiff's president or executed and did not enter into the subsequent employment, there was no express warranty.

7. Frauds, statute of ⟸25—Guaranty of fulfillment of warranty by another within statute, though the other makes no warranty.

If defendant's statement that, if plaintiff would employ a certain company to vaccinate its hogs for cholera, he would warrant or guarantee their immunity from cholera, was only a promise to insure the obligation of the company warranting results of the vaccination assuming that such warranty would be made, it was a promise within the statute, and the fact that no warranty was made by the company did not change its nature or avoid the necessity for its being in writing.

8. Frauds, statute of ⟸23(1)—Direct guaranty of results of anti-cholera serum sold by another need not be in writing.

Where defendant's statement that, if plaintiff would employ a certain company to vaccinate its hogs for cholera, he would guarantee their immunity from cholera, was intended as a promise that he would directly guarantee the efficacy of the anti-cholera serum, and not merely as a promise to stand good for the fulfillment by the company of its guaranty or warranty, the promise was enforceable though not in writing.

Department 1.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by the Simons Brick Company against Ed Wiglesworth. Judgment for plaintiff, and defendant appeals. Affirmed.

W. A. Alderson and K. A. Miller, both of Los Angeles, and Noyes & Heath, of Kansas City, Mo., for appellant.

Richard J. O. Culver, of Los Angeles, for respondent.

OLNEY, J. This is an appeal by the defendant from a judgment against him upon his alleged contract that, if the plaintiff would employ a certain company known as the Interstate Vaccine Company to vaccinate the plaintiff's hogs with anti-cholera serum, the defendant would personally warrant or guarantee that such vaccination would render the hogs immune from cholera, and he would pay for any hog vaccinated which subsequently died of that disease. The trial court found that a contract of the character stated was made; that the plaintiff in reliance upon it employed the Interstate Vaccine Company to vaccinate its hogs; that its hogs were so vaccinated; that a number thereafter died of cholera; and that the net loss to the plaintiff by the death of the hogs was $5,637.20, for which judgment was given the plaintiff. There are but two questions presented by the appeal: First, is the finding that there was a contract supported by the evidence? And, second, was the promise of the defendant upon which the claim of contract is based, and which admittedly was oral only, one which had to be in writing under the statute of frauds?

[1-3] As to the first question, the sufficiency of the evidence to sustain the finding mentioned, there was direct evidence as to the making of a promise by the defendant. It also appears clearly that the promise when made was intended to be contractual in character; that is, was intended as the definite assumption of an obligation by the defendant in case it were accepted by the plaintiff. According to the evidence, the defendant, in the spring of 1916, called on the president of the plaintiff, stated that he was the president and principal stockholder of the Interstate Vaccine Company, endeavored to persuade the president of the plaintiff to have its hogs vaccinated by that company, and in that connection stated that, if his company were employed to do this, he per-

sonally would guarantee the immunity of the hogs from cholera for the balance of their natural lives, and would pay the value of any that might subsequently die of cholera. If this proposal had been accepted then and there by the plaintiff by the employment of the vaccine company, there could be no doubt as to the existence of the contract or as to the sufficiency of the evidence to sustain the finding that there was a contract. The only doubt in the matter arises from the fact that the vaccine company was not employed at that time, was not in fact employed until the following fall. Then the plaintiff, through the local agent of the company and without any further dealings with the defendant, employed the vaccine company, and the hogs were vaccinated. The question on this branch of the case, therefore, is as to whether or not this employment can be related back to the defendant's promise of some months before. The defendant's statement to the president of the plaintiff was, of course, a proposal which had to be accepted within such time as the parties contemplated it would remain open, and, in the absence of any express understanding upon the point, within such time as it could be taken they reasonably had in mind under all the circumstances of the case. If nothing appeared other than that the defendant had made the proposal in the spring and the plaintiff months later had employed the vaccine company to vaccinate its hogs, it might well be taken that the employment of the vaccine company was an entirely new matter, not relating back in any manner to the conversation of the previous spring, so that if the defendant were to be held liable it would have to be on some new promise made at that time. But, according to the testimony for the plaintiff, which must be accepted in view of the court's findings, the further facts were that the conversation between the defendant and the plaintiff's president in the spring ended with the statement by the latter that he would keep in touch with the defendant and would call upon him when the plaintiff was ready to vaccinate. It also appears that during the summer the local agent for the vaccine company, who had been present at the original interview between the plaintiff's president and the defendant and had heard the latter's statement with regard to the guaranty, called upon the plaintiff's president and was informed that when the plaintiff was ready to vaccinate it would call upon him, and the guaranty was again spoken of as an inducing reason for the plaintiff to employ the vaccine company. This evidence is sufficient to justify the conclusion, implied in the court's findings, that it was understood that the defendant's proposal that he would guarantee the immunity of the hogs if the plaintiff employed the vaccine company, remained open until the plaintiff actually came to vaccinate and employed the vaccine company for that purpose, and that the employment was upon an understanding of which the guaranty of some months before was a part. This conclusion is strengthened by evidence that the following spring, when the defendant again personally met the plaintiff's president, he renewed his statement that he guaranteed the results of the use of his serum. Such a statement, of course, made after the vaccine company had been employed and the hogs had been vaccinated, would not itself be a binding promise; but it is of weight as showing what the parties understood were the terms upon which the vaccine company had been employed. There is evidence in the case which, perhaps, is sufficient to have justified a different conclusion as to the understanding, but there is no occasion for discussing it. The evidence stated is sufficient to justify the conclusion which the trial court reached, and that is final upon this branch of the case.

[4] As to the point that the promise of the defendant was not in writing, the witnesses called to prove the making of the promise, including the plaintiff's president himself, all speak of the promise as one to "guarantee" the immunity of the hogs. Stress is laid upon the use of this word as indicating or proving a promise which had to be in writing in order to be enforceable. But it is not every promise which may be aptly termed a "guarantee" that is required to be in writing. In this case, if the defendant had himself been selling his serum directly to the plaintiff and had stated to the latter that if it were used he would "guarantee" the results, the word would have been used in a customary and proper sense, and yet there could be no doubt that the promise would be a primary one and would not have to be in writing to be enforceable. It is only when the "guarantee" is a promise to answer for the debt, default, or miscarriage of another that it must be in writing. Sections 1624, 2787, 2793, and 2794, Civ. Code, and section 1973, Code Civ. Proc. The question in the present case is: Was the promise of the defendant one to answer for the obligation of another? The only obligation of another for which it can possibly be considered that the defendant intended to assume responsibility is an obligation on the part of the vaccine company warranting the results of the use of its serum. There is no other person and there is no other obligation to which the defendant's promise can possibly have related.

[5, 6] But it is plain from the evidence that no such obligation existed. Practically all that appears is that the plaintiff employed the vaccine company to vaccinate its hogs and paid it for so doing. There is no implied warranty in such an employment that the

subject of the treatment will be rendered immune, any more than there is a warranty by a physician vaccinating for smallpox that the patient will be immune from that disease. There is in each case an implied warranty or agreement that reasonable skill and care will be exercised in the selection and application of the vaccine, but that is all. Nor is there anything in the present case from which an express warranty on the part of the vaccine company may be inferred. The utmost that appears is that, when the local agent of the vaccine company called on the plaintiff's president some time prior to the employment of the company to vaccinate, he left with the president an advertising pamphlet containing a form of warranty contract by the vaccine company. But the plaintiff's president testifies that he did not read it, and no such contract was executed, and there is nothing to show that it in any manner entered into the subsequent employment of the vaccine company. The situation is that, if the plaintiff had sued the vaccine company instead of the defendant for the loss of its hogs, it would have failed of recovery for want of proof of any obligation on the part of the company to make good that loss.

[7, 8] It is not, however, a wholly sufficient answer to the claim of the defendant to say that no obligation on the part of the vaccine company in fact existed. It might still be that the defendant's promise was only to insure such an obligation, assuming that it would be made. In such a case, it would still be a promise to answer for the obligation of another, and the fact that that obligation did not subsequently arise as it was contemplated it would, would not change the nature of the defendant's promise or avoid the necessity for its being in writing. As the conversation in which the defendant's promise was made is repeated in the evidence, the promise is given, in some instances, a form from which it might perhaps be inferred it was intended as a mere backing up of what the defendant assumed would be an obligation of the vaccine company. In other instances it has the form of an unqualified and primary promise by the defendant wholly without relation to any corresponding obligation on the part of the vaccine company. The view that the latter was its character and was reasonably taken by the plaintiff to be such is strengthened by the fact that the defendant represented that he made the promise because he was practically the vaccine company, owning 96 per cent. of its stock, so that it made little difference to him whether he assumed a primary obligation or only one to answer for the vaccine company. While perhaps a contrary finding would not be wholly without support in the evidence, we think it fairly clear, on the other hand, that the evidence cannot be said to be insufficient to sustain the implied finding of the trial court that the defendant's promise was intended by him as a promise that he would directly guarantee or warrant the efficacy of the serum which he was seeking to persuade the plaintiff to use, and was not intended merely as a promise to stand good for the fulfillment by the vaccine company of such guaranty or warranty by it. It follows that the promise was enforceable although not in writing.

Judgment affirmed.

We concur: SHAW, J.; LAWLOR, J.

184 Cal. 386

MARTIN v. PALMER UNION OIL CO.
(L. A. 5638.)

(Supreme Court of California. Nov. 20, 1920.)

Corporations ⇐175—Contract making certain stock nonassessable not authorized by articles invalid.

The plain purpose of Civ. Code, § 290, subd. 6, *held* to be to prohibit any distinction or preference of any nature, not expressly provided for in a corporation's articles of incorporation, between shares of its stock; so that provision of a contract under which it issued certain common stock that it shall be nonassessable, not being authorized by such articles, is invalid.

In Bank.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by George A. Martin against the Palmer Union Oil Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Lewis A. Hilborn and Roy A. Bronson, both of San Francisco, for appellant.

Frank R. Wehe, of San Francisco, and John J. Squire, of Santa Barbara, for respondent.

OLNEY, J. This is an appeal by the plaintiff from a judgment against him rendered on demurrer to his complaint. The action is one to compel the defendant company to recognize the plaintiff as the owner of 3,200 shares of its capital stock, although such shares have been sold by the defendant to pay an assessment levied by it. The sole question is as to the validity of the assessment.

The assessment is attacked on the ground that it was levied in violation of an express contract by the defendant. It appears from the complaint that the stock of the defendant is divided into preferred and common shares; that stock of both kinds was issued; that in

this situation the defendant sold 600,000 shares of its common stock, presumably treasury stock, under a contract that such shares should not be assessable, and caused an indorsement to that effect to be placed upon the certificates issued to evidence such shares; that the plaintiff bought his shares direct from the company under this contract and received a certificate indorsed in accordance with it; and that the company nevertheless subsequently levied an assessment, sold the plaintiff's stock under it, and has since refused to recognize him as a stockholder. The complaint also sets forth, undoubtedly for the purpose of presenting the question of law in dispute between the parties, that neither the articles of incorporation nor the by-laws of the company contain any provision for the issuance of nonassessable stock.

It is apparent at once that the validity of the assessment depends upon the invalidity of the company's contract that the stock it was selling and of which the plaintiff bought a part should be nonassessable. The plaintiff relies upon the authority of Lum v. American Wheel Co., 165 Cal. 657, 133 Pac. 303, Ann. Cas. 1915A, 816. It was there held that a contract between a corporation and a stockholder that the shares of the latter were not assessable was valid. It is not certain on the face of the opinion whether it was intended to hold that such a contract was valid when a provision permitting it is found in the articles of incorporation, or that it was valid even if such provision were not found in the articles of incorporation. An examination of the record in the case, however, discloses that it nowhere appears that the articles of the defendant corporation contained any such provision. The record likewise discloses that, so far as appears, the contract involved was particular to the plaintiff and not common to all the stockholders, so that the effect of it would be at once to make a distinction between the shares of the plaintiff and the other shares of the corporation. The case decided therefore, was exactly the one now presented.

Nevertheless, we believe the question is controlled by the provisions of subdivision 6 of section 290, Civil Code, reading:

"Corporations formed for profit, pursuant to the provisions of this Code, may, by their articles of incorporation, provide for the classification of their capital stock into preferred and common stock. In the event that the articles of incorporation shall provide for such classification the same must contain a statement of the number of shares of stock to which preference is granted, and the number of shares of stock to which no preference is granted. The articles of incorporation shall also state, in clear and succinct manner, the nature and extent of the preference granted, and except as to the matters and things so stated, no distinction shall exist between said classes of stock or the owners thereof."

The plain purpose of this provision is that there shall be no classification of shares by way of preference or distinction between them unless such classification, with the preference or distinction upon which it is based, be stated in the articles of incorporation. A contract that certain shares should be nonassessable would at once create a preference or distinction and would come within the prohibition of the statute. It is true that the statute purports to be dealing with the matter of issuing preferred and common stock, and that when preferred stock is spoken of, without any specification of the particulars in which it is preferred, it is ordinarily assumed that the preference consists in a preferred right to dividends or to share in the capital assets upon dissolution, or to both. But while this is the preference which preferred stock ordinarily has, there is nothing in the statute to indicate that the preference which the statute provides can only be made when expressly authorized by the company's articles, is limited to this particular kind of preference. The language of the statute is general, and we think it plain that it was intended, and very wisely, to prohibit any distinction or preference between shares of any nature whatever not expressly provided for by the company's articles of incorporation. The contract under present discussion comes directly within this prohibition—was in fact an attempt to create in the general class of the defendant's common stock a subclass, so to speak, of preferred stock, having a special privilege, that of nonassessability, not provided for in the defendant's articles. Such being its character, it was void.

The opinion in Lum v. American Wheel Co. makes no mention of the Code section, and an examination of the briefs in the case shows that it was not called to the attention of the court, except in a brief in reply to one by amici curiæ. It was undoubtedly overlooked by the court, as otherwise the court could hardly have failed to mention and discuss it. The case must be overruled, not as necessarily incorrect in the principles declared, but as inadvertently applying those principles to a case where they were not applicable because of a positive statutory provision to the contrary.

Appellant's counsel seek to escape the force of the Code section by advancing the proposition that a contract that all of the company's stock should be nonassessable would not be illegal, since in that case there would be no preference, and that the contract in the present case should be deemed such a contract, since by so treating it the taint of illegality can be avoided. The rule, of course, is that when a contract is equally capable of two constructions, one of which will make it illegal and the other not, the latter is to be preferred and adopted. But this is a rule of construction and has no application to a

case where the intent of the parties is plain, and that intent is to do something which the law says shall not be done. Such is the present case. The intent to create a preference in the way of making 600,000 shares of the company's stock nonassessable, without similar provision as to the balance of the stock, is plain, and the statute says that no preference shall exist except as provided in the company's articles of incorporation.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; SLOANE, J.; SHAW, J.; WILBUR, J.; LAWLOR, J.

184 Cal. 395

BAILEY v. JOHN W. SWARD, Inc., et al. (L. A. 5162.)

(Supreme Court of California. Nov. 22, 1920.)

Chattel mortgages ⇐138(1) — Lien of mortgage held superior to rights of lessees under prior lease in the nature of a cropping contract.

The lien of a chattel mortgage of a crop of rice, "subject to the outstanding crop leases on said described premises by which the lessees are entitled to two-thirds interest in the crops on harvest of the same," was superior, as respects the remaining one-third, to any rights of the lessees under a provision in the so-called lease, which was more in the nature of a cropping contract, whereunder the lessees advanced $2,000 to the lessor, and lessor agreed to refund such amount in gold coin or in rice at the prevailing market price when division of the crop should be made, the refunding agreement being a promise to pay, and not a pledge, and the lease contract providing that title to the crop should remain in the lessor until a division should be made.

In Bank.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action by A. W. Bailey against John W. Sward, Incorporated, Chin Sam & Co., and others. From an adverse judgment, the last-named defendants appeal. Affirmed.

Emmons & Johnstone, of Bakersfield, for appellants.

N. E. Conklin, of Bakersfield, L. D. Manning, of Oakland, H. B. Griffith, and Ostrander & Cary, of Oakland, for respondent.

SHAW, J. The defendants, Chin Sam & Co. appeal from a judgment for the plaintiff.

The action was to foreclose a chattel mortgage executed by John W. Sward, Incorporated, to Dana Burks, and afterwards assigned to the plaintiff, covering the rice crop grown on certain 300 acres of land by Chin Sam & Co. in the year 1915. The case presents the question whether the right of Chin Sam & Co., a copartnership, to hold one-third of said crop as payment for money advanced by Chin Sam & Co. to Sward Company, was paramount to the right of the mortgagee of said part of the crop.

The crop was grown by Chin Sam & Co. under an instrument denominated a lease, dated January 14, 1915, executed by Sward Company to Chin Sam & Co. It provided that Chin Sam & Co. should have the land during the cropping season of 1914 for the purpose of raising and growing a crop of rice thereon. Sward Company was to plow and check the land, build the necessary irrigation ditches, furnish the lumber necessary to build a barn, house, and cookhouse, and for wiers and boxes for irrigating ditches, and survey the land. Chin Sam & Co. were to put in the necessary wiers and boxes for irrigation, sow and plant the land to rice, irrigate and cultivate the same in a proper manner, and, when ripe, harvest, thresh, and sack the same. The solution of the question depends upon the effect of the following provisions:

"It is hereby mutually agreed that when all of the foregoing provisions have been kept and performed by [Chin Sam & Co.] as herein provided, they shall be entitled to receive two-thirds of the crop so threshed, the same to be divided between the parties hereto in the field [Sward Company] taking one-third of the entire crop in the field, [Chin Sam & Co.] taking the remaining two-thirds, the title to the whole crop being and remaining in [Sward Company] until division is made. The one-third retained by [Sward Company] shall be its rental share, for the use and occupation of said premises by [Chin Sam & Co.], but nothing in the foregoing to be construed so as to prevent said [Chin Sam & Co.] hauling said crop to cover as soon as threshed. * * * [Sward Company] agrees to haul its share of the crop from the field. * * *

"In consideration of [Sward Company] agreeing to secure financial assistance to [Chin Sam & Co.] with which to harvest and market the rice crop [Chin Sam & Co.] hereby agree to advance to [Sward Company] in United States gold coin the sum of $2,000, payable $1,000 upon the execution of this agreement, the receipt whereof is hereby acknowledged by the first party, $1,000 on or before 30 days hereafter. Upon conclusion of the first harvest and threshing of the crop herein provided for to be grown [Sward Company] agrees to refund the $2,000 in gold coin of the United States, or in rice at the prevailing market price when division of the crop is made."

The mortgage held by the plaintiff was executed on June 18, 1915. It purported to mortgage to Burks the entire "crop of rice now being, standing, and growing upon that certain piece or parcel of land [describing the land leased to Chin Sam & Co.], subject to the outstanding crop leases on said described premises by which the lessees are entitled

to two-thirds interest in the crops on harvest of the same, providing that they have fulfilled the terms of said crop leases." The mortgage was duly recorded in the office of the county recorder in the chattel mortgage record. The lease to Chin Sam & Co. was duly recorded in the recorder's office in the record kept for the recording of leases, but was not executed or recorded as a chattel mortgage. The finding of the court was that neither Burks nor Bailey had actual or constructive notice at the time of advancing the money secured by the chattel mortgage of any clause or clauses in the lease aforesaid other than was given by the statement in the mortgage that it was subject to the outstanding crop leases by which the lessees were entitled to two-thirds interest in the crops, but that before making the advances both Burks and Bailey had visited the premises and knew that Chin Sam & Co. were in the occupation thereof and were cultivating the crop thereon.

After the crop was harvested, threshed, and sacked by Chin Sam & Co., as provided in the lease, it was found that one-third thereof consisted of 1,080 sacks. The $2,000 mentioned in the last-quoted paragraph of the lease was advanced by Chin Sam & Co. to Sward Company, but had not been refunded to them in money. The 1,080 sacks which comprised the share of Sward Company was not enough to repay the $2,000 advanced to it by Chin Sam & Co. Thereupon, instead of delivering the 1,080 sacks to Sward Company or to the plaintiff as holder of the mortgage, Chin Sam & Co. kept the same in their possession, claiming that they were entitled to the share of Sward Company under that part of the lease which provided that Sward Company should refund the $2,000 in gold coin, "or in rice at the prevailing market price when division of the crop is made." The only point presented in the case is the question whether or not they are justified in making this claim.

While the instrument executed by Sward Company to Chin Sam & Co. is named a lease, yet, as the title to the crop was to be in the lessor from the time of planting until the division was made, it is more in the nature of a cropping contract. Whatever be its nature, however, the fact that under its provisions the title to the entire crop was to be in Sward Company until the division took place is a controlling factor in the case. The mortgage purporting to include the entire crop was expressly made subject to the crop lease "by which the lessees are entitled to two-thirds interest in the crops on harvest of the same." Consequently it did not cover the interest of Chin Sam & Co. in that two-thirds share, although the title to that part of the crop was, at the time of its execution, vested in Sward Company. Chin Sam & Co. could under no circumstances have or obtain title under the lease to the one-third of the crop going to Sward Company until the division was made. There is nothing in the lease which purports to create a lien on or pledge of that portion of the crop in favor of Chin Sam & Co. against Sward Company. The provision is, in effect, merely that at the time of the division Sward Company had the option either to pay the $2,000 in coin or to pay it in rice at the prevailing market price. It was a promise to pay, not a pledge. It is true Chin Sam & Co. were in possession of the rice, but in view of the fact that the title thereto was to remain in Sward Company until division and afterwards unless Sward Company failed to repay the advances in money, the possession of Chin Sam & Co. prior to that time was merely as bailee, and not as pledgee, and it gave them no right to withhold the rice as against the holder of said mortgage. It follows that the decision of the court below was correct.

In view of this conclusion, it is immaterial whether Burks or Bailey had or had not actual or constructive notice of the provision of the lease whereby Sward Company promised to repay the advances in rice.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SLOANE, J,; WILBUR, J.; LENNON, J.; LAWLOR, J.

49 Cal. App. 570

PEOPLE v. KAUFMAN. (Cr. 908.)

(District Court of Appeal, First District, Division 2, California. Oct. 16, 1920, as Modified Nov. 12, 1920. Rehearing Denied Nov. 4, 1920. Hearing Denied by Supreme Court Dec. 13, 1920.)

1. Constitutional law ⇐38—Statutes ⇐174, 175—Constitutionality and construction not dependent on particular facts.

The constitutionality and construction of a statute are matters of law, and do not depend on the facts of any particular case.

2. Statutes ⇐191 — Applicable to all cases within its scope when constitutional.

If a statute violates no constitutional guaranty, it is necessarily applicable to all cases within its scope.

3. Statutes ⇐176—Application is a question for the courts.

If the scope of a statute is determined generally, it becomes the duty of the courts to determine whether or not particular cases are within its purview.

4. Constitutional law ⇐48—Statute not construed contrary to Constitution if avoidable.

A statute will neither be applied nor construed to render it obnoxious to the Constitution if this result may be avoided by any reasonable interpretation of its language.

5. Highways ⟸186—Purpose of statute, relative to duties of automobile drivers following collision, stated.

Motor Vehicle Act, § 21, relative to the duty of automobile drivers after a collision with another vehicle, was designed to prohibit negligent or wanton drivers from seeking to evade civil or criminal prosecution by escaping before their identity could be established, and to prohibit all drivers from leaving injured persons in distress and danger for want of proper medical or surgical treatment.

6. Highways ⟸166—Statute as to duties of automobile drivers after collision not designed to compel settlement of damages.

Motor Vehicle Act, § 21, relative to the duties of automobile drivers following a collision, was not designed to be used as a club to exact monetary settlement for injuries either to persons or property.

7. Highways ⟸186—Refusal to carry other party to collision to hospital or doctor not crime, when neither party injured.

Motor Vehicle Act, § 21, requiring the driver of an automobile colliding with another vehicle to render all necessary assistance, including the carrying of occupants of the vehicle to a physician or surgeon for treatment if required, or, if such carrying is requested, does not permit one of two automobile drivers, equally negligent in bringing about a collision in which neither is injured, by first demanding that he be carried to a hospital or surgeon, to put the stamp of felony on the other refusing the request.

8. Statutes ⟸241(1)—Criminal statutes to be reasonably construed.

Every statute must receive a reasonable construction, and this is particularly true of statutes defining crimes.

9. Witnesses ⟸378—Animus of complaining witness held without bearing on case except on question of credibility.

On the trial of a driver of an automobile colliding with another for refusal to carry the driver of the other automobile to a hospital, the animus of the complaining witness had no bearing on the case except on the question of his credibility.

10. Witnesses ⟸330(1) — Cross-examination of complaining witness which would have affected credibility improperly excluded.

On the trial of the driver of an automobile colliding with another for refusing to carry the driver of the other automobile to a hospital, cross-examination of the complaining witness as to a quarrel and scuffle with a third person shortly before the collision should have been permitted, as a proper means of testing the credibility of his testimony regarding his injuries, and incidentally his credibility regarding the entire matter.

On Petition for Rehearing.

11. Criminal law ⟸938(1)—New trial granted for newly discovered impeaching evidence in connection with other matters.

In a prosecution of a driver of an automobile colliding with another for refusing to transport the other driver to a hospital, where the state failed to show any essential element of criminality, and cross-examination of the prosecuting witness concerning injuries in a scuffle with a third person shortly before the collision was excluded, and on motion for new trial affidavits tending to show that the injuries of which he complained were received in such scuffle, the exercise of sound judicial discretion demanded a new trial, notwithstanding the rule against granting new trials solely for newly discovered evidence directed solely to the impeachment or contradiction of a witness.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Albert Kaufman was convicted of violating the Motor Vehicle Act, and he appeals. Reversed, and new trial ordered.

Hearing denied by Supreme Court; Lawlor and Wilbur, JJ., dissenting.

Louis Glickman, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

BRITTAIN, J. On an information charging him with felony for violation of section 21 of the Motor Vehicle Act (St. 1915, p. 408), the defendant was tried, found guilty by the jury, and sentenced to pay a fine of $100, or in default of the payment to be confined in the Alameda county jail for a period of one day for each $2 of the fine imposed. His motion for a new trial, supported by affidavits regarding newly discovered evidence, was denied. On this appeal he contends the evidence was insufficient to sustain the conviction, that the court erred in limiting cross-examination of the complaining witness, and that the motion for a new trial should have been granted. Incidentally, he maintains that section 21 of the Vehicle Act should not be so strictly construed against one accused of felony as to make it applicable to the facts of this case, and that if it is to receive strict construction, it is violative of certain constitutional guaranties.

[1-4] The constitutionality and construction of a statute are matters of law. Neither depends upon the facts of any particular case. If the legislative enactment is violative of no constitutional guaranty, it is necessarily applicable to all cases within its scope. If the scope of the act is determined generally, it becomes the duty of courts to determine whether or not particular cases are within the purview of the statute. A statute will neither be applied nor construed to render it obnoxious to the Constitution, if this result may be avoided by any reasonable interpretation of its language. The constitutionality of section 21 of the Motor Vehicle Act was upheld in a case where it was attacked on grounds closely akin to those relied upon by the appellant. People v. Diller, 24 Cal. App. 799, 142 Pac. 797. The contention in this

case is that if the section requires the driver of a motorcar which has collided with another to take any one who was riding in the other car to a surgeon, upon the mere request of such person, regardless of whether the person making the request is in need of the care of a physician or not, and makes a refusal to do so idle a thing punishable as a felony, the statute cannot be upheld. In the present case, at least, no such construction need be placed upon the act. The question of constitutionality is not involved, and it is unnecessary in this case even to analyze the able decision in People v. Diller.

Section 21 of the Vehicle Act, in so far as it is at all pertinent to the facts of this case, provides that—

"Whenever an automobile * * * collides with any vehicle containing a person, the driver of * * * such automobile * * * shall immediately cause such automobile * * * to stop and shall render * * * to the occupants of the vehicle collided with, all necessary assistance, including the carrying of such * * * occupant to a physician or surgeon for medical or surgical treatment, if such treatment be required, or if such carrying is requested by * * * any occupant of the vehicle struck."

It further provides that the driver shall give the number of the automobile and the names of the persons in it. Any violation of any of these provisions is in terms made punishable by imprisonment in the state prison not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding $5,000, or both such fine and imprisonment.

[5-7] The purpose and propriety of the act are apparent. It was designed to prohibit, under pain of severe punishment, negligent or wanton drivers of motorcars from seeking to evade civil or criminal prosecution by escape before their identity could be established, and similarly to prohibit all drivers, whether negligent or not, from leaving persons injured in collisions with cars driven by them, in distress and danger for want of proper medical or surgical treatment. It was not designed to be used as a club to exact monetary settlement for injuries either to persons or property. One of two automobile drivers who may have been equally negligent in bringing about a collision in which neither driver was injured, by first demanding that he be carried to a hospital or surgeon, could not by the expedition of his demand, put the stamp of felony upon the other, who might refuse the request made in the terms of the statute, but made in bad faith.

[8] In the present case the complaining witness was driving alone. With the appellant, in the car he was driving, were four other persons. If none of them was hurt or required medical or surgical treatment, any one of the five in the appellant's car might first have asked the complaining witness for transportation to a surgeon, and he might have been accused of felony if he had said "there is no reason why I should provide transportation for you." Upon no reasonable hypotheses can the criminality of either of two actors be made to depend entirely upon which of the two shall first make a request of the other. Every statute must receive reasonable construction, and this is particularly true of statutes defining crimes.

"It is to be remembered that the letter of a penal statute is not of controlling force, and that the courts, in construing such statutes, from very ancient times have sought for the essence and spirit of the law and decided in accordance with them, even against express language; and in so doing they have not found it necessary to overthrow the law, but have made it applicable to the class of persons or the kind of acts clearly contemplated within its scope." Ex parte Lorenzen, 128 Cal. 431, 61 Pac. 68, 50 L. R. A. 55, 79 Am. St. Rep. 47.

"General terms should be so limited in their application as not to lead to injustice or oppression or an absurd consequence." People v. Earl, 19 Cal. App. 69–72, 124 Pac. 887, 888; U. S. v. Kirby, 7 Wall. 482, 19 L. Ed. 278.

Shortly after 6 o'clock on the evening of January 3, 1920, the appellant, driving a touring car, in which were his wife and three of his employees, turned his car across East Twelfth street, in Oakland, near its junction with Lake Shore avenue. While the rear wheels of his car were still in or close to the car tracks in the center of the street, the Ford car, driven by the complaining witness, who was alone, crashed into the front of the car driven by the appellant. Both cars stopped and both drivers alighted. There was an altercation between them concerning which was at fault, the complaining witness asserting that the appellant had improperly driven his car across the street, and the appellant claiming that the complaining witness had been driving at a dangerous and excessive rate of speed, but for which the collision would have been avoided. A number of persons collected at the scene of the accident, among them a fellow employee of the complaining witness, who was driving his own car, and who a little later took the complaining witness from the scene of the accident. During the altercation the complaining witness walked to the rear of the car of the appellant, ostensibly to get its number, when the appellant said to him, "That is unnecessary," and at the same time handed the complaining witness his business card. The length of the conversation was placed by various witnesses at from 8 to 10 or 15 minutes. The complaining witness gave several versions of what was said during the conversation. He was described by the appellant and by those in the car with him as being violent and boisterous in manner, and in one of the versions of his conversation he testified:

"As I said a while ago, I asked Mr. Kaufman to take me to the receiving hospital; that was no place to argue; that I was hurt, and he said, 'I will not.' Then I said, 'You are in the wrong; you are on the wrong side of the street.' I said, 'You ought to be arrested,' and with that he said, 'Who are you?' and he was in a very fighty mood, I suppose because I struck his car, and I kind of stepped back, and I said, 'I am a deputy sheriff,' and I flashed a badge."

The words, "I suppose because I struck his car," on motion were stricken out. The complaining witness was employed as a collector for a water company, and had been given a badge as a deputy sheriff, although he was not paid as such. He stated that when he showed his badge, the appellant said, "I don't care for your badge, and if you are the sheriff of this county, I wouldn't care for you either." The appellant then reentered his own car and drove away. The front axle of the appellant's car was bent, and the radiator and fenders were crushed. He was able to drive the car, but had great difficulty in steering it. The car of the complaining witness was badly injured, and was pushed aside, but left with the lights burning. The complaining witness was then taken by his coemployee in his car to the receiving hospital. This was Saturday night. The complaining witness had no further medical attention until after he called on the appellant at his place of business on Monday afternoon. As to what occurred at that time the complaining witness testified:

"As I entered the store, Mr. Kaufman looked at me, and I had my face all bandaged up, and he says, 'Oh, you are the man that hit my car Saturday night.' I said, 'Very naturally,' and I says, 'I hit your machine when you cut the corner at night.' I says, 'I didn't see you coming,' and I says, 'The least thing you could do was to take me to the hospital.' 'Oh,' he says, 'you were not hurt.' 'Well,' I says, 'I was hurt, and I am still hurt, and badly hurt.' I don't know what else took place. Anyway, he said something and I says, 'Well, I ain't going to argue with you at all, Mr. Kaufman.' I did say, 'What are we going to do about it' or, 'what are you going to do about it,' something like that, and he said, 'There is nothing to be done; you were wrong; you were driving 45 miles an hour;' and as he said that I walked out."

Being asked if he did not tell the appellant something about having him arrested, he replied:

"I did say—when he said he wasn't going to do anything about it, I says, 'I am.'"

Again being asked if he had not said anything about having the appellant arrested, he replied:

"Not that I remember."

His attention being called to his evidence given at the preliminary examination, it was stipulated that he then testified that—

When he visited the appellant's store he asked the appellant what he intended to do about his car. "I said, 'the least you can do is to fix the car.' I said to him, 'You know you were in the wrong.'"

He was then asked if that was all that was said, and he replied on the preliminary examination:

"Well, he said he would not ask me anything for his damages; that I could pay my own; that I would never get a cent out of him, and I told him I would proceed."

[9] The animus of the complaining witness had no bearing on the trial of the case, except upon the question of his credibility. He testified he was thrown across the steering wheel of the car by the collision and was "knocked out," as he expressed it, for several minutes. Further, that his face struck the stanchion of the car and was cut. It was bleeding during the altercation, which took place immediately after the accident. There was no attempt on the part of the appellant to hide his identity, and he and those with him testified that the complaining witness did not ask to be taken to the hospital. The conviction of the appellant rests solely upon the acceptance by the jury of the version of the complaining witness that he made this request and their understanding of the instructions of the court in regard to the provisions of section 21 of the Motor Vehicle Act. There is no attack upon the instructions. Section 21 of the act was read to the jury, and apparently no request was made or instruction asked in any way limiting its language to the effect that if the occupant of the motorcar in a collision asks and is refused transportation to a physician or surgeon, the driver refusing the request is guilty of a felony.

[10] On cross-examination the complaining witness was asked if shortly before the collision he had not had a quarrel and scuffle with his son, in which his face was scratched. He sought to avoid interrogation upon this subject, and counsel for the appellant was not permitted to question him in regard to the details of that quarrel. In view of the entire character of the evidence given by the complaining witness, it appears that cross-examination upon that subject would have been proper as a means of testing the credibility of his statement in regard to his injuries, and incidentally his credibility regarding the entire matter. The error, however, would be inconsiderable if on the entire record it appeared justice had been done, but this does not appear.

The physician, to whom the complaining witness went after his visit to the store of the appellant, testified that at that time his face was cut and the portion of his trunk

near the lower ribs appeared to be sore to the touch and was slightly discolored as from a bruise. He frankly admitted that except from the statements made to him by the complaining witness, he had no means of knowing how the injuries were caused. On the motion for a new trial the affidavits of the wife and son of the complaining witness were presented, together with the affidavits of persons in whose presence these affidavits were made. In substance the affidavits covered the same facts. From that of the son of the complaining witness it appears that between 4.50 and 5:15 o'clock in the afternoon of the day of the collision, the complaining witness left his son's house in Oakland, and that a few minutes before the complaining witness and his son were in a struggle and scuffle; that at that time the complaining witness threatened his son, who, in order to avoid being struck and injured by the complaining witness, was compelled to wrestle with him and to hold his hands; that during the scuffle the complaining witness struck his head against the corner of the building causing a gash from which the blood flowed freely; that when the complaining witness left his house the blood was actually flowing freely from the gash then cut, and that the complaining witness was then bruised, injured, and was in pain. It appeared further that the struggle was so violent and the complaining witness treated his son so roughly that the sleeve of the son's coat was completely torn out. When he left his house the complaining witness was in a most highly excited fighting, and threatening mood. In view of these statements and the effect they would have had upon the question of the credibility of the complaining witness, particularly in the matter of how he received his injuries, and in view of the palpable attempt to collect money from the appellant prior to any suggestion of arrest on this felony charge, this court is of the opinion that the motion for a new trial should have been granted. Upon retrial the jury should be instructed in regard to the proper limitations to be placed upon the express language of the highly penal statute upon which this prosecution is based. The judgment is reversed, and a new trial ordered.

We concur: LANGDON, P. J.; NOURSE, J.

On Petition for Rehearing.

LANGDON, P. J. [11] In denying the petition for rehearing filed on behalf of the people in this case it is proper to state that a reexamination of the record fails to disclose any divergence between the evidence and the statements in the original opinion. It is strongly urged that the decision is at variance with the salutary rules against granting new trials solely on the ground of newly discovered evidence directed solely to the impeachment of a witness, or solely, for the purpose of contradicting him. These rules are fully established, and ought to be maintained. There is nothing in the original opinion in conflict with them. The construction and application of the Motor Vehicle Act were properly before this court. In the trial of the case it was rigidly applied to a case perhaps within its letter, but wholly outside its spirit. This court interpreted the law. The state failed to show any essential element of criminality on the part of the defendant. The remarks of the trial court about the immateriality of the details of the quarrel between the prosecuting witness and his son, it was claimed, prevented the defendant from fully cross-examining the prosecuting witness upon the vital question of whether or not he was injured in the collision. On motion for new trial, affidavits before the court tended to show that the injuries of which the prosecuting witness complained were received during a brutal fight with his son shortly before, and were in no way connected with the collision. Under all these circumstances, the exercise of sound judicial discretion demanded that a new trial be granted, to the end that unless a crime had been committed the brand of a conviction of felony should not be stamped upon defendant to disgrace him and the members of his family in later years.

Rehearing is denied.

49 Cal. App. 580

CANDEIAS v. SUPERIOR COURT IN AND FOR MERCED COUNTY et al.

(Civ. 2244.)

(District Court of Appeal, Third District, California. Oct. 16, 1920. Hearing Denied by Supreme Court Dec. 13, 1920.)

1. Mandamus ⊂=55—District Court of Appeal cannot substitute its discretion for that vested in trial judge to pass upon merits of application for stay of execution.

In a proceeding in the District Court of Appeal for a writ of mandate, the court cannot substitute its own discretion for the discretion vested by the law in the judge of the lower court to pass upon the merits of an application for a stay of execution made pursuant to Code Civ. Proc. § 1176, it being for the trial court to determine whether without a stay the objects of the appeal would be defeated, or that a stay was reasonably necessary to protect appellant from irreparable or serious injury in case of a reversal, or whether with a stay respondent, in event of affirmance, will sustain an irreparable or disproportionate injury, and, in order to invoke a writ of mandamus, it must be shown from the records that there were no facts or circumstances to sustain the action in refusing the application for a stay, and that consequently

the order refusing to grant the stay was made without jurisdiction.

2. Mandamus ⊂=55—Court did not act without semblance of cause in refusing to grant stay of execution.

A refusal to order a stay of execution upon a judgment of dispossession in an unlawful detainer suit in which an appeal was taken could not be said, on petition in the District Court of Appeal for a writ of mandate, to have been without semblance of cause, where there was a showing that injury to alfalfa on the land was willful and was continued even after the trial of the case and was progressive in its nature, and that the attempts of petitioner to restore it by replowing and reseeding were abortive by reason of his unfarmerlike methods.

Application by A. S. Candeias for a writ of mandate to be directed to the Superior Court of the State of California in and for the County of Merced, and Hon. E. N. Rector, Judge of such court. Writ discharged.

L. C. Pistolesi, of San Francisco, and O. F. Meldon, of Sausalito, for petitioner.

F. W. Henderson, of Merced, for respondent.

BUCK, Presiding Judge pro tem. Mandamus to compel respondent, as judge of the superior court of the county of Merced, to order a stay of execution upon a judgment of dispossession rendered against petitioner in an unlawful detainer suit now on appeal to this court.

From the petition and return it appears that petitioner was the tenant of one Pfitzer of an 80-acre dairy farm under a five-year lease, expiring in December of 1922. At the time of the lease, there were about 45 acres of the land planted to alfalfa, and by the terms of the lease petitioner agreed to "keep all stock off of the alfalfa land when the same is wet; to keep the hogs in a special field, and not to allow the same to run in any other field or fields; and in the event that any of the alfalfa is tramped out or damaged by stock, said party of the second part (petitioner) agrees to reseed the same at his own cost and expense." The petitioner had on the premises about 80 dairy cows, and the necessary implements and appliances for conducting a dairy business.

On April 21st of this year an action in unlawful detainer was commenced by the lessor against the petitioner wherein it was claimed that the petitioner had failed and refused to keep his stock off the said alfalfa land when it was wet, but had suffered it to run upon the land seeded to alfalfa while the same was wet, and that, by reason of its being wet, cattle pasturing thereon bogged into the same, tracked it up, and injured and destroyed to a great extent the alfalfa growing thereon. Upon a trial of the cause and the hearing of testimony the court found in accordance with the foregoing allegation, and further found that by reason of the pasturing of said land "that plaintiffs have been damaged in the sum of one hundred dollars, and that defendant has violated the covenants of his lease," and rendered judgment restoring to plaintiffs the possession of the property, and evicting defendant therefrom, and for a cancellation of the lease. That thereafter petitioner filed his notice of appeal and made application to the judge of the court, respondent herein, to fix the amount of the bond on appeal, pursuant to section 945, Code of Civil Procedure, and for an order directing a stay of execution upon the filing of the bond, pursuant to section 1176, Code of Civil Procedure. A hearing was had upon this application, and there was testimony to the effect that petitioner, since the trial of the action, had, by unfarmerlike methods, failed properly to irrigate and properly direct the irrigation water over the land seeded to alfalfa; had caused great injury to the land seeded to alfalfa, and to the crops growing thereon; that his work in the way of plowing and reseeding had been of no advantage to himself or the owner; that a portion reseeded in 1920 to alfalfa by the petitioner had failed to produce a fair stand of alfalfa; that the injury done by him to the premises was progressive in its nature, and that the further occupancy of the premises by him would be detrimental to the interests of the owners of the land; that a portion of the premises upon which there was a fair stand of alfalfa at the time petitioner entered into possession had been plowed up since the trial of the action, and that this work was of no benefit to the property; that the methods pursued by petitioner in the cultivation of the premises and the irrigation of the crop, the drainage of the irrigated land, and the care of the premises generally, were unfarmerlike; that upon the trial of said action testimony was adduced by the plaintiffs satisfying the court's mind that the pasturing of cattle upon said premises while wet was willful; that the field where the principal damage was done had deteriorated from a field which, when petitioner went into possession, produced from five to six tons of alfalfa hay per year, produced not more than one-half a ton to one ton a year, and that principally foxtail; that the evidence on the part of the plaintiff was also, in substance, that petitioner had plowed up certain portions of the land, and plaintiffs had furnished seed twice for the reseeding thereof; that the work so done proved of no value, and no stand was obtained; that, upon the third demand being made by petitioner upon plaintiffs, plaintiffs refused to furnish further seed because of petitioner's unfarmerlike methods and failure to get results.

Upon the hearing of the motion for a stay,

counsel for petitioner represented that petitioner had stored upon said premises a quantity of hay, amounting to about 150 tons, and plaintiff stated in open court that a reasonable time would be allowed said petitioner to remove the hay.

From the testimony taken at the trial, and upon the hearing of the application for a stay, respondent was convinced:

"That if petitioner were permitted to continue in possession of said premises, the injury done by him thereto would be irreparable, and that the owners of said premises would not be protected by any bond given by him; that the damage done by petitioner, not only to the crops thereon, but also to the land itself, would be continuous."

Whereupon the respondent denied the application for a stay.

[1] In this proceeding for a writ of mandate this court cannot substitute its own discretion for the discretion vested by law in the judge of the lower court to pass upon the merits of the application for a stay. It was for that court to determine whether without a stay the objects of the appeal would be defeated, or that a stay was reasonably necessary to protect appellant from irreparable or serious injury in case of a reversal; or whether with a stay respondent, in event of affirmance, will sustain an irreparable or disproportionate injury. 3 Corpus Juris, pp. 1289 and 1290, and cases cited.

In order to invoke against the respondent herein the writ of mandamus, petitioner must show from the record that there were no facts or circumstances to sustain the action of the trial judge in refusing the application for a stay, and that consequently the order refusing to grant the stay was made without jurisdiction; or, as stated in the case of Raisch v. Board of Education, 81 Cal. 542, at page 546, 22 Pac. 890, at page 891, "there was no semblance of cause" for the action of the court; or, as stated by Mr. Justice Henshaw in the case of Newlands v. Superior Court, 171 Cal. 741, at page 744, 154 Pac. 829, at page 831, petitioner should show "that discretion under the facts can be legally exercised in but one way," before he will be entitled to his writ of mandate. The case of Wood v. Strother, 76 Cal. 545, 18 Pac. 766, 9 Am. St. Rep. 249, relied upon by counsel, as cited in Hensley v. Superior Court, 111 Cal. 541, at page 543, 44 Pac. at page 232, goes no furtner than to hold that where "the law affixes a right to specific relief from certain facts, and there is no question made as to the existence of such facts, the court has no discretion to refuse the relief. In such a case the limit of the discretionary power of the court has been reached, and nothing but a clear duty remains." See, also, Kaiser v. Hancock, 25 Cal. App. 323, 143 Pac. 614; Plummer v. Agoure, 20 Cal. App. 319, 128 Pac. 1014.

[2] Therefore, in view of the showing in this case that the injury to the alfalfa, which was a portion of the land, was willful, and was continued even after the trial of the case, and was progressive in its nature, and that the attempts of petitioner to restore the alfalfa by replowing and reseeding were abortive by reason of his unfarmerlike methods, this court cannot conclude that the respondent acted without semblance of cause in finding that irreparable injury would be caused plaintiff if the defendant were permitted to remain in possession of the premises, and that an appeal bond would not afford plaintiff full protection.

The petitioner, therefore, having failed to show that the respondent was acting outside of his duty in refusing to grant the stay, the writ should be discharged, and it is so ordered.

We concur: BURNETT, J.; HART, J.

49 Cal. App. 625

MURRAY v. CALIFORNIA CONSERVING CO. (Civ. 3538.)

(District Court of Appeal, First District, Division 1, California. Oct. 19, 1920. Hearing Denied by Supreme Court Dec. 16, 1920.)

1. Work and labor ⊂⊃14(1), 24(2)—Contract held properly introduced in evidence in action in form of common count.

Where full performance of a contract on part of plaintiff was prevented by acts of defendant, plaintiff could treat contract as abandoned, and bring action in form of a common count, and introduce thereunder the contract and show the acts amounting to an interference, and recover thereunder the amount specified in the contract, and the reasonable value of extra work done under a supplementary oral agreement.

2. Principal and agent ⊂⊃101(1)—Contract for extra work entered into within ostensible authority of agent binding.

Where superintendent of defendant's packing plant was so far in charge of the operation of the plant as to possess at least ostensible authority to make a supplemental contract for extra work, plaintiff was entitled to rely upon that fact in proceeding to do the work and to recover for the material furnished and the services rendered.

3. Contracts ⊂⊃303(5)—Defects in ventilating system no defense, when caused by defendant's neglect.

Where plaintiff guaranteed that ventilating system would exhaust superheated air and steam, he was entitled to recover the contract price, where such system, when first installed, did for a time accomplish its purpose, and only failed to do so when motors and material had been so affected by contact with the steam within the room as to refuse to function, which contact was due to lack of

proper housing of the motors, which under the agreement it was the duty of the defendant to have provided.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by Michael F. Murray against the California Conserving Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wise & O'Connor and Altman & Goldman, all of San Francisco, for appellant.

Harrison S. Robinson and Harry L. Price, both of Oakland, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff for the sum of $2,305.23. The facts out of which the defendant's alleged liability arose were the following: In the month of September, 1917, the defendant had completed a building in connection with its packing plant in Haywards, which was to be used for packing and canning tomato products. On the top floor of this building was a room equipped with 25 large copper kettles, which were to be used in heating tomato pulp for the purpose of exhausting a certain quantity of water therefrom as to make the product fit for commercial purposes. It was found that when this portion of the plant was put in operation the said room became filled with steam so as to make it impossible for men to remain at work therein for any considerable length of time. It became necessary to remedy this condition immediately, and with that end in view the defendant's superintendent of the plant requested the plaintiff to call at the plant on the afternoon of September 27, 1917, for the purpose of a consultation as to how to effectually remove the practical difficulties of the situation. The plaintiff suggested a system of ventilation by the use of fans and motors, and it was agreed that he should investigate the matter and report with respect to such system and the cost of installing the same. A few days later the plaintiff submitted a proposition in writing, in which, representing the company with which he was connected, it was proposed to furnish and install certain fans and motors of specified sizes and power, together with the switch boxes, starting devices, belting and wires necessary to connect the same with the defendant's wiring system already installed in the building. By the terms of this proposition all necessary connecting, framing, carpenter work, housing, and the furnishing of all labor and material necessary for the installation of said motors and fans except that above specified was to be furnished by the defendant as the owner of the building. The plaintiff's proposition embraced the following statement:

"It is the intention and understanding that the three exhaust fans on the roof will exhaust the air and surplus steam from the room directly below and the 2–24" fans in the window spaces will deliver fresh air into the room, thus making the workroom as habitable as it is ordinarily expected of a room of its kind. Above work for the sum of $1,500."

The defendant, acting through its said superintendent, accepted the foregoing proposition, and the work of installing the ventilating system was at once entered upon, and, in so far as the plaintiff was concerned, was completed on or about October 4, 1917. The system was at once put in operation, and for a portion of the first day apparently accomplished the purpose for which it was installed, namely, that of clearing the room of steam. Toward the close of said day, however, it was found that the motors stopped and refused to further function. The cause of this stoppage was apparently due to the fact that the defendant had not properly or sufficiently done the work of constructing certain conduits and housings for the protection of the motors, and other material which the plaintiff had installed, from the effect of the steam arising from the boiling mixture. When this fact was discovered a further oral agreement was made between the plaintiff and the superintendent of the defendant by which certain additional work was to be done by the former for the purpose of remedying these discovered defects. The plaintiff proceeded to do this extra work at an expense to him of $805.23. In the meantime, however, the defendant had not done certain work which it was to do for the purpose of housing the motors, and the result was that they again refused to function, after a short period of trial, on account of their contact with the steam of the superheated room. Thereupon the defendant, without further consultation with the plaintiff, removed all the material used in the ventilating system installed by the plaintiff, and informed him that it did not wish him to do anything further in relation to the matter. The plaintiff demanded payment of the sum of $1,500 claimed to be due upon his accepted proposition, and the further sum of $805.23 for the extra work performed. These demands being by the defendant refused, the plaintiff instituted the present action.

The complaint filed herein was in the form of the common count for work and labor done and performed and material furnished by plaintiff to defendant, at the special instance and request of the latter, of the reasonable value of $2,305.23. The answer of the defendant consisted in specific denials of the averments of the plaintiff's complaint, and the cause went to trial upon the issues thus framed. At the time of trial the defendant presented and was permitted to file a further and separate answer, alleging, in substance, though not in express terms, the agreement between the parties with reference to the installation of said ventilating system,

and then proceeding to aver that such ventilating system, so installed under said agreement, had proven unsatisfactory, and had failed to so exhaust the air and surplus steam from the premises, or to so deliver fresh air into the same, as to render the same habitable, or to make it possible for the workmen of defendant to continue their labors in the said room, and that for that reason the defendant had been compelled to remove and did remove, the plaintiff's ventilating system from the premises.

Upon the introduction of evidence pro and con upon the issues thus framed the cause was presented to the jury under the instructions of the court, and the jury presently returned a verdict in the plaintiff's favor for the full sum demanded in his complaint. From the judgment entered upon such verdict the defendant prosecutes this appeal.

The first contention of the appellant is that the trial court was in error in giving to the jury the following instruction:

"If you find from the evidence that a portion of the work incidental to the ventilating system was to be done by the defendant corporation, then there was an implied contract on the part of the defendant to perform its share of such work in such manner as to enable the plaintiff to complete his share of the work in the manner agreed upon. And if you find that the defendant failed to perform in a workmanlike manner its share of the work, and such failure prevented plaintiff from completing the work, then your verdict should be in favor of plaintiff and against defendant."

And again:

"If the ventilating apparatus failed to ventilate the building because of careless or unskillful installation by the employees of the defendant of the wiring system, or the failure to house, or the careless or unskillful housing, by the employees of the defendant of any of the motors which constituted part of such ventilating system, then the defendant, and not the plaintiff, is answerable for such failure."

The basis of the appellant's objection to these instructions is its claim that the plaintiff, having predicated his action upon performance on his part of the agreement for the installation of the ventilating system in question, and having failed to show performance on his part of that portion of said agreement which is above quoted, as expressing the intent and understanding that the ventilating system would so exhaust the steam-laden air from and so deliver fresh air into the workroom to be ventilated as to make the same habitable for the workmen employed therein, was not under such a pleading entitled to prove prevention of performance on the part of the defendant as a basis for his recovery under the common counts; and hence that the above-quoted instructions on the part of the court were erroneous.

[1] We find no merit in this contention. The plaintiff brought this action in the form of the common counts, upon the theory, well established in a long line of cases in this state, that where full performance on the part of the plaintiff has been prevented by acts of the defendant, the plaintiff may treat the contract as abandoned, and bring a suit under the common counts for the reasonable value of the materials furnished and services performed. Jones & L. Co. v. Doble Co., 162 Cal. 497, 123 Pac. 290; Brown v. Crown G. M. Co., 150 Cal. 376, 89 Pac. 86; Griffith v. Happersberger, 86 Cal. 605, 25 Pac. 137, 487. In accordance with the principle announced in these cases we are of the opinion that the plaintiff was entitled to bring this action in the form of a common count, and to introduce thereunder the contract entered into between the parties, and show the defendant's acts amounting to an interference with the full performance of the same upon the part of plaintiff, and to recover thereunder the amount specified in said contract and the reasonable value of such extra work as had been done under the supplementary oral agreement. The instructions of the court to which the defendant objected were therefore correct in their application to the facts of the case at bar. The cases cited by the defendant in support of his foregoing contention do not sustain it, and, when examined in the light of the facts to which they refer, are not in conflict with the authorities above cited.

[2] The next contention of the appellant is that the plaintiff, in so far as he relied upon his alleged right to recover for the extra work done under the oral agreement between him and the superintendent of the defendant, was not entitled to recover for the same, for the reason that he failed to establish authority on the part of said superintendent of defendant to enter into said oral supplementary agreement, and we find this contention also to be devoid of merit. The evidence, in our opinion, sufficiently shows that the superintendent of defendant was so far in charge of the operation of its packing plant as to possess at least ostensible authority to make both of the agreements in question, and that the plaintiff was entitled to rely upon that fact in proceeding to do the work performed by him under the supplemental oral agreement, and hence was entitled to recover for the same.

[3] The final contention of the appellant is that the plaintiff by his written agreement in substance guaranteed that the ventilating system to be installed by him thereunder would exhaust the superheated air and steam from the place in which it was to be installed, and would so introduce fresh air into the same as to render it habitable for workmen, and that, having failed to perform this condition of his contract, he is not entitled to re-

cover. The difficulty with this contention consists in the fact that the evidence sufficiently shows that when the plaintiff's ventilating system was installed and put in operation it did for a time accomplish its purpose, and only failed to do so when its motors and material had been so affected by contact with the steam within said room as to refuse to function, which contact was due to the lack of proper housing, which, under the aforesaid agreement, it was the duty of the defendant to have provided. We find, therefore, that this final contention of the appellant is also untenable.

Judgment affirmed.

We concur: WASTE, P. J.; BEASLY, Judge pro tem.

(49 Cal. App. 614)

NEWARK TRUST CO. v. KRIEBEL et al.

(Civ. 3468.)

(District Court of Appeal, First District, Division 2. California. Oct. 18, 1920.)

1. Appeal and error ⊜863—Matters reviewable on appeal from order denying motion to vacate judgment.

Where plaintiff did not appeal from a judgment for defendant, but from an order denying its motion to vacate the judgment and to enter judgment for plaintiff on the findings, the only question before the reviewing court was whether or not the conclusions of law were consistent with and supported by the findings of fact.

2. Bills and notes ⊜291—Payee holding note in trust held not liable on indorsement merely for purpose of transferring legal title.

A payee of a note, holding the same as trustee for a corporation in process of organization, did not render himself liable as an indorsee, where the indorsement was made merely for the purpose of transferring legal title to one who had knowledge of the trust relation.

3. Corporations ⊜82—No obligation on purchaser of corporate stock under contract to demand resale at certain price within certain time.

Under a contract by a trustee for subscribers and a corporation in process of organization, reciting, "It is also understood I will personally sell for you 16,000 shares of stock in the new company at par, less 10 per cent., within three months of the organization of the company," there was no obligation on the part of defendant purchaser to make demand on the trustee to carry out such engagement, though defendant did not in terms agree to sell the stock; the consideration for such promise being a note given for the price of the shares of stock, as collateral to which the stock was left in the hands of the trustee.

4. Corporations ⊜82—Stipulation by corporation to repurchase stock not fraud on other subscribers.

A stipulation between a corporation and a purchaser of stock therein, whereby the corporation agrees to repurchase such stock on certain conditions, is not to be denounced as a fraud on other subscribers and creditors of the corporation, where it is not shown that any fraudulent invasion of the rights of stockholders or creditors has been attempted or would result.

5. Corporations ⊜82—Knowledge of an agent and trustee for subscribers of the terms of a conditional agreement made with a subscriber, imputed to them.

Knowledge of the terms of a conditional agreement with a subscriber for stock, made by an agent and trustee for other subscribers while acting as such, will be imputed to the other subscribers.

6. Bills and notes ⊜140—Execution of renewal note no waiver of defenses to original.

Where payee by her attorney upon executing a renewal note informed the holder thereof that she would defend any suit to enforce its collection, there was no waiver of such defenses as she might have had to the original note.

7. Estoppel ⊜52—"Waiver" is intentional relinquishment.

A "waiver" is the intentional relinquishment of a known right after knowledge of the facts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Waiver.]

8. Corporations ⊜83—No obligation on part of subscriber for stock, desiring to rescind, to return stock of no value.

To rescind a stock subscription contract under Civ. Code § 1689, it was not necessary to return the stock, where it was absolutely valueless, in view of section 1691, subd. 2.

9. Corporations ⊜117—When maker of note for stock may rescind on failure of consideration, or wait and defend on that ground.

Upon failure of consideration for a note, the maker could either rescind at once or wait and defend on that ground any suit that might be brought on the note; the consideration for the note being corporate stock which was deposited with the payee as collateral therefor.

10. Pleading ⊜93(1)—Inconsistent defenses may be set up without waiver.

It is permissible to set up inconsistent defenses without raising presumption that one is a waiver of the other.

11. Pleading ⊜92—Counterclaim based on breach of contract held not waiver of defense of rescission.

A counterclaim for damages for breach of contract was not a waiver of a defense of rescission; and, where defendant was not permitted to recover upon her counterclaim, the allegations regarding the recovery of damages may be treated as surplusage in support of the judgment, in view of Code Civ. Proc. §

441, providing defendant may set up as many defenses and counterclaims as he may have.

12. Appeal and error ⟹1039(1)—Reversal not warranted merely because of error in pleadings.

Where it plainly appears from the entire record that substantial justice has been done between the parties, a reversal is not warranted because of any error in the pleadings.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by the Newark Trust Company against Fred L. Kriebel and others. From an order denying plaintiff's motion to set aside a judgment for defendants, and enter judgment for plaintiff on the pleadings, the plaintiff appeals. Affirmed.

Irvin C. Louis and Rush M. Blodget, both of Los Angeles, for appellant.

Newlin & Ashburn, of Los Angeles (J. W. McKinley, of Los Angeles, of counsel), for respondent Phillips.

W. E. Shelton, of Los Angeles, for respondent Kriebel.

LANGDON, P. J. [1] This is an appeal from an order denying plaintiff's motion to set aside the judgment for defendants and enter judgment for plaintiff on the findings. A jury was impaneled advisory to the court, and found certain facts which the court adopted in its findings, and also returned a general verdict in favor of the defendant Phillips, and the court gave judgment in her favor. Plaintiff did not appeal from this judgment, but now appeals from an order denying its motion to vacate the judgment in favor of defendant and to enter judgment for plaintiff on the findings. Consequently, the only question before this court is whether or not the conclusions of law are consistent with and supported by the findings of fact.

The action was brought upon a promissory note for $10,000, given by defendant Phillips in renewal of a note for the same amount. The original note was given in June, 1913, to defendant Kriebel, as trustee for the Rector Automatic Radiator Company, a corporation to be formed in the future. This note had attached to it a collateral agreement pledging certain stock as security therefor. The court submitted to the jury four special interrogatories, which were answered by the jury. The findings of the jury upon these questions were adopted by the court in its findings, and will be discussed in connection therewith. The findings of the court disclose the following facts:

On June 20, 1913, the defendant Jane M. Phillips executed and delivered to defendant Kriebel a promissory note for $10,000. This note was given in part payment for something over 16,000 shares of stock in a company thereafter to be formed and incorporated under the name of Rector Automatic Radiator Company, which company was later incorporated as planned. The defendant Kriebel, in selling the said stock to the defendant Phillips, and in taking said promissory note in part payment therefor, was acting as agent and trustee for the said corporation thereafter to be formed, and for the subscribers to the stock thereof, and he took the said promissory note in his own name, but in trust for the said corporation and its stockholders. Said defendant Kriebel also, contemporaneously with the execution of said promissory note, and while acting as such agent and trustee, and as a part of said transaction for the sale and purchase of said stock of the Rector Automatic Radiator Company and the execution of said promissory note for $10,000, and in order to induce the making of said note by said defendant Phillips, did execute and deliver, in his capacity as agent and trustee for the said corporation and its stockholders, a certain instrument reading as follows:

"In making this subscription, it is also understood I will personally sell for you 16,000 shares of stock in the new company at par, less ten per cent., within three months from the organization of the company."

The promise made by said Kriebel to sell said stock for defendant Phillips which was contained in said contemporaneous written agreement was a promise made by him in his capacity as agent and trustee, and was so understood by the defendants Kriebel and Phillips, and said promise constituted the substantial consideration for the said promissory note.

Kriebel did not, at any time, either in his individual capacity or as such agent and trustee, nor did the Rector Automatic Radiator Company, ever sell, or attempt to sell, for the defendant Phillips 16,000 shares of said stock, either at the price named in said agreement, or at any other price.

The court further found that by reason of the failure to perform the terms of said agreement to so sell 16,000 shares of said stock, there was a total failure of consideration for the said promissory note dated June 20, 1913. It was the note given as a renewal of said note on June 20, 1913, that was the basis of the present action.

The court also found that at the time of the execution and delivery of the said note dated June 20, 1913, by the defendant Phillips, and at the time of the receipt thereof by defendant Kriebel, and at the time of the receipt thereof by the defendant Rector Gas Lamp Company (the assignee of Kriebel, trustee), said company had full knowledge of the contents of said writing, wherein Kriebel as agent for the Rector Automatic Radiator Company, agreed to sell said stock; and that

the Rector Automatic Radiator Company and its assignee, Rector Gas Lamp Company, fully acquiesced in and consented to the terms of said agreement at and before the time of the transfer of the said promissory note to one Waters B. Day, who was the real owner at the time of the commencement of this action; plaintiff being the assignee of said note merely for the purpose of collection.

The court further found that at the time of the commencement of this action, the stock agreed to be purchased by defendant Phillips under said stock subscription agreement was of no value whatsoever. It further appears from the record that the defendant Phillips is an incompetent, and was represented in this action by her general guardian.

[2] With reference to the judgment in favor of defendant Kriebel, it was found that the Rector Gas Lamp Company, the first assignee herein, knew, at the time the note was assigned to it, that the said Kriebel was not the owner of said note, but was holding the same as trustee for the Rector Automatic Radiator Company, and that the assignment by said Kriebel of said note and collateral agreement was merely for the purpose of transferring to the said Rector Gas Lamp Company the legal title to said note, and that said assignment and indorsement was not made for the purpose of guaranteeing personally the payment of said note. It was also found that said indorsement was made by the said defendant Kriebel, as agent and trustee, for the purpose of transferring said note. These findings, of course, warrant the denial of judgment in favor of the plaintiff as against defendant Kriebel.

[3] However, the real attack is made upon the judgment in favor of defendant Phillips. It is urged with reference to this, first: That defendant Kriebel was under no obligation to sell the stock in question under his agreement as trustee with defendant Phillips, unless defendant Phillips should, within the time specified in said agreement, request him to do so, and tender the stock to him. There is a finding of the court upon this point, that defendant Phillips did not make demand upon Kriebel to sell said stock within three months after the incorporation of the company, and did not offer him the stock. But there is also a finding that defendant Phillips did everything that was required of her under said agreement, and that she was not obligated to offer said stock to defendant Kriebel. Appellant contends that the force of this general finding of full performance on the part of defendant Phillips is overcome by the special finding that she did not offer the stock to Kriebel for sale. In the first place, it appears from the complaint and the findings that 40,000 shares of said stock of said Rector Automatic Radiator Company were deposited with defendant Kriebel as collateral security for the payment of the promissory note, in lieu of other security which was returned by Kriebel to defendant Phillips. It, therefore, appears that at all times the defendant Kriebel had in his possession more than the 16,000 shares of the stock which he had agreed to sell. But quite apart from this consideration, it appears from said agreement for the resale that there was no obligation on the part of defendant Phillips to make demand upon Kriebel to carry out his positive engagment. Kriebel contracted unconditionally to sell 16,000 shares of said stock, which was in his possession as collateral, within three months after the incorporation of the company. It is true defendant Phillips did not, in terms agree to sell the stock. It is immaterial to this inquiry whether she might have declined to sell after a purchaser had been found by Kriebel, as contended by appellant. For regardless of this, Kriebel was bound to make an offer of performance of his positive engagement. He had accepted a valuable consideration for his promise, the promissory note in question, as found by the court. If defendant Phillips then had the privilege of accepting or rejecting such offer, in this respect only the contract was an option contract, as contended by appellant. It was not optional with Kriebel whether he would perform or not. His positive undertaking to sell 16,000 shares of the stock at a certain price within a specified time, for which promise he had received a valuable consideration, coupled with the fact that 40,000 shares of said stock were in his possession as collateral security, certainly made it unnecessary for defendant Phillips to make demand upon him to do what he had contracted to do, irrespective of the question of whether or not she might have paid the note, released the collateral, and refused to sell at all. So long as she had not waived her rights, or released him from his duty under the agreement by refusing to sell, he was bound to sell within the time covered by the contract.

[4] Appellant also argues that the subscription contract for the stock and the note given therefor was a contract between defendant Phillips and the other subscribers to the stock, and such a contract cannot be varied by a separate writing such as this agreement to resell the stock. However, the answer to this objection appears in the findings that all parts of this contract—the subscription agreement, the note, the agreement to resell—were between Kriebel, as agent for the stockholders, and defendant Phillips; that the contract in all its parts and terms was known to said company and the subscribers to its stock. Such an agreement is, of course not void against the other stockholders. It is their contract, and assented to by them. A stipulation between a corporation and a purchaser of stock therein, whereby the corporation agrees to repurchase such stock up-

on certain conditions, is not to be denounced as a fraud on other subscribers and creditors of the corporation, where it is not shown that any fraudulent invasion of the rights of stockholders or creditors has been attempted or would result. Schulte v. Boulevard Gardens Land Co., 164 Cal. 464, 129 Pac. 582. In said last-cited case, at page 468 thereof (164 Cal.), at page 583 of 129 Pac., it is said:

"In the case at bar, however, we have something more than a mere attempt by a stockholder to sell, and by a corporation to buy, shares of stock. The plaintiff is seeking to enforce a part of an entire contract under which the stock was originally issued to him. The right to return the stock and to receive the sum agreed to be paid upon such return was a material and indivisible part of the consideration upon which the plaintiff agreed to become a stockholder. As between the parties it would be manifestly unjust to permit the corporation to retain the money paid by plaintiff, and at the same time to repudiate the promise which it gave in exchange for the money. The obligation to pay, upon a return of the shares, the sum agreed to be paid, is not to be viewed as a new undertaking, arising after the plaintiff * * * became a stockholder. The sale to plaintiff was conditional. He never became a stockholder except subject to the qualification that he might return his shares upon the stipulated terms."

[5] It is to be remembered that in the present case, as in the case from which quotation has just been made, the rights of creditors are not involved, and it appears from the findings that the assignee of this note from the Rector Automatic Radiator Company had full knowledge of and acquiesced in all the terms and conditions of the subscription contract. Nor does the case involve the question of the invalidity of secret stipulations limiting the apparent liability of certain subscribers. No facts appear to justify any inference of a fraudulent invasion of the rights of any stockholder, but on the contrary, it is found that the entire conditional agreement was made by Kriebel while he was acting as agent and trustee of the other subscribers. Knowledge of the terms of said conditional agreement with Phillips, made by their agent, will be imputed to such subscribers.

[6, 7] It is also claimed that defendant Phillips waived any defense she might have had to the original note given in 1913 by her renewal of the said note in 1914. The court found that upon this renewal of said note, defendant Phillips, by her attorney, informed the holder thereof that she would defend any suit to enforce its collection upon the ground that there had been a violation of the contract to resell the stock. This was correctly found by the trial court to amount to a reservation of all defenses to the original note, and to negative any waiver of such rights by a renewal thereof.

"Where a note is executed to a payee only in renewal of a prior note given to him, the real consideration for which it is given is that for which the prior note was given, and the failure of the consideration of the same may be pleaded in an action on the latter note." 8 Corpus Juris, p. 751, § 1022.

"The giving of a note, unexplained, is not conclusive evidence of a settlement of all the demands between the parties to such an instrument, but the question of the intent of the parties, in such case, is one of fact, to be determined by the jury from all the evidence relating to the transaction. * * * And so, also, whether a subsequent note is given in payment of, or only in renewal of, a prior note, is not a question of law, but one of fact, to be determined by the jury; and when it is given in renewal only of a prior note, the real consideration for which it is given is that for which the prior note was given, and it is, in a suit upon the subsequent note, competent to show that the consideration has failed." Wheelock v. Berkeley, 138 Ill. 153, 27 N. E. 942.

The jury found, and the court adopted such finding, that defendant Phillips did not waive her rights in renewing the note.

"Waiver is the intentional relinquishment of a known right after knowledge of the facts." Allen v. Mayfield, 164 Cal. 6, at page 11, 127 Pac. 45, at page 48.

The positive statement, therefore, of defendant Phillips to the holder of the note that she would enforce her rights as a defense against the note, negatives any intention to waive the same. The objection of the appellant that the renewal of the note was a waiver of the defenses against the original note is therefore without merit.

[8] Appellant contends that although the defendant Phillips might have rescinded the contract under section 1689, Civil Code, the aggrieved party must tender back what has been received under the contract as a condition precedent to a right to rescind. This is unquestionably the law, but the trial court found that the contract for resale which had not been performed by Kriebel was the only consideration for the promissory note, and that there was a total failure of consideration for the promissory note. Appellant argues that it appears from the other findings that the shares of stock in the Rector Automatic Radiator Company were also a consideration for the note, and that there is no finding they have been returned. The court found that at the time of the commencement of the action, the shares of stock were absolutely valueless. There is no obligation to return a consideration which is of no value whatever. Civ. Code, § 1691, subd. 2; Gifford v. Carvill, 29 Cal. 593.

[9] It is claimed by appellant, however, that in the absence of a finding as to the value of the stock three months after the incorporation of the company—which is the

time when performance of his obligation was due by Kriebel, and the time when he failed therein, and the time when Mrs. Phillips' right of rescission arose—it must be presumed that the stock was of some value at that time, and so should have been returned and rescission made at the proper time. It appears by the complaint and from the findings that 40,000 shares of this stock were in the hands of Kriebel or his assignees as collateral security for the note. Therefore defendant Phillips had not possession of the stock to give to the defaulting defendant, but the stock was actually in his own hands. She had the right, upon the failure of consideration for her note, either to rescind at once or to wait and defend upon that ground any suit that might be brought on her note, and she could not have recovered back these shares of stock deposited as collateral after successfully defending a suit upon the note given for their purchase price. It appears, therefore, that defendant Phillips has done everything required of her and everything that she could do.

There is one other matter urged by appellant which warrants consideration. It arises also in connection with the claim of waiver by defendant Phillips of her defenses to the note. Defendant Phillips, in addition to filing her answer in this cause, filed a cross-complaint against defendant Kriebel setting up the fact of the breach of his agreement to resell the stock for the price agreed upon therein, and asking damages for such breach of contract. She was not awarded such damages, but she was adjudged free from liability upon her note because of a failure of consideration therefor. Appellant points out that Mrs. Phillips had a choice of two remedies upon the failure of consideration—either the remedy of rescission and recovery of the consideration paid by her, or an affirmance of the contract, and a suit for damages. Therefore, it is argued, her cross-complaint in which she asked for damages for the breach was an affirmance of the contract; it was an election on her part not to rescind, and therefore the defense to her note based upon the theory of rescission of the contract should not have been permitted to her.

[10, 11] It is permissible to set up inconsistent defenses without raising a presumption that one is a waiver of the other. Billings v. Drew, 52 Cal. 565; Eppinger v. Kendrick, 5 Cal. Unrep. 295, at pages 300, 301, 44 Pac. 234; Snipsic Co. v. Smith, 7 Cal. App. 150, 93 Pac. 1035. We see no reason for a different rule when the allegations are set up in answer and counterclaim. Section 441, Code of Civil Procedure, provides that a defendant may set forth by answer as many defenses and counterclaims as he may have. As before stated, the defendant in the present case was not permitted to recover upon her counterclaim, and in support of the judgment we are of the opinion that the allegations regarding the recovery of damages may be treated as surplusage. In the case of Montgomery v. McLaury, 143 Cal. 83, 76 Pac. 964, a similar question was considered. At pages 87 and 88 thereof (143 Cal.), at page 966 of 76 Pac. it is said:

"It seems perfectly clear from the whole frame of the complaint, no less than from the specific relief which it prays, that the intention of the pleader was to state facts entitling him to the rescission which he prayed. But at the same time he stated facts showing that the plaintiffs had been damaged in the sum of $7,000, and since he prayed also for the recovery of that amount of damages, it would seem that the theory of the complaint was to set forth all the facts surrounding the transaction * * * and to pray for any and every kind of relief to which, upon the facts, the plaintiffs might be found entitled. In most cases this is a correct theory of pleading under our system of practice, which recognizes but one form of action—an action on the case. But it sometimes happens that a party seeking redress for an injury is obliged to make an election between two inconsistent positions, and planting himself firmly upon one to definitely renounce the other before he can claim relief in any form. Such, appellants contend, is the case here. The doctrine is well settled, they say, that one defrauded in a bargain is restricted to one of two remedies, between which he must make an election before he can institute an action. He may affirm the contract and have his action at law for damages for the deceit, or he may disaffirm the contract and sue in equity for a rescission, but he cannot pursue both remedies at the same time, nor either until he has affirmed or disaffirmed the contract; for until he affirms he has no cause of action for the deceit, and until he disaffirms, he has no right to a rescission. * * * There is no such rigid and inexorable rule as to election of remedies in cases of fraud as that for which the appellants contend. It is undoubtedly true that when one who has been defrauded in a contract elects to affirm it after discovery of the full extent of the fraud he cannot afterwards claim a rescission. This is simply a result flowing from the general doctrine of estoppel. But an election to disaffirm a contract induced by fraud, and an effort to obtain a rescission, will not, if resisted, * * * bar an action based upon a subsequent affirmance of the contract. * * * It is not denied that the complaint in this case contains every allegation necessary to sustain an action for deceit, but appellants contend that other allegations which it contains, as well as its specific prayer for relief, show that the contract has been disaffirmed, and therefore that it will not sustain a judgment based upon the theory of affirmance. * * * There does not seem to be any good reason why, after a trial of the issues and after findings by the court which show that a rescission has been made impossible by the acts of the appellants, those portions of the complaint which are framed with a view to rescission may not be treated as surplusage. * * * No injustice can then possibly result from treating as mere

surplusage all such portions of the complaint and the prayer for relief as may have reference to a rescission."

[12] We think the facts in the present case present the same reason for the rule just quoted as the facts in the case from which the quotation was taken. We are also persuaded that the judgment should be sustained by the consideration that it plainly appears from the entire record before us that substantial justice has been done between the parties, and, under such circumstances, a reversal is not warranted because of any error in the pleadings. Nothing was awarded to defendant Phillips under the superfluous allegations contained in her pleadings, and no damage has resulted to the appellant by reason thereof.

The judgment is affirmed.

We concur: NOURSE, J.; BRITTAIN, J.



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